

2022 FEMA Updates

Florida Electric Cooperative Association
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TODAY'S AGENDA

- Importance of Compliance
- Procurement Requirements *Revised in 2020*
- PAPPG v.4 *Effective June 1, 2020*
- Appeal & Arbitration Regulations *Amended Jan. 1, 2022*
- BRIC Mitigation Grants *New in 2020*
- Notable Decisions & Trends
- Q&A

PROCUREMENT IS ON THE RADAR

- 2016 OIG Report re FEMA Public Assistance:
 - Goals of proper procurement relate to more than just reasonable cost
 - Better enforcement would “**motivate**” recipients of federal funds to follow the rules
- 2021 OIG Report re FEMA Public Assistance:
 - “Noncompliance with procurement regulations was among the three findings OIG identified most often.”
 - “FEMA should not allow procurement-related questioned costs based solely on its determination of reasonableness.”

WHY IT MATTERS

- Under 2 C.F.R. § 200.339, **Remedies for noncompliance**, the Federal awarding agency may...
 - **Impose conditions** on the award, such as:
 - Requiring reimbursement, rather than advance payments;
 - Withholding authority to proceed until agency is satisfied with performance;
 - Requiring additional, more detailed financial reports;
 - Requiring additional project monitoring;
 - Requiring the non-Federal entity to obtain technical or management assistance; or
 - Establishing additional prior approvals.
 - Temporarily **withhold cash payments** pending correction of the deficiency.
 - **Deny/disallow funds** for all or part of the cost of the activity or action not in compliance.
 - Completely or partially **suspend or terminate the Federal award**.
 - Initiate suspension or debarment proceedings.
 - Withhold further Federal awards for the project or program.
 - Take other remedies that may be legally available.

WHY IT MATTERS

- Remedies can happen now or later....OIG audits can lag payment by several years!
- Common reasons for losing funding:
 - Improper procurement;
 - Unreasonable cost;
 - Unsupported costs (i.e., inadequate documentation)
- Success depends on:
 - Understanding the requirements;
 - Implementing policies and procedures that support compliance;
 - Executing those policies and procedures;
 - Documentation, documentation, documentation.

HELPFUL RESOURCES

- 2 C.F.R. Part 200 (available at [ecfr.gov](https://www.ecfr.gov)—use current version!)
- FEMA Procurement Disaster Assistance Team (PDAT) (www.fema.gov/grants/procurement):
 - Field Manual contains amplifying guidance (updated October 2021)
 - Contract provisions guide (updated June 2021)

FEDERAL PROCUREMENT REQUIREMENTS

- Procurement Standards – 2 C.F.R. §§ 200.317-327
 - 200.317 – Procurements by states.
 - 200.318 – General procurement standards.
 - 200.319 – Competition.
 - 200.320 – Methods of procurement to be followed. ***REVISED***
 - 200.321 – Contracting with small and minority businesses, women's business enterprises, and labor surplus area firms.
 - 200.322 – Domestic preferences for procurements. ***NEW***
 - 200.323 – Procurement of recovered materials.
 - 200.324 – Contract cost and price.
 - 200.325 – Federal awarding agency or pass-through entity review.
 - 200.326 – Bonding requirements.
 - 200.327 – Contract provisions. ***REVISED***

METHODS OF COMPETITION (2 C.F.R. § 200.320)

- Micro-Purchases (\leq \$10,000) ***REVISED***
 - Entities may annually self-certify up to \$50,000 if they:
 - Document the amount;
 - Document a justification; and
 - Can demonstrate low risk or, for public institutions, if consistent with state law.
 - Higher thresholds are also possible, but only with federal agency approval.
 - Now considered an acceptable “non-competitive” procurement method.
 - P-cards can be used per documented and approved procedures.
- Small Purchase Procedures ($>$ \$10,000 and \leq \$250,000)
 - Must obtain an adequate number of written price or rate quotations
 - What is adequate? No less than 3.

