

PREPARING FOR HURRICANE SEASON

Obtaining and Keeping Your FEMA Reimbursement: Procurement and Documentation Requirements



Wendy Huff Ellard
601.969.4681
wellard@bakerdonelson.com



Danielle Aymond
225.381.7039
daymond@bakerdonelson.com

Today's Agenda

- Procurement Requirements
- Documentation Requirements
- Q&A

Why Should You Care About All of These Rules?

- **FEMA disaster grants to electric cooperatives can provide reimbursement for:**
 - Debris Removal and Emergency Protective Measures
 - Repair, Restoration, or Replacement of Facilities
- **FEMA disaster grants are significant.**
 - \$1,924,749,230 in PA obligated for Hurricane Irma in Florida
 - \$961,994,665.26 in PA obligated for Hurricane Michael in Florida
- **Improved/Alternate Project Funding**
- Mitigation funding to **Build Resiliency**

Inherent Risks - Power Restoration Timeline

- Disaster expenditures often precede application for FEMA funding.
- Timeline:
 - Disaster damages lines and poles
 - Crews get the power back on
 - Work is complete
 - President declares disaster and FEMA arrives
- Yet, for FEMA reimbursement, utilities must show expenditures complied with federal grant rules...



...this timeline creates risk where your procedures for non-disaster power restoration differ from FEMA-funded power restoration.

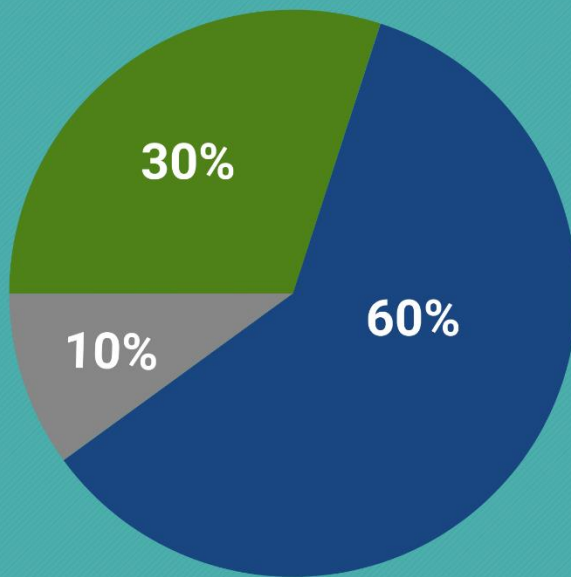
Federal Disaster Funding: Not What it Used to Be

- OIG and Congressional Pressure to Decrease Costs
- Repetitive Loss – “You Should Know Better”
- [**EXTREME**] Crack Down on Procurement Compliance
- Creation of FEMA Procurement Disaster Assistance Team (PDAT)





2020 Atlantic Hurricane Season Outlook



■ Above-normal ■ Near-normal ■ Below-normal season

Season probability

Named storms
13-19

Hurricanes
6-10

Major hurricanes
3-6

Be prepared: Visit hurricanes.gov and follow @NWS and @NHC_Atlantic on Twitter.

May 2020

Perfect Storm ... Compliance Risks

- **FEMA authority allows retroactive deobligation of disaster grants based on:**
 - Improper procurement, unreasonable cost, work beyond approved scope, FEMA mistake in approving scope
 - “Deobligation” means FEMA takes the funds back—even if they’ve already been spent!
- **Success in retaining funds depends on:**
 - pre-disaster policies and procedures
 - compliance with rules and policies during performance
 - documentation of procurements and expenditures segregated by FEMA grants

Eligibility Criteria



Eligible Costs

- Directly tied to the performance of eligible work;
- Adequately documented;
- Reasonable and necessary to accomplish the work;
- Compliant with Federal/State/local requirements;
- Consistent with applicant's internal policies; and
- Reduced by all applicable credits, such as insurance proceeds and salvage values.

Cost Reasonableness

- Evaluation Factors:
 - Generally recognized as ordinary/necessary
 - Comparable to market price based on:
 - Historical documentation
 - Average cost in area
 - Published prices
 - Special circumstances (e.g., supply shortages, project-specific complexities)
 - Conflicts of Interest
 - Procurement Compliance



Robust competition is the best evidence of cost reasonableness.

Procurement Standards & the OIG

- Located in the Code of Federal Regulations at 2 C.F.R. Part 200 –
- By far the
- In the 6 years questioned procurement issues
- Average la



Federal Procurement Requirements

- Procurement Standards – 2 C.F.R. §§ 200.317-326
 - 200.317 - Procurements by states.
 - 200.318 - General procurement standards.
 - 200.319 - Competition.
 - 200.320 - Methods of procurement to be followed.
 - 200.321 - Contracting with small and minority businesses, women's business enterprises, and labor surplus area firms.
 - 200.322 - Procurement of recovered materials.
 - 200.323 - Contract cost and price.
 - 200.324 - Federal awarding agency or pass-through entity review.
 - 200.325 - Bonding requirements.
 - 200.326 - Contract provisions.

