

Procurement Under FEMA Awards

Requirements for Recipients and Subrecipients When
Procuring Services and Supplies with Funding under Stafford
Act Grant Programs



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FEMA

Agenda



- **Introductory Remarks**
- **Terminology and Key Players**
- **Background**
- **Procurement Standards for States**
- **Procurement Standards for Other Non-Federal Entities**
- **Differences Between the New and Old Procurement Standards**



Rules of the Road



- Please ask questions as they arise during the presentation—there is no need to wait until the end to ask them.
- This presentation (including the slides and any oral information conveyed) provides general information about the procurement requirements applicable to Stafford Act grants and is not intended to be, nor should it be considered as, legal advice.
 - For example, some slides may omit or only summarize certain requirements set forth in the regulations.
 - You should not act or rely on information contained in our presentation (written or oral) without seeking the advice of your own attorney.



FEMA Procurement Disaster Assistance Team (PDAT)

- We will provide an electronic copy of the slides to you after the conclusion of the training session.
- We highly encourage you to download copies of the procurement regulations.
- Please also go to: www.fema.gov/procurement-disaster-assistance-team

Purpose



- This presentation is intended to provide a high level, general overview of the Federal procurement standards applicable to disaster assistance awards under the Stafford Act.
- We don't expect you to become experts after this presentation; however, you should be able to recognize the basic concepts and issues necessary to successfully spot potential problems.



Scope



- The focus of this presentation is the current procurement standards under the *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards* (“*Uniform Rules*”), which are codified at 2 C.F.R. §§ 200.317 through 200.326 and supersede the procurement regulations formerly in effect.
- This presentation does not address other requirements imposed by Federal law, executive orders, other regulations, or the remainder of the Uniform Rules.



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Terminology



- **“Non-Federal Entity”** – means a state, local government, Indian tribe, institution of higher education, hospital or nonprofit organization that carries out a Federal award as a recipient or subrecipient (2 C.F.R. § 200.69)
- **“Federal Award”** – means, among other things, the Federal financial assistance that a non-Federal entity receives directly from a Federal awarding agency or indirectly through a pass through entity (2 C.F.R. § 200.38); it also means the instrument setting forth the terms and conditions.
- **“Recipient”** – means a non-Federal entity that receives a Federal award directly from a Federal awarding agency to carry out an activity under a Federal program (2 C.F.R. § 200.86)



Terminology



- **“Pass-Through Entity”** – means a non-Federal entity that provides a subaward to a subrecipient to carry out part of a Federal program (2 C.F.R. § 200.74)
- **“Subaward”** – means an award provided by a pass-through entity to a subrecipient for the subrecipient to carry out part of a Federal award received by the pass-through entity; it does not include payments to a contractor (2 C.F.R. § 20.92)
- **“Subrecipient”** – means a non-Federal entity that receives a subaward from a pass-through entity to carry out part of a Federal program; but does not include an individual that is a beneficiary of such program (2 C.F.R. § 200.93)



Key Players

Recipient

Subrecipient

FEMA

DHS OIG

- The **recipient** (formerly, “grantee”) is the Federal award administrator for all funds provided under the Public Assistance Program and responsible for ensuring compliance with all applicable Federal laws, regulations, Executive Orders, FEMA policies, the FEMA-State/Tribe Agreement, and other terms and conditions.
- The recipient must comply with the applicable procurement standards for all recipient procurements
- The recipient, as a pass-through entity, is responsible for:
 - Processing subawards to subrecipients
 - Ensuring subrecipient awareness of, and compliance with Federal procurement standards for subrecipient procurements
 - Ensuring compliance with the FEMA-State Agreement (if recipient is a state) or FEMA-Tribe Agreement (if recipient is a tribe)



FEMA

Key Players

Recipient

Subrecipient

FEMA

DHS OIG

- A **subrecipient** (formerly, “subgrantee”) is the non-Federal entity that receives a subaward from a pass-through entity to carry out part of a Federal program, and which is accountable to the recipient or pass-through entity for the use of the funds provided (2 C.F.R. § 200.93). Includes:
 - Local and Tribal Indian Governments;
 - Institutions of Higher Education (“IHE”), Hospitals, and other Nonprofit Organizations (“PNP”); and
 - State agencies or instrumentalities receiving funds from the pass-through entity
- The subrecipient must adhere to the applicable Federal procurement standards for all subrecipient procurements
- Indian tribal governments follow the procedures at 2 C.F.R. §§ 200.318-.326, irrespective of whether they are a recipient or subrecipient.



Key Players

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Recipient

Subrecipient

FEMA

DHS OIG

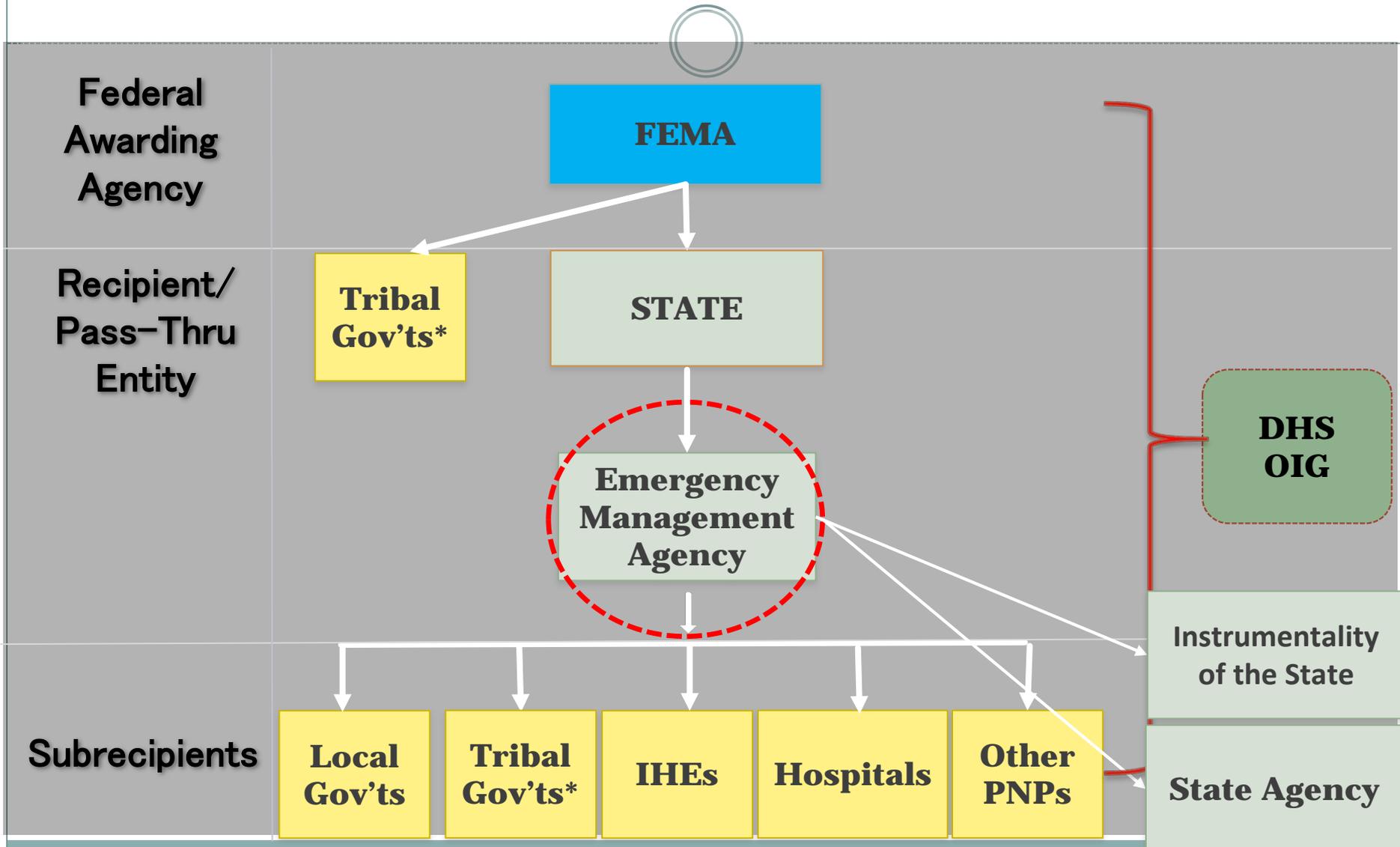


- FEMA is the Federal awarding agency:
 - Has an affirmative duty to manage and administer the Federal award in a manner to ensure that Federal funding is expended for authorized purposes and in accordance with all Federal laws, regulations, and Executive Orders and the terms of the grant award.
 - Educate and inform grantees about various grant requirements.
 - Recovers funding for improper expenditures under a grant.
- DHS Office of Inspector General (“OIG”):
 - Conducts independent audits, investigations, and inspections of the programs and operations of DHS and makes recommendations.
 - The DHS OIG has broad authority to audit FEMA programs and activities.