METHODS OF COMPETITION (2 C.F.R. § 200.320)

CONTINUED

- Formal Competition (> \$250,000)
 - Sealed Bids – price determines winner
 - Proposals – price and other factors determine winner
 - Requests for Qualifications can be used instead of an RFP process only for architectural or engineering professional services (A/E Services)
 - A/E Services are also the only exception to the prohibition on geographic preferences
- Noncompetitive Procurement
 - Micro-Purchases
 - Available only from a single source
 - Public exigency/emergency will not permit delay required for competitive solicitation
 - Federal awarding agency (e.g., FEMA) or pass-through entity (i.e., FDEM) approves in response to written request
 - After solicitation, competition is inadequate

SOCIOECONOMIC CONTRACTING (2 C.F.R. § 200.321)

- Required “Affirmative Steps”
 1. Placing qualified small and minority firms on solicitation lists
 2. Soliciting small/minority/women’s businesses whenever they are potential sources
 3. When economically feasible, dividing total requirements into smaller tasks to permit maximum participation
 4. Establishing delivery schedules which encourage participation
 5. As appropriate, using the SBA and MBDA
 6. Requiring prime contractor to take affirmative steps as to subs

DOMESTIC PREFERENCES (2 C.F.R. § 200.322) ***NEW***

- Requires preference for “purchase, acquisition, or use” of “goods, products, or materials” produced in the U.S.
- Requires preference inserted into all contracts and POs.
- Includes iron, aluminum, steel, cement, and other manufactured products.
- “Produced in the United States” means, for **iron** and **steel** products, that all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.
- “Manufactured products” means items and construction materials composed in whole or in part of non-ferrous metals such as **aluminum**; **plastics** and **polymer-based products** such as **polyvinyl chloride pipe**; aggregates such as **concrete**; **glass**, including **optical fiber**; and **lumber**.

CONTRACT COST AND PRICE (2 C.F.R. § 200.324)

- Cost or Price Analysis = *required*
 - For every procurement above the “Simplified Acquisition Threshold” – \$250,000
 - Document the cost analysis in procurement file
 - If you don’t determine that the contract price is fair and reasonable, Federal awarding agency will (**or may not**)
- Cost-plus-a-percentage-of-cost = Federal awarding agency cannot pay
 1. Payment is made at a pre-determined percentage rate;
 2. The pre-determined percentage rate is applied to actual performance costs;
 3. The contractor’s entitlement is uncertain at the time of contracting; and
 4. The contractor’s entitlement increases commensurately with increased performance costs.

BONDING (2 C.F.R. § 200.326)

- Bonding requirements are applicable “when awarding construction or facility improvement contracts” over \$250,000.
 - Bid Bond = 5% of Bid Price
 - 100% Performance Bond
 - 100% Payment Bond

But what constitutes **construction work** or a **facility improvement** project?

- FEMA 2021 PDAT Manual now says, “The rules also do not define construction work. FEMA will accept the meaning of construction work established under applicable state, local, and/or Tribal laws and regulations. If state, local, and/or Tribal laws and regulations do not provide such definitions, FEMA uses the definition set forth at 41 C.F.R. § 60-1.3.”
- 41 C.F.R. § 60-1.3: *The construction, rehabilitation, alteration, conversion, extension, demolition or repair of buildings, highways, or other changes or improvements to real property, including facilities providing utility services. The term also includes the supervision, inspection, and other onsite functions incidental to the actual construction.*

CONTRACT PROVISIONS (2 C.F.R. § 200.327)

Required by Regulation	Recommended by FEMA
<ul style="list-style-type: none">• Remedies• Termination for Cause• Termination for Convenience• Equal Employment Opportunity• Davis-Bacon Act*• Copeland Anti-Kickback Act*• Contract Work Hours and Safety Standards• Right to Inventions*• Clean Air Act• Federal Water Pollution Control Act• Debarment & Suspension• Byrd Anti-Lobbying Act• Procurement of Recovered Materials• Domestic Preferences *NEW*• Prohibition on Certain Telecom and Video Surveillance Services or Equipment *NEW*• Affirmative Steps for Solicitation of Disadvantaged Firms	<ul style="list-style-type: none">• Changes• Access to Records• Non-Use of DHS Seal, Logo, and Flags• Compliance with Federal Law, Regulations, and Executive Orders• No Obligation by Federal Government• Program Fraud and False or Fraudulent Statements or Related Acts

* Not applicable to FEMA Public Assistance program

10 MOST COMMON PROCUREMENT MISTAKES

1. **Sole-sourcing** without adequate documentation of situation
2. Continuing the **noncompetitive contract** after emergency
3. **Piggybacking**
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**

DOCUMENTING THE PROCUREMENT

- Regulations require that you “maintain records sufficient to detail the history of each procurement.”
 - Solicitations / Request for Quotes
 - Independent Cost Estimate
 - Advertising
 - Solicitation Lists
 - Written Quotations
 - Affirmative Steps Compliance
 - “Written method for conducting technical evaluations of the proposals received and making selections”
 - Evaluations (we recommend individual score sheets)
 - Cost or Price Analysis
 - Notice of Award
 - Contracts and purchase orders with required contract provisions
 - Responsibility Determination
 - Debarment Certification
 - Anti-Lobbying Certification
 - Protest documentation
 - Evidence of contractor oversight
 - T&M contracting requirements

ALLOWABLE, REASONABLE COST

§200.403 Factors affecting allowability of costs.