General Procurement Standards (2 C.F.R. § 200.318)

- Maintain documented procurement procedures
 - must be compliant with State/local/federal rules
 - must be in writing and must be followed
 - **MUST EXIST PRE-DISASTER**
- Maintain records sufficient to detail the history of procurement



General Procurement Requirements (cont'd)

- Award contracts to only **responsible contractors**
 - Document procedures for checking qualifications
 - Contractors must certify they and subcontractors are not debarred or suspended
 - Check SAM.gov website—
no reimbursement for work awarded to debarred or suspended contractor
 - Florida has its own state-specific naughty list
 - Also consider history of past performance

The form is titled 'From The Desk Of Santa Claus' and 'DEPARTMENT OF NAUGHTY LIST'. It features a green banner with the words 'OFFICIAL NOTICE'. The form includes fields for 'DATE:', 'CITATION NUMBER:', 'CHILDS NAME:', and 'DESCRIPTION OF NAUGHTY BEHAVIOR:'. A red circular stamp on the left side reads 'NORTH POLE EXPRESS DELIVERY'. The 'SEEN BY:' field is filled with 'Elf Bernard' in red cursive, followed by '(HEAD ELF)'.

From The Desk Of Santa Claus
DEPARTMENT OF NAUGHTY LIST
OFFICIAL NOTICE
DATE: _____ CITATION NUMBER: _____
CHILDS NAME: _____
DESCRIPTION OF NAUGHTY BEHAVIOR: _____
SEEN BY: *Elf Bernard* (HEAD ELF)

General Procurement Requirements (cont'd)

- Time and Material / Time and Equipment Contracts:
 - Permissible only...
 - after a determination that **no other contract is suitable**; and
 - if the contract includes a **ceiling price** that the contractor exceeds at its own risk (2 C.F.R. 200.318(j)); and
 - the applicant maintains a **high degree of oversight** to ensure efficient methods and cost controls.
 - **Tip:** create a checklist to document reasons for determination of suitability, cost analysis, development of ceiling price
 - **Tip:** document monitoring of performance of work

General Procurement Requirements (cont'd)

- Conflicts of Interest: applicants must maintain written standards of conduct covering conflicts of interest:
 - Must govern action of employees/officers/agents engaged in selection, award, and administration of contract.
 - Must cover personal and organizational conflicts of interest.
 - Must prohibit employees from soliciting/accepting gifts.
 - Must provide for disciplinary actions.
 - Must cover organizational conflicts of interest among contractors.
 - Must prohibit contractors that develop/draft solicitations from competing for that work.

Tip: Conflict of Interest Compliance Program

- Code of Conduct should specify system to assure compliance
- Tips:
 - Annual Distribution of Procurement Code of Conduct
 - Acknowledgment Form signed by employees
 - Annual Training
 - Designate one person to manage compliance
 - **KEEP RECORDS OF ALL ACTIONS**

10 Most Common Mistakes

1. Improper Use of Pre-Event Contract
2. Noncompliant Emergency Contracting
3. Inadequate (or no) competition / sole-sourcing
4. Failing to follow rules for T&M contracts
5. Use of cost-plus-percentage-of-cost contracting
6. Awarding contracts without the required contract clauses
7. Use of geographic preferences
8. Failing to take (or documenting) affirmative steps to solicit disadvantaged firms
9. Failing to conduct a cost or price analysis where required
10. Lack of documentation

Pre-Storm / Non-Emergency Procurement Process

- Evaluate / anticipate your needs:
 - Debris Removal
 - Debris Monitoring
 - Power Restoration
 - Base Camp and Related Services
 - Materials
- Develop Scopes of Work to encompass “reasonably expected needs”
- Draft FEMA-compliant RFPs and ITBs
 - RFQs may be used to prepare a pre-qualified list, but limited use
- Conduct FEMA-compliant competitive procurement
 - Independent cost estimate
 - Cost analysis
- Award FEMA-compliant pre-positioned contracts

Emergency Procurement Process

- Evaluate your needs
- Develop Scopes of Work to encompass “reasonably expected needs”
- Document emergency/exigent circumstances justifying noncompetitive contracting
- Develop independent cost estimate to ensure cost reasonableness
- Solicit available contractors
 - Pre-qualified lists may help in this scenario
- Perform cost analysis to ensure cost reasonableness
- Award FEMA-compliant contracts
- Cancel contracts at earliest opportunity and conduct competitive procurement for remaining work

Emergency Contracting Requirements

- Required **contract clauses** at 2 C.F.R. § 200.326 & Appendix II
- Applicable **bonding requirements** at 2 C.F.R. § 200.325
- **Responsible contractors** only
- **Cost or price analysis** to demonstrate cost is fair and reasonable
- No **cost-plus-percentage-of-cost** contracting
- **T&M** contracts may only be used if:
 - Documented determination that no other contract type is suitable
 - Not-to-exceed amount
 - High degree of contractor oversight
- Applicants must follow **documentation, oversight, and conflict of interest** requirements

Bottom Line: even where noncompetitive contracting is justified, there are still a lot of rules that are easy to break in the midst of chaos.