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Key Players



*Certain tribal governments may elect to act as a recipient under the Stafford Act

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Why We're Here...

- DHS OIG audits of FEMA disaster grants FYs 09-14:
 - Resulted in 82 recommendations related to recipient and subrecipient failures to adhere to the federal procurement stds
 - OIG recommended \$387.3 million in disallowed costs
- DHS OIG audits of FEMA disaster grants FY 15:
 - 15 recommendations to disallow \$122,213,672
- Common Findings:
 - Noncompetitive contracting practices
 - Failure to include required contract provisions
 - Failure to employ required procedures to ensure small/minority/women-owned firms are used
 - Cost-plus-percentage-of-cost contracting

Non-compliance with the Federal procurement requirements may comprise a material failure to comply with the terms of the disaster grant award and violate the FEMA-State Agreement.



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FEMA Procurement Disaster Assistance Team (PDAT)

- PDAT was stood up by the FEMA Office of Chief Counsel in April 2014 to train and assist applicants, emergency management personnel at all levels, and FEMA personnel on the procurement rules that must be followed when contracting for work using Federal disaster assistance funds. This constitutes a large part of PDAT's mission.
- We also assist applicants by reviewing questions from, and providing answers through FEMA personnel, as we are not legal advisors for applicants.
- We also oftentimes deploy to Joint Field Offices (“JFO”) to provide support to applicants, deployed FEMA personnel, and emergency management personnel on the ground.



Background

Stafford Act

Applicability

Grace Period

Contracting



- The Robert T. Stafford Disaster Relief and Emergency Assistance Act (“Stafford Act”) authorizes Federal financial assistance for states, local and Indian tribal governments, and certain private nonprofit organizations to respond to and recover from emergencies and major disasters.
- FEMA administers this financial assistance through various Stafford Act grant programs.
 - Public Assistance Program
 - Hazard Mitigation Grant Program
 - Pre-Disaster Mitigation



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Background

Stafford Act

Applicability

Grace Period

Contracting

- DHS adopted the Uniform Rules on December 19, 2014, in an Interim Rule (79 Fed. Reg. 75871)
 - The Uniform Rules apply to all new grant awards under emergencies and major disasters declared on or after December 26, 2014 (79 Fed. Reg. at 75872 and § 200.110)
- The Uniform Rules, where applicable, supersede the procurement standards formerly found at 44 C.F.R. § 13.36 (applicable to States, local and tribal governments) and 2 C.F.R. pt. 215 (applicable to institutions of higher education, hospitals, and private nonprofit organizations)



Background

Stafford Act

Applicability

Grace Period

Contracting

44 C.F.R. pt. 13 & 2 C.F.R. pt. 215

Dec. 26, 2014

2 C.F.R. pt. 200 (Uniform Rules)

Procurement standards for all projects associated with emergency or disaster declarations issued before this date were found at 2 C.F.R. §§ 215.40-.48 (Institutions of Higher Education, Hospitals, and other Nonprofit organizations) and 44 C.F.R. §§ 13.36(a)-(i) (States, local and tribal governments).

Procurement standards at 2 CFR §§ 200.317-.326 apply to all projects associated with declarations and emergencies issued after this date.

Grace Period
(2 CFR § 200.110)



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Background

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Stafford Act

Applicability

Grace Period

Contracting



- The Uniform Rules at 2 C.F.R. § 200.110 provide that:
Federal awarding agencies must implement the policies and procedures applicable to Federal awards by promulgating a regulation to be effective by December 26, 2014 unless different provisions are required by statute or approved by OMB. **For the procurement standards in §§ 200.317-.326, non-Federal entities may continue to comply with the procurement standards in previous OMB guidance (as reflected in § 200.104) for a total of three fiscal years after this part goes into effect** If a non-Federal entity chooses to use the previous procurement standards for two additional fiscal years before adopting the standards in this part, the non-Federal entity must document this decision in their internal procurement policies.



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Background

Stafford Act

Applicability

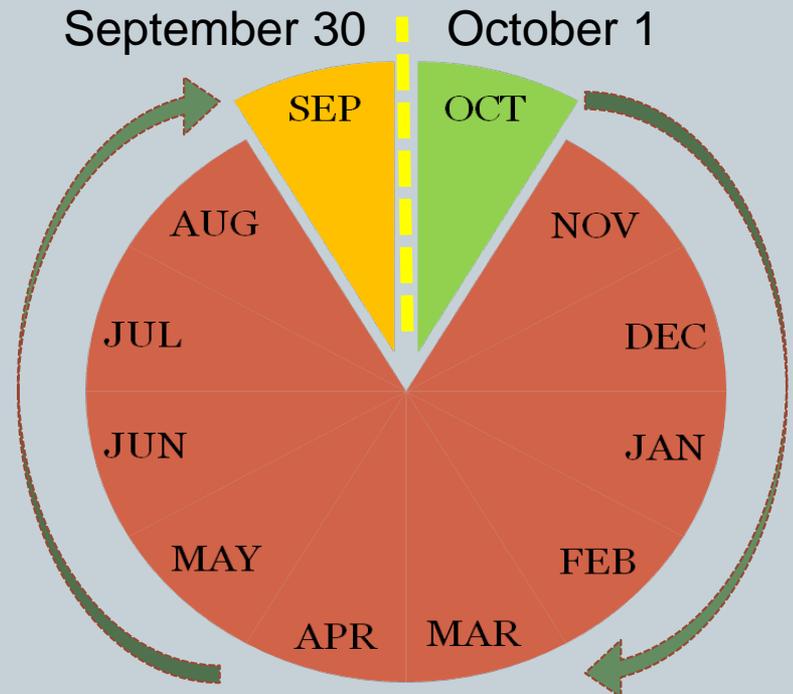
Grace Period

Contracting

Questions to Ask

- What's the 2 C.F.R. pt. 200 effective date?
→ Dec. 26, 2014
- Who's fiscal year is used to measure the grace period?
→ Non-Federal entity's (NFE) FY
- When do you start measuring?
→ First FY after effective date
- How long can you utilize the grace period?
→ Until the end of the NFE's third FY after effective date

Sample NFE Fiscal Year



Hypothetical: Implementation of Uniform Rules

The City of X is hit by multiple tornadoes and incurred significant damage. A disaster declaration was issued on May 28, 2015. The City of X was previously given very high marks for their compliance with the old Federal procurement standards in an audit conducted by the DHS OIG. The City of X states that it is very comfortable with the procurement standards under 44 C.F.R. § 13.36(b)-(i) and insists on using them instead of the current Federal procurement standards found in 2 C.F.R. §§ 200.318-.326.

Must the City of X adhere to the current Federal procurement standards, despite their protestations and insistence on using the old standards?



Background

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Stafford Act

Applicability

Grace Period

Contracting



- Non-Federal entities will often use contractors to help them carry out their Stafford Act awards or subawards.
 - For example, a non-Federal entity may receive a Public Assistance award to restore a damaged building and then award a contract to a construction company to do the work.
 - The contract is a commercial transaction between the non-Federal entity and its contractor.
 - FEMA has no contractual relationship with the contractor



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Background

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Stafford Act

Applicability

Grace Period

Contracting



- Although the Federal government is not a party to the contract, the non-Federal entity must comply with the conditions attached to a grant in awarding federally-assisted contracts.
 - A non-Federal entity must comply with the procurement requirements imposed by Federal law, executive orders, and federal regulations.
 - These will control over non-Federal authorities (such as local procurement standards) to the extent they conflict with Federal requirements.
- The Uniform Rules set forth the various procurement standards at 2 C.F.R. §§ 200.317 – .326.