...costs must meet the following general criteria in order to be allowable under Federal awards:

- (a) **Be necessary and reasonable** for the performance of the Federal award and be allocable thereto under these principles....
- (g) **Be adequately documented**....

§ 200.404 Reasonable costs.

A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost...

Public Assistance Program & Policy Guide (PAPPG)

- **PAPPG v.3.1:** "[i]n the case of noncompliance with Federal procurement requirements, **FEMA determines a reasonable cost** for the eligible work completed based on all available information and documentation."
- **PAPPG v.4.0:** "In the case of noncompliance, **FEMA applies an appropriate remedy** in accordance with its authorities. FEMA has determined an appropriate remedy under these circumstances is **to either deny all costs associated with the contract or**, if sufficient information is provided **to substantiate a reasonable amount** for the eligible work completed, FEMA may reimburse the portion of the costs it determines are reasonable and allowable based on all available information and documentation provided."

Appeal and Arbitration Regulations

- 44 C.F.R. § 206.206 – amendments effective January 1, 2022
- Submission:
 - Old: no preferred method of submission
 - New: must be submitted electronically
- Deadlines:
 - Old: 60 days from receipt of decision
 - New: 60 days (applicant) / 120 days (recipient) from date of decision
- Expenses:
 - Appeal-related expenses can be claimed as management costs
 - Arbitration-related expenses are not eligible for reimbursement

Building Resilient Infrastructure & Communities (BRIC)

- New program in 2020, replaced Pre-disaster Hazard Mitigation Program
- Next Notice of Funding Opportunity (NOFO) expected September 2022
- Private non-profits are not eligible to apply as applicants or subapplicants, but applicants or subapplicants can apply for funding on their behalf
 - Applicants: state, territories, tribes that have had a major disaster declaration in the last 7 years
 - Subapplicants: local governments
- Funds Available: 6% set aside for estimated amount of grants for each major disaster
 - 75% cost share
 - Competitively awarded financial assistance

Building Resilient Infrastructure & Communities (BRIC)

- Cost-effective mitigation projects designed to increase resilience and public safety and reduce injuries, loss of life, and damage and destruction of property, including damage to critical services and facilities. Projects must, among other things:
 - Meet floodplain requirements
 - Meet procurement and other requirements at 2 C.F.R. Part 200
 - Be technically feasible and effective
 - Solve a problem independently or be a functional portion of a long-term solution with reasonable assurance of completion
 - Address a problem that has been repetitive or that poses a risk to the public health/safety if left unresolved
 - Be cost-effective under OMB Circular A-94

Decisions and Trends

- Pre-Disaster Condition
 - Schedule annual photographs
 - Maintain records of routine maintenance of all facilities
 - Follow manufacturer/warranty requirements
 - PAPPG has specific required documentation for conductor:
 - Signed/dated/stamped letter from licensed PE with direct experience with the system certifying the pre-disaster condition/capacity + records
 - Construction work plans
 - RUS corrective action plans (if applicable)
 - Staking sheets
- Cost + % of Cost Contracting
 - FEMA is rejecting attempts to correct through amendment

Decisions and Trends

- Reasonable Costs
 - Mileage
 - Incidental Expenses
- Meal Costs
 - Avoid duplication (e.g., actual cost vs. per diem; bulk meals & individual meals)
 - Head counts vs. meal counts—keep sign in sheets, cap at capacity, show your math
 - Meals for staff
 - Required by Policy
 - Conditions constitute level of severity that requires long hours without time to obtain own meals
 - Food or water not reasonably available to purchase

Decisions and Trends

- Mutual Aid
 - Need supporting documentation down to the penny, e.g., itemized gas station receipts
 - Duplicative costs – payment of meal and incidental expenses + per diems
 - Sign-in/sign-out sheets on mobilization/demobilization days
 - IOUs as Providing Entities – proprietary pay rate and benefit calculations

More Information

- Disaster Recovery Briefs - <https://www.bakerdonelson.com/disaster-recovery-briefs>
- Baker Donelson Distribution List
- Webinar on Appeals & Arbitrations Process – May 4 @ 2 Eastern / 1 Central (online registration)

Q&A DISCUSSION

PRESENTED BY:



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