Solicitation and Competition

- Must conduct procurements in a manner providing full and open competition, 200.319
- **MAKE SURE ADEQUATE SOLICITATION/PUBLICATION**
- Some of the situations considered to be restrictive of competition include but are not limited to:
 - Placing unreasonable requirements on firms in order for them to qualify to do business;
 - Requiring unnecessary experience and excessive bonding;
 - Noncompetitive pricing practices between firms or between affiliated companies;
 - Noncompetitive contracts to consultants that are on retainer contracts;
 - Organizational conflicts of interest;
 - Specifying only a "brand name" product instead of allowing "an equal" product to be offered and describing the performance or other relevant requirements of the procurement; and
 - Any arbitrary action in the procurement process.

Solicitation and Competition: Other Don'ts

- Cannot consider geographical preferences in evaluation
- Must identify all evaluation factors in the solicitation/RFP
- Don't assume FEMA/OIG will allow your standing vendor if you are not able to show how that vendor was procured
- Don't ignore DBE requirements / 200.321: You must "take all necessary affirmative steps to assure that minority businesses, women's business enterprises, and labor surplus area firms are used when possible."

Methods of Competition

- Micro-Purchases (\leq \$10,000)
- Small Purchase Procedures ($>$ \$10,000 and \leq \$250,000)
- Sealed Bidding – price determines winner
- Competitive Proposals – price and other factors determine winner
- Noncompetitive Proposals
 - Available only from a single source
 - Public exigency/emergency will not permit delay
 - FEMA or FDEM approves in response to written request
 - After solicitation, competition is inadequate