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Background

Applicability

Grace Period

Contracting

Noncompliance



Remedies for Non-Compliance with the Federal Procurement Standards:

(2 C.F.R. § 200.388)

(a) Temporarily withhold cash payments pending correction of the deficiency by the non-Federal entity or more severe enforcement action by the Federal awarding agency or pass-through entity	(b) Disallow all or part of the cost of the activity or action not in compliance
(c) Wholly or partly suspend or terminate the Federal award	(d) Initiate suspension or debarment proceedings
(e) Withhold further awards for the program	(f) Take other remedies that may be legally available



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Suspension and Debarment



- Non-Federal Entities and contractors are subject to the non-procurement debarment and suspension regulations implementing Executive Orders 12549 and 12689, 2 C.F.R. pt. 180 (2 C.F.R. § 200.212).
- Non-Federal Entities must not make any award or permit any award at any tier to parties listed on the governmentwide exclusions in the System for Award Management (“SAM”), which can be found at www.sam.gov.
- The rules for assistance exclusion are also governed by DHS implementing regulations at 2 C.F.R. pt. 3000.



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Summary of Procurement Standards



State Non-Federal Entities (state agencies, instrumentalities of the state, and territories)	Other Non-Federal Entities (local governments, tribal governments, IHEs, hospitals, and other nonprofit organizations)
2 C.F.R. § 200.317	2 C.F.R. §§ 200.318 through 200.326
<p><u>Synopsis:</u></p> <ul style="list-style-type: none">• (1) Must follow same policies and procedures it uses for procurements from its non-Federal funds;• (2) Comply with § 200.322 (procurement of recovered materials); and• (3) Include any clauses required by § 200.326 (contract provisions)	<p><u>Synopsis:</u></p> <ul style="list-style-type: none">• (1) Must follow its own documented procurement procedures which reflect applicable state, local, and tribal laws and regulations; and• (2) Provided that the procurements conform to applicable federal law and the standards identified in 2 C.F.R. §§ 200.318 through 200.326



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*****Note: “State”** – means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, U.S. Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any agency or instrumentality thereof exclusive of local governments.***

Hypothetical: States

The Federal procurement standard at 2 C.F.R. § 200.320(b) allows small purchase procedures for the acquisition of supplies or services below the simplified acquisition threshold (which is currently \$150,000). The State of X has a threshold of \$175,000 in its own version of small purchase procedures, and uses its own threshold and small purchase procedures to procure \$170,000 in supplies.

Is there an issue with the State's procurement?



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*****Note:** If a non-Federal entity's procurement meets local, state and/or tribal procurement standards (if applicable), but fails to meet the Federal procurement standards, reimbursement of all otherwise eligible funds is JEOPARDIZED.***

Hypothetical: Other NFEs

The Federal procurement standard at 2 C.F.R. § 200.320(b) allows small purchase procedures for the acquisition of supplies or services below the simplified acquisition threshold (which is currently \$150,000). The State of X has a threshold of \$175,000 in its own version of small purchase procedures. The City of Y uses the State's threshold and uses small purchase procedures to procure \$170,000 in supplies.

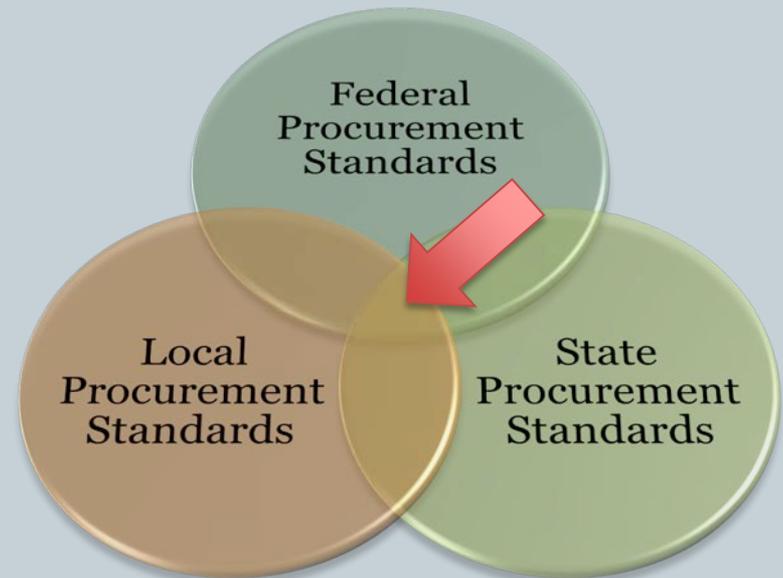
Is there an issue with the City's procurement?



Procurement Standards for Non-Federal Entities Other than States

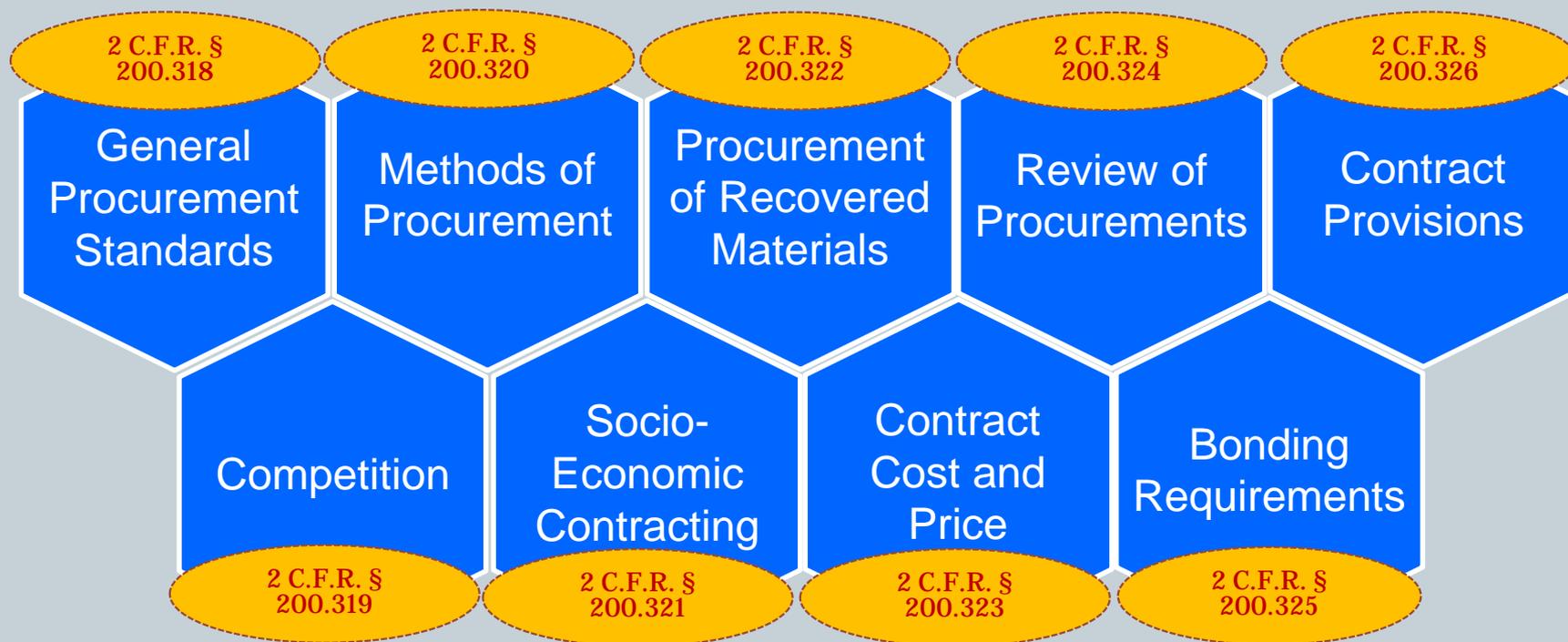


- The Federal procurement standards address only a small portion of the procurement rules that possibly apply to a procurement.
- If the Federal procurement standards do not address nor prohibit a concept, it is generally not a Federal requirement.
- If, however, there is a direct conflict between any of the standards, the most restrictive standard applies.