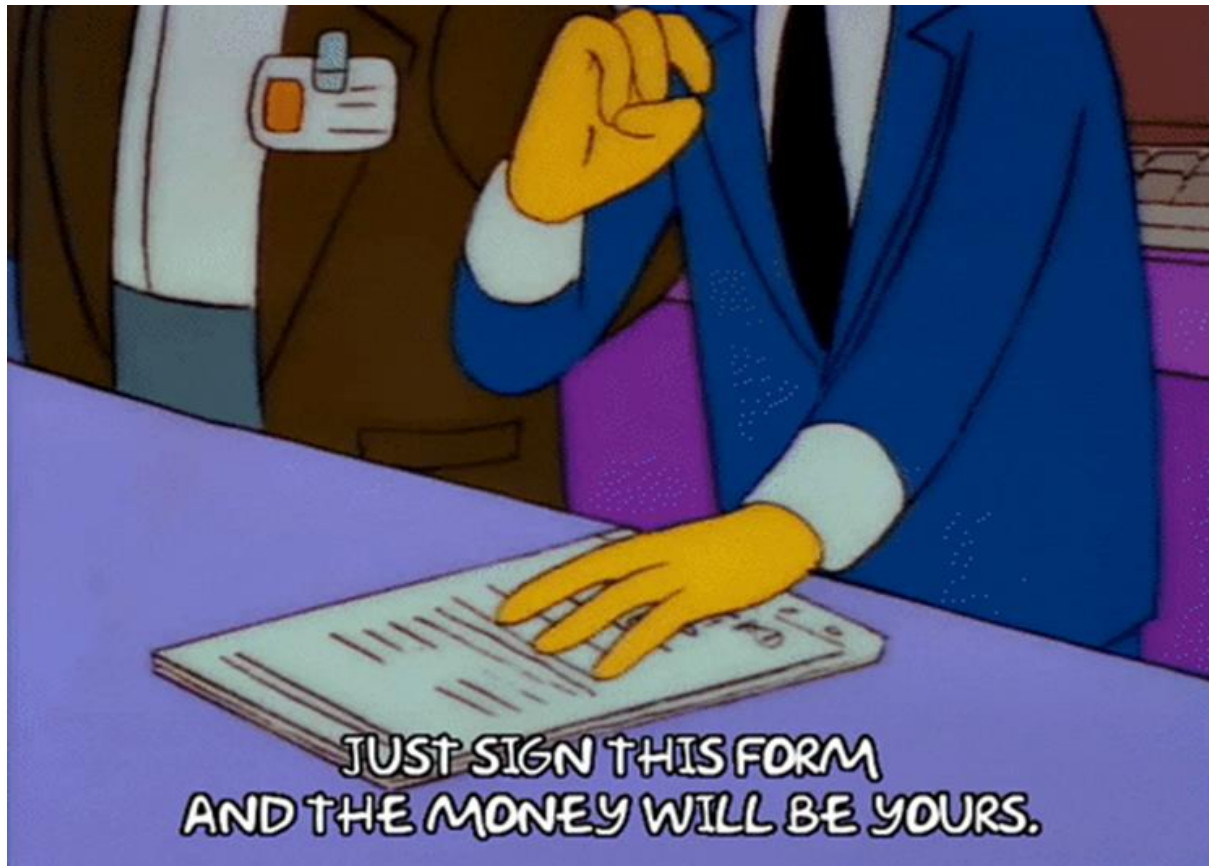
Socioeconomic Contracting

- Must “take all necessary affirmative steps to assure that minority businesses, women’s business enterprises, and labor surplus area firms are used when possible”
 - Regulation lists six specific affirmative steps
 - OIG recommends deobligation if not taken
 - Tip: establish a documented affirmative outreach program for minority contractors prior to disaster
 - Tip: use a template memorandum to document compliance with each affirmative step.

Contract Cost and Price; Cost Analysis

- Must perform a cost or price analysis in connection with every procurement action in excess of \$150,000 / \$250,000; 200.323
 - **Major OIG issue**
 - Requirement also applies to contract modifications
- **Must make an independent estimate BEFORE receiving bids or proposals**
- You may evaluate:
 - Historic documentation for similar work;
 - Average costs for similar work in the area;
 - Published unit costs from the national cost estimating databases;
 - FEMA cost codes, equipment rates, and engineering and design service curves

Inadequate Contracting Documents



Inadequate Contracting Documents

- Must include proper bonding; no bonding requirements set by Super Circular for debris/emergency work
- Make sure to include the **REQUIRED Clauses; 200.326**
 - Davis Bacon and Anti-Kickback are not applicable for work solely funded by FEMA PA
 - Contract Works Hours and Safety Standards Act DOES apply
 - Buy American does not apply to work solely funded by PA
- Access to Records – required per 200.336; timeframe
- Insurance – FEMA does not require that you insure ongoing work but recommended

Inadequate Contracting Documents (continued)

- Debarment Certification - Check for issues through www.sam.gov
- Lobbying Certification – Required for contracts \$100,000 and up
- Only award to "responsible contractors"; 200.318(h). Consider:
 - Integrity
 - Compliance with Public Policy
 - Past Performance – check news, media reports, other applicants
 - Financial and Technical Resources – can be grounds to disqualify but document!
- Well document any bid rejections
- ❖ Have an assigned **Contract Manager**
- ❖ Establish a **Procurement File**

Documentation Requirements

- Familiarize yourself with the documentation required for:
 - Force Account Labor
 - Force Account Equipment
 - Rented or Purchased Equipment
 - Supplies from Stock
 - Purchased Supplies
 - Contracts
 - Mutual Aid
- FDEM does not disburse FEMA-obligated funding until its auditors have validated 100% of project costs.
- We have provided with the presentation materials a reference sheet describing required documentation for each of these categories of costs.

What You Can Do Now...

Proper Record Keeping

Requirement: Must maintain records to detail the history of procurement.
2 C.F.R. 200.318(i)

- Have a policy for contractor evaluation and keep all procurement records. Develop a **Procurement File Checklist**.
- Maintain record of determination that the chosen vendor is a "responsible contractor." 2 C.F.R. 200.318(h)
- Document cost analysis & all pricing determinations. 2 C.F.R. 200.323
- T&E Contracts – Create a form to document rationale for determination of suitability, cost analysis, development of ceiling price. 2 C.F.R. 200.318(j)

What You Can Do Now / Immediately After...

Proper Record Keeping

- **READ** (or have someone else read) your contracts
- Only allow costs claimed in accordance with your contracts:
 - Overtime costs claimed according to rates specified
 - Fuel claimed and documented; if you are paying inclusive rates and also reimbursing for fuel or providing it – you have an issue
 - Meals costs documented; if paying per diem and also providing meals – you have an issue
 - Lodging; have documentation of costs – if paying per diem and staying in your base camp – you have an issue
- If you reach your capped T&E amount; document why you need to extend and formally execute amendment to confirm
- Support all necessary Change Orders using same process as required for contracts

Questions?



PREPARING FOR HURRICANE SEASON

Obtaining and Keeping Your FEMA Reimbursement: Procurement and Documentation Requirements



Wendy Huff Ellard
601.969.4681
wellard@bakerdonelson.com



Danielle Aymond
225.381.7039
daymond@bakerdonelson.com