Overview of Standards

The procurement standards can be broken down into the following categories:



General Procurement Standards

Mandatory

Encouraged

A NFE must maintain oversight to ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders (2 CFR § 200.318(b))

A NFE must have procedures that avoid the acquisition of unnecessary or duplicative supplies or services, and consideration should be given to breaking out procurements to obtain a more economical price (2 CFR § 200.318(d))

Mandatory

Contractor Oversight

Necessity

Standards of Conduct

Conflicts of Interest

Gifts

Responsible Contractors

Records

Time & Materials

Settlement of Issues

Encouraged

Use of Federal Excess Property

Intergovernmental Agreements

Value Engineering Clause



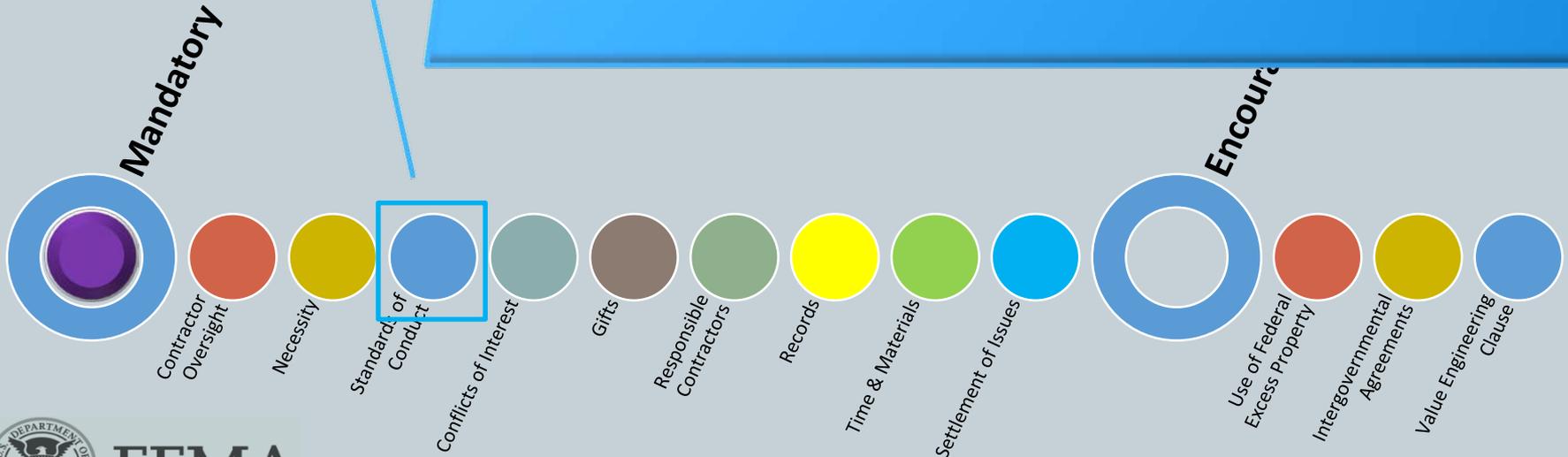
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General Procurement Standards

Mandatory

Encouraged

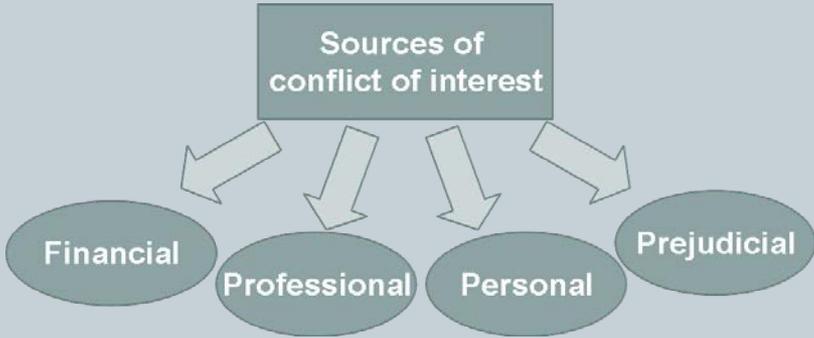
- (1) Must cover conflicts of interest and govern the actions of employees engaged in the selection, award and admin of contracts (2 CFR § 200.318(c)(1))
- (2) These standards must provide for disciplinary actions;
- (3) Must cover “organizational conflicts of interest” if the non-Federal entity has a non-governmental parent, subsidiary, or affiliate



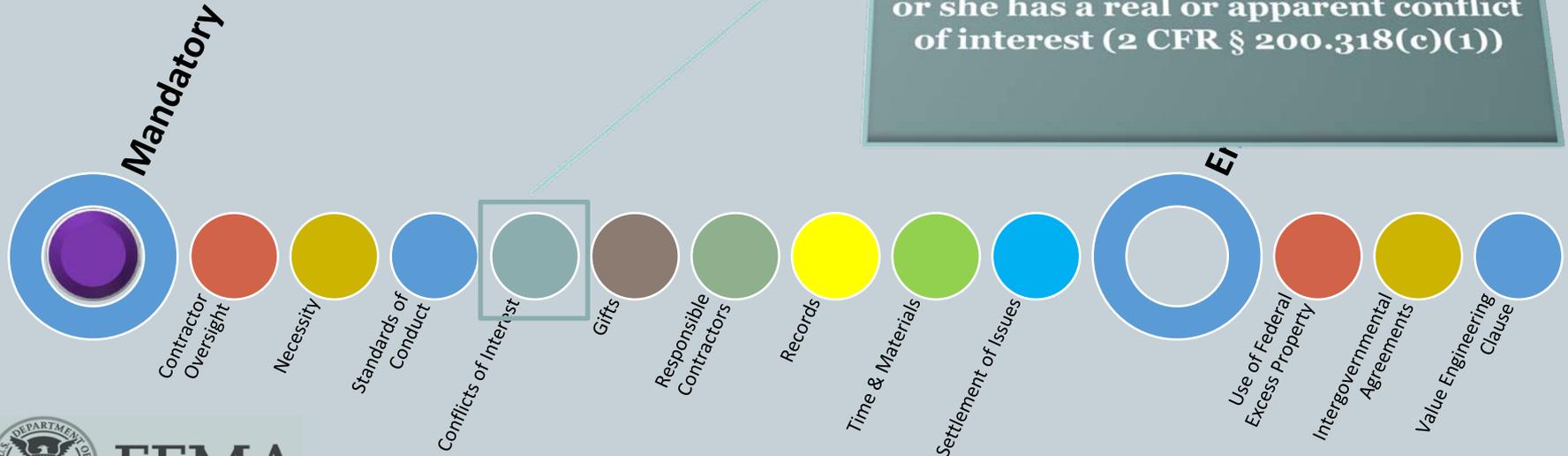
General Procurement Standards

Mandatory

Encouraged



No employee, officer, or agent must participate in the selection, award, or administration of a contract supported by a Federal award if he or she has a real or apparent conflict of interest (2 CFR § 200.318(c)(1))



General Procurement Standards

Mandatory

Encouraged

The officers, employees, and agents of the NFE must neither solicit nor accept gratuities, favors, or anything else of monetary value from contractors/subcontractors (2 CFR § 200.318(c)(1))

A NFE must award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement taking into consideration such matters: (2 CFR § 200.318(h))

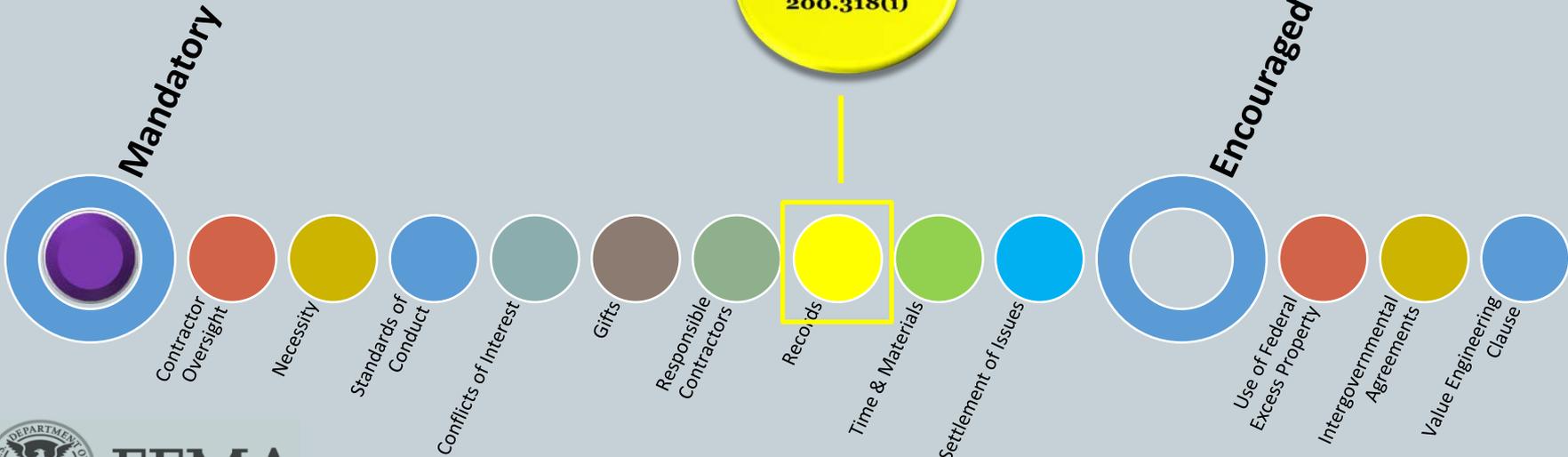
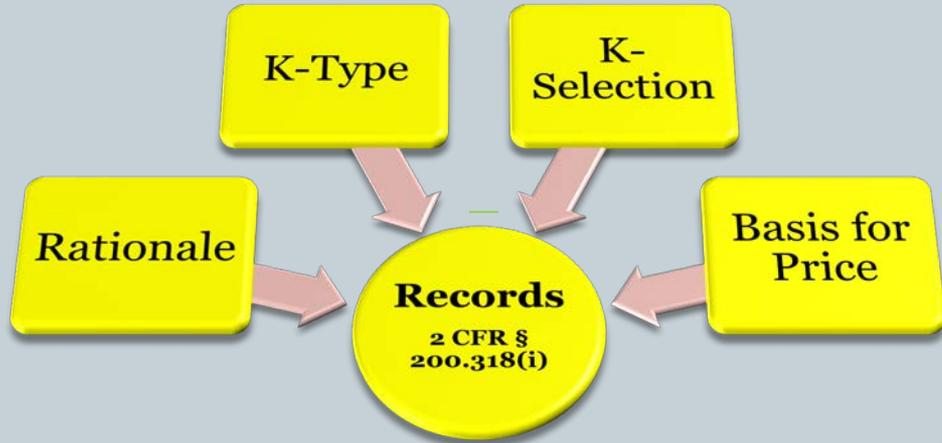
- Integrity
- Public Policy Compliance
- Record of Past Performance
- Financial & Technical Resources



General Procurement Standards

Mandatory

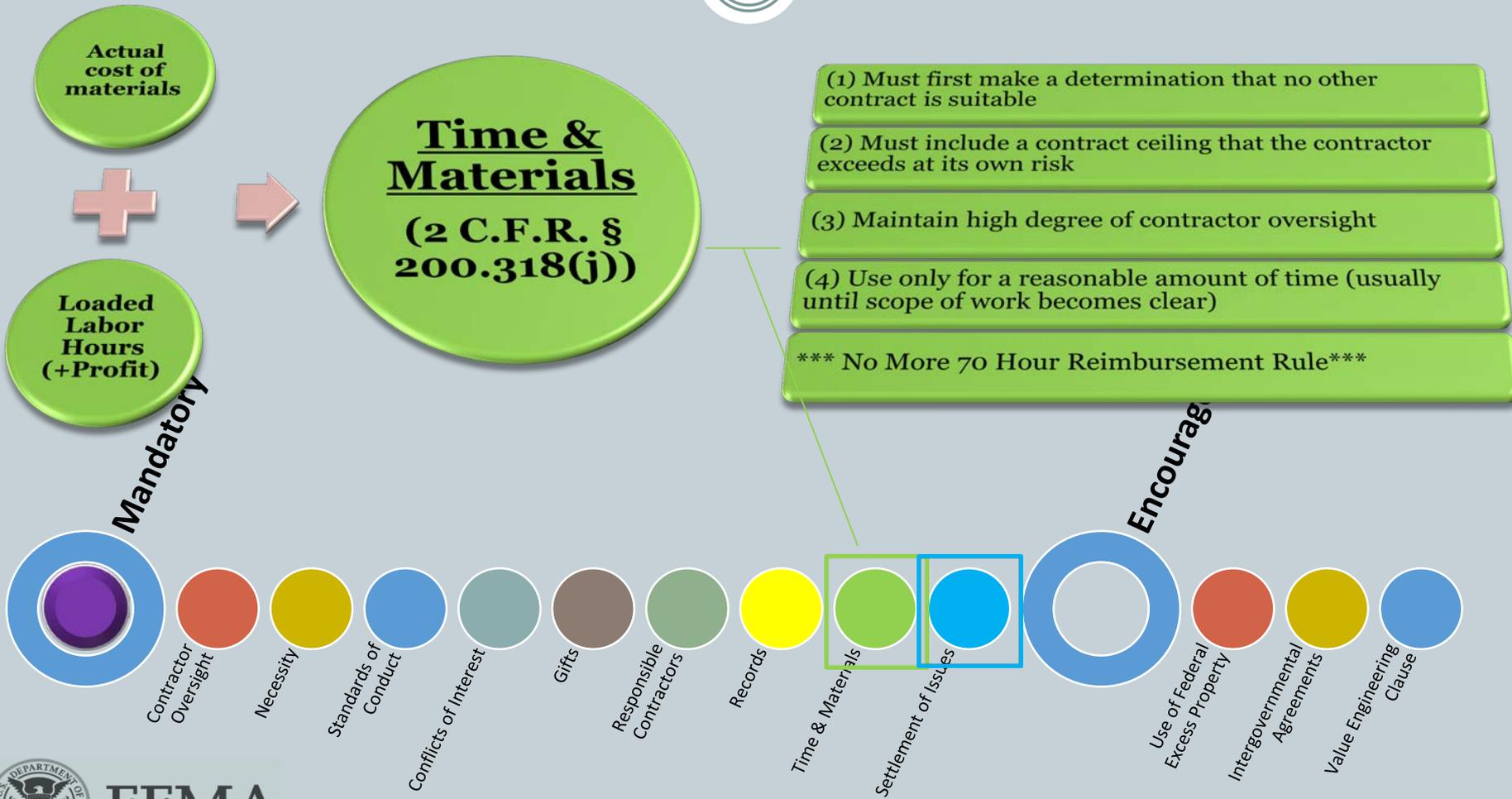
Encouraged



General Procurement Standards

Mandatory

Encouraged

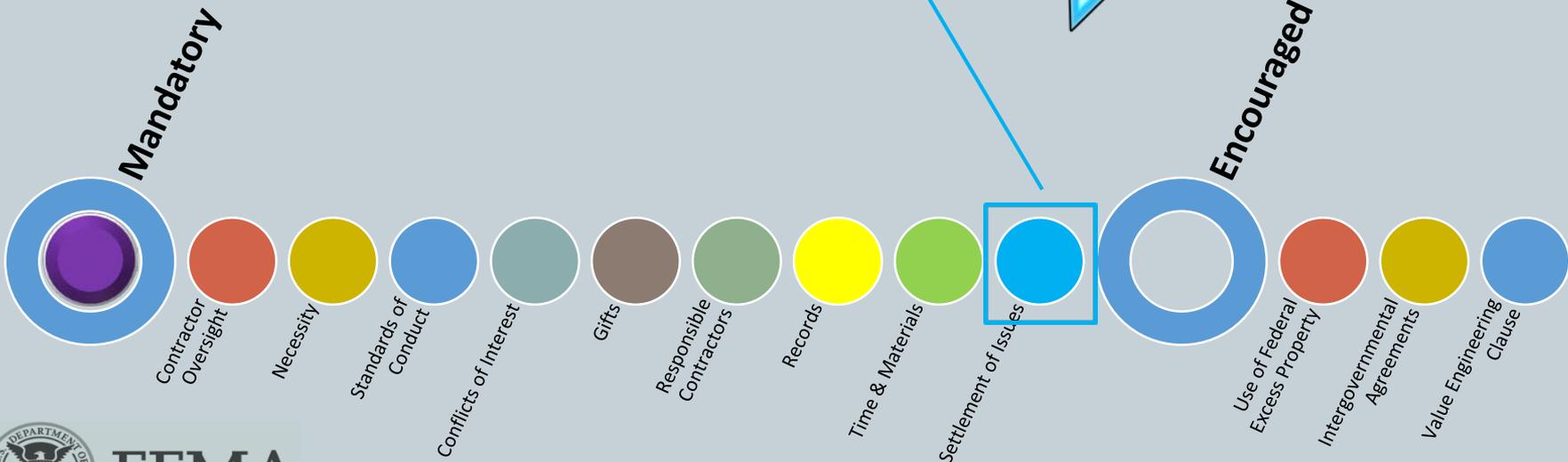


General Procurement Standards

Mandatory

Encouraged

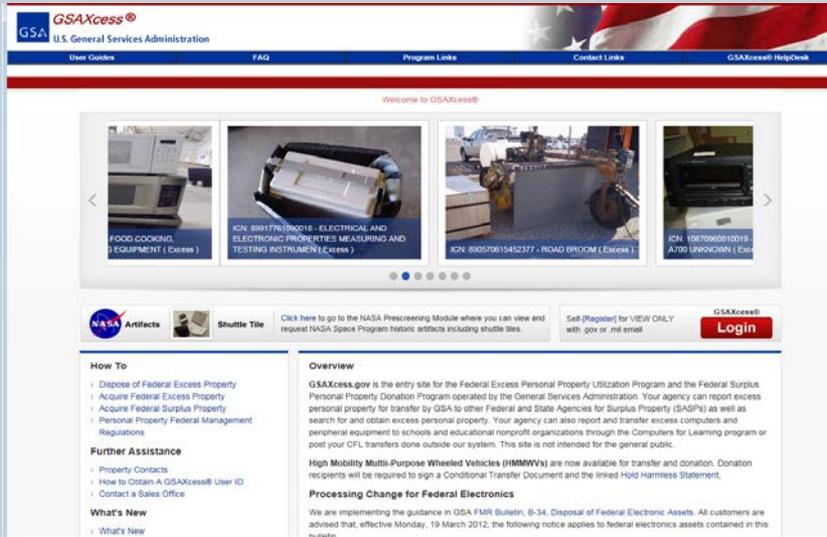
A NFE alone must be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual issues. (2 C.F.R. § 200.318(k))



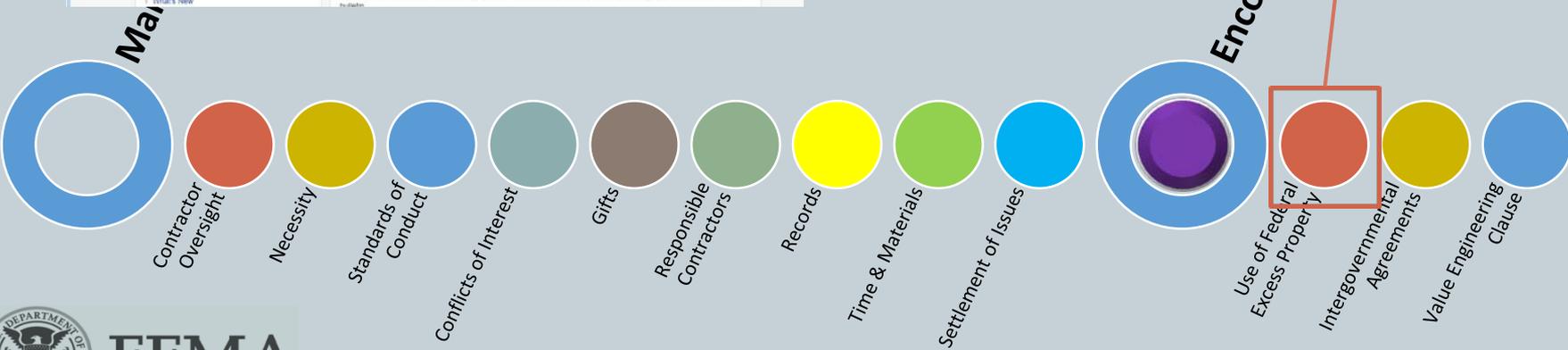
General Procurement Standards

Mandatory

Encouraged



(2 C.F.R. § 200.318(f)) Administered by GSA through the Federal Surplus Personal Property Donation Program. Open to tax supported entities and eligible private nonprofit tax-exempt organizations. See www.gsa.gov/portal/content/104591 and www.gsaxcess.gov for more information



General Procurement Standards

Mandatory

Encouraged



(2 C.F.R. § 200.318(e))
Provides the authority for mutual aid agreements, use of schedule contracts, joint procurements, etc.

(2 C.F.R. § 200.318(g))
Used to promote cost or efficiency savings by the contractor



Hypothetical: General Procurement Standards

A local government is procuring construction services for the repair of its town hall damaged in a major disaster. Using procurement through sealed bids, the local government receives twelve bids. The head of the contracting board, who makes the final award decision, is the brother of the President of the company that submitted the lowest bid.

Should the head of the contracting board participate in the award decision?



Competition

Full & Open Comp.

Contractor Exclusions

Geographical Pref.



- A non-Federal entity must conduct procurement transactions in a manner providing “full and open competition” consistent with the standards of 2 C.F.R. § 200.319.
- Contractors that develop or draft specifications, requirements, statements of work, or invitations for bids or requests for proposals must be **excluded** from participating for such procurements (new).



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Competition

Full & Open Comp.

Contractor Exclusions

Geographical Pref.



- A non-Federal entity must conduct procurements in a manner that ***prohibits*** the use of statutorily or administratively imposed state, local, or tribal *geographical preferences* in the evaluation of bids or proposals, except where Federal law expressly mandates or encourages geographical mandates.

Does not apply to licensing requirements

Does not apply to geographical requirements under A&E contracts

Inapplicability of § 307 of the Stafford Act

Applicability of the Indian Self-Determination and Education Assistance Act



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Competition

Pre-Qualified Lists

Advanced Contracts

Restrictive of Comp.

- **Pre-Qualified Lists** – A non-Federal entity may use pre-qualified lists of persons, firms, or products, subject to certain conditions: ***Not a contract!!!***
 - Sufficient competition amongst the contractors on the pre-qualified list for full & open competition; and
 - May not preclude potential bidders or offerors from qualifying during the solicitation period.
- **Advanced Contracts** – A non-Federal entity may award and use a pre-positioned contract, if:
 - All Federal procurement standards have been met; and
 - The scope of work is adequate to encompass the anticipated work.



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Is a contract!!!

Competition

Pre-Qualified Lists

Advanced Contracts

Restrictive of Comp.

- Also known as pre-awarded, pre-positioned, or existing contracts (among others).
- A contract that was awarded prior to the issuance of the current Federal procurement standards may still be used after Dec. 26, 2014 – if certain conditions are met:
 - (1) The existing contract must have been in compliance with the Federal procurement standards that were applicable at the time the contract was solicited and awarded.
 - (2) The subrecipient must re-examine the contract to ensure that it complies with the current Federal procurement standards – some of which have been revised, but most of which have become more permissive.



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Competition

Pre-Qualified Lists

Advanced Contracts

Restrictive of Comp.

- (3) Where there has been a change in the new procurement standards and the existing contract is non-compliant, the subrecipient must determine under local, state, or tribal procurement law, whether a contract modification is legally permissible to bring the contract into compliance;
- (4) The subrecipient would have to determine that the existing contract's scope of work was broad enough to cover the type and extent of work now contemplated – out of scope work cannot be included in an existing contract; and
- (5) The subrecipient would have to reassess whether the age of the existing contract is a problem as it relates to whether the associated prices/costs remain fair and reasonable due to the passage of time (e.g., a 4-5 year old contract should probably be re-competed).



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Hypothetical: Pre-Qualified List

City, after publicly advertising a request for qualifications, pre-qualifies three debris removal contractors for potential use during a future event. Later that same year, a category 5 hurricane impacts the State of Z, causing widespread damage and debris. Knowing debris removal will continue for approximately six months, the City uses the procurement by sealed bids method among the three contractors to meet the debris removal requirement. Contractor, who is not among the list of three, contacts the City during the solicitation period and wants to submit a request for qualifications and subsequent bid. The City denies this request during the solicitation period.

Does such a denial comport with 2 C.F.R. § 200.319(d)?



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Hypothetical: Existing Contract

Powerful storms impact the City of P, resulting in torrential rainfall, flooding and damaging much of the city's infrastructure. Eight miles of underground natural gas pipelines were damaged, although the resulting damage did not result in emergency / exigent circumstances sufficient to meet the non-competitive procurement exception. Instead, City of P plans on using a contractor under an existing contract to repair and replace the eight miles of damaged pipelines for \$3 million.

A review of the existing contract indicates that disaster-related repairs were anticipated; however, that section of the contract limits such repair work to no more than one mile and includes a not-to-exceed clause of \$500,000.

Under this scenario, can the City of P utilize its existing contract to repair the damaged pipeline?



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Competition

Restrictive of Competition

Written Proc. Procedures



- The regulations identify 7 situations considered to be restrictive of competition (2 C.F.R. § 200.319(a)(1)-(7))
 - (1) Placing unreasonable requirements in order for firms to qualify;
 - (2) Requiring unnecessary experience and excessive bonding;
 - (3) Noncompetitive pricing practices between firms or between affiliated companies;
 - (4) Noncompetitive contracts to consultants that are on retainer contracts;
 - (5) Organizational Conflict of Interest;
 - (6) Specifying only a “brand name” product;
 - (7) Any arbitrary action in the procurement process.



Competition

Restrictive of Competition

Written Proc. Procedures



- A non-Federal entity must have written procedures for procurement transactions, which must ensure solicitations provide for at least the following (2 C.F.R. § 200.319(c))
 - Incorporate a clear and accurate description of the technical requirements for the material product, or service procured.
 - Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.



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Procurement Methods

Micro-Purchase

Small Purchase

Sealed Bidding

- **Micro-Purchase Procedures** (2 C.F.R. § 200.320(a)) (new)
 - ✦ The acquisition of supplies or services, the aggregate dollar amount of which does not exceed the micro-purchase threshold - **\$ 3500**
 - ✦ To the extent practicable, must distribute micro-purchases equitably among qualified suppliers
 - ✦ May be awarded without soliciting competitive quotations if the non-Federal entity considers the price to be reasonable
- **Small Purchase Procedures** (2 C.F.R. § 200.320(b))
 - ✦ Are those relatively simple and informal procurement methods for securing services, supplies, or other property that does not cost more than the simplified acquisition threshold - \$ 150,000
 - ✦ Price or rate quotations are to be obtained from an “adequate number” of qualified sources (no less than 3)



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Do **NOT** split projects to circumvent the dollar thresholds

Procurement Methods

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Sealed Bidding

Competitive Prop.

Non-competitive Prop.

- **Sealed Bidding** (2 C.F.R. § 200.320(c))
 - Lowest priced, responsive, responsible, bidder WINS.
 - Price & Price-related factors are the only considerations.
 - Fixed Price Contracts used.
 - Bids must be solicited from an “adequate number of known suppliers,” providing them sufficient response time before date for the opening of bids.
 - Local and tribal governments must publicly advertise the invitation for bids (change)
 - All bids will be opened at the time and place prescribed in the IFB, and for local and tribal governments, the bids must be opened publicly (change)
 - This method is “preferred” for construction when sealed bidding is “feasible,” which is when certain conditions are present.
 - Other procedural requirements at 2 C.F.R. § 200.320(c)(2)



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Procurement Methods

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Sealed Bidding

Competitive Prop.

Non-competitive Prop.

- **Competitive Proposals** (2 C.F.R. § 200.320(d))

- Also known as: “best value” or “tradeoff” contracting. Unlike sealed bidding, NFEs can prioritize factors other than price, and prioritize them more highly.
- The appropriate method when more than one source is expected to submit an offer and either a fixed-price or cost-reimbursement type contract is awarded
- Requests for proposals **must be publicized** and identify all evaluation factors and their relative importance
- Proposals must be solicited from an adequate number of qualified sources
- Must have written method for conducting technical evaluations of the proposals received and for selection of the contractor
- Awards will be made to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered.



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Procurement Methods

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Sealed Bidding

Competitive Prop.

Non-competitive Prop.

- **Non-Competitive Proposals** (2 C.F.R. § 200.320(f)) (change)
 - Procurement through solicitation of a proposal from only one (or limited) source - may be used only when one or more of the following circumstances apply.
 - **One Source**: The item is available only from a single source.
 - **Exigency/Emergency**: An exigency or emergency will not permit a delay resulting from competitive solicitation.
 - **Awarding Agency Approval**: The Federal awarding agency or pass-through entity expressly authorizes non-competitive proposals in response to a written request from the non-Federal entity.
 - **Inadequate Competition**: After the solicitation of a number of sources, competition is determined inadequate.
 - The award of a contract no longer has to be “infeasible” under one of the competitive methods of procurement



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Hypothetical: Noncompetitive Procurement



The State of C suffered a devastating 7.2 magnitude earthquake. Several major bridges in the City of S, for which the State Department of Transportation (DOT) is responsible, were damaged. Additionally, several city surface streets were damaged. Due to the extensive damage throughout the State of C, the governor waives all state procurement requirements. DOT and the City of S immediately award sole source contracts to contractors that have previously worked on state and city projects and performed well.

Are these contract awards permissible under the Governor's waiver? If not, what rules apply, and what additional facts would be useful?



Socioeconomic Contracting

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Solicitation Lists

Solicit Potential Sources

SBA/DOC Services

- ***In addition to*** “full and open competition,” a non-Federal entity must take all necessary affirmative steps to assure that minority businesses, women’s business enterprises, and labor surplus area firms are used when possible (2 C.F.R. § 200.321)
- The affirmative steps must include at least the following:
 - ✓ (1) Placing qualified small and minority businesses and women’s business enterprises on solicitation lists.
 - ✓ (2) Assuring that small and minority businesses, and women’s business enterprises are solicited whenever they are potential sources.
 - ✓ (3) Using the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Minority Business Development Agency of the Department of Commerce.



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Socioeconomic Contracting

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Smaller Tasks/Qty

Est. Delivery Sched.

Subcontracting

- The affirmative steps must include at least the following (cont'd):
 - ✓ (4) Dividing Total requirements when economically feasible, into *smaller tasks or quantities* to permit maximum participation by small and minority businesses, and women's business enterprises.
 - ✓ (5) Establishing *delivery schedules*, where the requirement permits, which encourage participation by small and minority businesses, and women's business enterprises.
 - ✓ (6) Requiring the prime contractor, if *subcontracts* are to be let, to take the five previous affirmative steps.



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Hypothetical: Socioeconomic Contracting

Situation 1 – Severe storms and flooding impacts the State of Y, and waters cause a dam breach which floods the City. With most of the City underwater, the City needs to conduct rescue of most of its 30,000 citizens, which are stuck in their homes with floodwaters rising. The City, however, lacks the needed boats and takes an hour to call ten companies in nearby towns to meet the requirement. It awards three time and materials contracts to companies able to meet the requirement immediately. The City does not take the six affirmative steps.

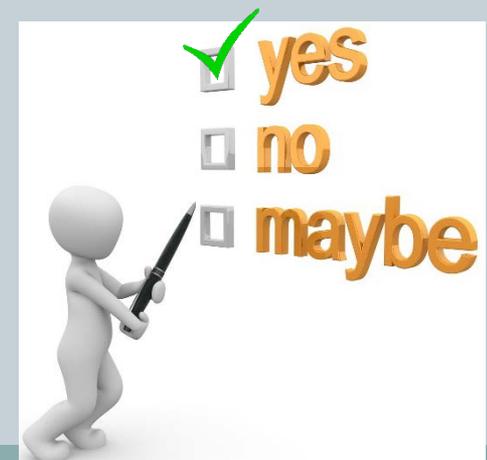
Is this a violation of 2 C.F.R. § 200.321?



Hypothetical: Socioeconomic Contracting

Situation 2 – City conducts a procurement for construction services needed to repair a damaged school. The procurement meets most every requirement of 2 C.F.R. pt. 200, with the only shortfall that it did not take the fifth affirmative step under 2 C.F.R. § 200.321(b)(5) (contacting the SBA and DOC).

Is this a violation of 2 C.F.R. § 200.321?



Cost and Price

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Greater Than \$150,000

Independent Estimate

Negotiate Profit

- A Non-Federal Entity must perform a price or cost analysis in connection with every procurement action above the simplified acquisition threshold, including contract modifications (2 C.F.R. § 200.323) (change)
- The method and degree of analysis is dependent on the facts and circumstances surrounding the particular procurement but, as a starting point, the non-Federal entity must make independent estimates before receiving bids or proposals (change)
- A non-Federal entity shall negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed.



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Cost and Price

Cost Plus Percentage of Cost

- A non-Federal entity must not use a cost-plus-percentage-of-cost or cost-plus-percentage-of-construction-cost method of contracting (2 C.F.R. § 200.323(d))
- Criteria evidencing this type of contract:
 - (1) Payment is on a predetermined percentage rate;
 - (2) The predetermined percentage rate is applied to actual performance costs;
 - (3) The contractor's entitlement is uncertain at the time of contracting;
 - (4) The contractor's entitlement increases commensurately with increased performance costs.

- **Rationale...**

There is **NO** incentive to control costs, and the contractor has a financial interest in *increasing* the cost of performance.



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Hypothetical: Cost and Price

The City conducts a procurement through competitive proposals for consulting services, resulting in a cost reimbursement contract with anticipated costs of \$100,000 at the time of the contract. The City has made an independent estimate of the contract cost during acquisition planning of \$110,000.

Is the City required to conduct a price or cost analysis?



Hypothetical: Contract Price



City conducts a procurement through competitive proposals for architectural and engineering services related to the construction of a new city hall. Following the selection of the contractor, the City negotiates fair and reasonable compensation. The City ultimately awards a cost reimbursement contract, under which (1) the contractor is paid actual costs for the salaries of its employees through reimbursement of hourly rates for services performed; (2) actual costs for supplies and other materials; and (3) a fixed fee. The fixed fee is calculated at the time of contract by estimating the total estimated construction cost of the building and applying a percentage rate of 4%, bringing the fixed fee to \$40,000.

Is this a permissible contract pricing structure?



Pre-Procurement Document Review

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Review of Specifications

Other Proc. Documents

- **Review of Specifications:**

- A non-Federal entity must make the technical specifications for a proposed procurement available upon request by FEMA or the pass-through entity where FEMA or the pass-through entity believes such review is necessary to ensure that the item or service specified is the one being proposed for acquisition (2 C.F.R. § 200.324(a))

- **Pre-Procurement Review of Other Procurement Documents:**

- Upon request, a non-Federal entity must make available for FEMA or pass-through entity pre-procurement review, other procurement documents (such as requests for proposals, invitations for bid, independent cost estimates) in certain circumstances (2 C.F.R. § 200.324(b))
- A non-Federal entity is exempt from the pre-procurement review if FEMA or the pass-thru entity determines that its procurement systems comply with the standards under 2 C.F.R. pt. 200.

Bonding Requirements

Construction / Facility Improvement Contracts

- A non-Federal entity must follow its own bonding requirements for construction or facility improvement projects *beneath* the simplified acquisition threshold (2 C.F.R. § 200.325)
- A non-Federal entity must meet certain bonding requirements for construction or facility improvement projects *above* the simplified acquisition threshold (2 C.F.R. § 200.325(a)-(c)), unless FEMA determines the Federal interest is adequately protected.
- If no such waiver has been made, the bonding requirements are:
 - ✓ (1) A bid guarantee from each bidder equivalent to 5% of the bid price;
 - ✓ (2) A performance and payment bond on the part of the contractor for 100% of the contract price.



Hypothetical: Bonding Requirements

City conducts a procurement through sealed bidding for debris removal services, awarding the contract on a unit price basis with estimated total costs of \$400,000. Neither FEMA nor the State has certified the bonding policy and requirements of the City.

Is the procurement subject to the bonding requirements of 2 C.F.R. § 200.325?



Procurement of Recovered Materials



- A non-Federal entity that is a state agency or agency of a political subdivision of a state and its contractors must comply with Section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (2 C.F.R. § 200.322)
- The requirements of Section 6002 include:
 - Procuring only items designated in guidelines of the EPA at 40 C.F.R. pt. 247 that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds \$10,000 or the value of the quantity acquired during the preceding fiscal year exceeded \$10,000
 - Procuring solid waste management services in a manner that maximizes energy and resource recovery
 - Establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines.



Required Contract Provisions

- A non-Federal entity's contracts are required to contain certain provisions – some are based on sound contracting practices while others are required by Federal law, executive order, and regulations (2 C.F.R. § 200.326). (change)
- These required provisions are provided in Appendix II to Part 200—**Contract Provisions for Non-Federal Contracts Under Federal Awards.**
 - ✓ > \$150k – Administrative/contractual/or legal remedies for breach of contract
 - ✓ > \$10k – Terminations for Cause and Convenience
 - ✓ Equal Employment Opportunity – Construction
 - ✓ Davis Bacon / Copeland Anti-Kickback Acts – Construction (Inapplicable to PA Program)
 - ✓ \$100k + mechanics or laborers – Contract Work Hours and Safety Act



Required Contract Provisions



- Required Contract Provisions (cont'd):
 - ✓ Rights to Inventions Made Under a Contract or Agreement (Inapplicable)
 - ✓ > \$150k – Clean Air Act & the Federal Water Pollution Control Act
 - ✓ Debarment and Suspension – “SAM”
 - ✓ > \$100k award – Byrd Anti-Lobbying Amendment
 - ✓ § 200.322 – Procurement of Recovered Materials
- Additional FEMA Requirements:
 - ✓ Contract changes
 - ✓ Access to Records
 - ✓ DHS Seal, Logo, and Flags
 - ✓ Compliance w/Federal Law, Regs & EOs
 - ✓ No Obligation by Federal Government Program Fraud &



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False/Fraudulent Statements

Agenda



- **Introductory Remarks**
- **Terminology and Key Players**
- **Background**
- **Procurement Standards for States**
- **Procurement Standards for Other Non-Federal Entities**
- **Differences Between the New and Old Procurement Standards**



States



- The former standard at 44 C.F.R. § 13.36(a) is substantively the same as 2 C.F.R. § 200.317 – a state must follow the same policies and procedures it uses for procurements from its non-Federal funds.
- There is a slight difference in the case of contract clauses:
 - The previous standard required that the “state will ensure that every purchase order or other contract includes any clauses required by Federal statutes and executive orders and their implementing regulations.”
 - The current regulation is more prescriptive, making the state include the clauses required by 2 C.F.R. § 200.326.
- The current standard also makes clear a state needs to comply with 2 C.F.R. § 200.322 (procurement of recovered materials)



IHEs, Hospitals, and Other PNPs



- The former procurement standards applicable to IHEs, hospitals, and other nonprofit organizations were set forth in 2 C.F.R. §§ 215.40 through 215.48.
- These standards were similar, but not the same as the current:
 - The current procurement standards devote great attention to the methods of procurement that must be followed;
 - Geographic preferences are expressly prohibited;
 - There are different affirmative steps related to small and minority businesses, women's business enterprises, and labor area surplus firms;
 - Written standards of conduct must include provisions for organizational conflict of interest in the case of parents, subsidiaries, and affiliates;
 - There are some additional documentation requirements concerning the choice of the method of procurement and contract type; and
 - Time and Materials contracts can only be used under certain conditions.



Government Entities (not States)



- There are some important distinctions between the former standards at 44 C.F.R. § 13.36 and the current standards:
- The methods of procurement have changed:
 - There is now a micro-purchase method of procurement;
 - Clarifies that the small purchase procedures apply to simplified acquisitions of \$150,000;
 - Removal of the “infeasibility” condition precedent for a procurement through noncompetitive proposals;
 - Requirement for sealed bids to be advertised and opened publicly is limited to local and tribal governments.
- The regulation expressly prohibits contractors that develop or draft specifications, requirements, statements of work, or invitations for bids or proposals from competing for such requirements.



Government Entities (not States)

- The cost or price analysis regulation has changed:
 - Cost or price analysis only required for procurements exceeding the simplified acquisition threshold (used to be required for all procurements);
 - No longer a requirement to conduct a cost analysis when adequate price competition is lacking; and for sole source procurements, including contract modifications or change orders;
 - All non-Federal entities required to perform independent estimate.
- There is new content required in a non-Federal entity's written standards of conduct for organizational conflicts of interest arising due to related organizations.
- Removal of content requiring non-Federal entities to have protest procedures to handle and resolve disputes related to procurements and also content explaining when the Federal awarding agency will review protests.



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Questions



- Additional resources can be found at the following link:

www.fema.gov/procurement-disaster-assistance-team



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Homeland Security



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