



FEMA

FIELD MANUAL

**PUBLIC ASSISTANCE
GRANTEE AND SUBGRANTEE
PROCUREMENT REQUIREMENTS
UNDER
44 C.F.R. PT. 13 AND 2 C.F.R. PT. 215**

**FEMA Office of Chief Counsel
Procurement Disaster Assistance Team**

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FEMA

FIELD MANUAL – PUBLIC ASSISTANCE GRANTEE AND SUBGRANTEE PROCUREMENT REQUIREMENTS UNDER 44 C.F.R. PT. 13 AND 2 C.F.R PT. 215

1. PURPOSE. This Field Manual provides a description and explanation of the mandatory requirements for Public Assistance grantees and subgrantees when using Public Assistance funding to finance their procurements. We developed this Field Manual to support FEMA employees in assisting grantees and subgrantees to comply with the procurement requirements and to increase consistency in the FEMA’s application of these standards across the agency.
2. BACKGROUND
 - a. Robert T. Stafford Disaster Relief and Emergency Assistance Act. The Robert T. Stafford Disaster Relief and Emergency Assistance Act (“Stafford Act”) authorizes FEMA, among other things, to provide financial assistance to States, local governments, Indian tribal governments, and certain private nonprofit organizations (“PNPs”) for debris removal, emergency protective measures, and permanent restoration of infrastructure following a Presidential declaration of an emergency or major disaster.
 - b. Public Assistance Program. FEMA has administratively combined these Stafford Act authorities under the umbrella of its Public Assistance Program, under which FEMA provides financial assistance through grants to a State or Indian tribal government (grantees), which in turn carry out work directly and/or process subgrants to other eligible Public Assistance applicants (subgrantees).
 - c. Use of Third-Party Contractors by Grantees and Subgrantees. Grantees and subgrantees may use contractors to assist them in carrying out these Public Assistance awards, and such contractor costs are attributable to billions of dollars in grant funding each year. As a condition of receiving financial assistance for these contractor costs, grantees and subgrantees must comply with, among other things, the Federal procurement requirements set forth at 44 C.F.R. § 13.36 (for States, local and Indian tribal governments) and 2 C.F.R. §§ 215.40-48 (for institutions of higher education, hospitals, and other private nonprofit organizations).
3. LEGAL EFFECT OF THIS FIELD MANUAL. The Field Manual is an internal guidance document and does not have the force and effect of law, regulation, or FEMA policy. Although it does not have such force and effect, in clarifying the content of the regulations and describing recommended best practices, it does contain information about how FEMA interprets and applies federal procurement requirements and how a grantee or subgrantee can comply with these requirements.

4. SCOPE

- a. This Field Manual provides a description and explanation of the procurement requirements to applicable grantees and subgrantees when procuring property and services for debris removal (Category A), emergency protective measures (Category B), and restoration of damaged facilities (Categories C-G) under the Public Assistance Grant Program. This includes, among other things, the procurement of property and services for the construction, repair, and alteration of buildings, structures, or appurtenances.
 - b. Procurements of real property consisting of land and any existing buildings and structures on that land are generally beyond the scope of this Field Manual. This Field Manual, on the other hand, does apply to the procurement of services and property for the construction of buildings, structures, or appurtenances that were not on land to be used for the Public Assistance project when that land was acquired. This Field Manual also applies to any alterations or repairs to buildings or structures existing on that land when that land was acquired or made available for the Public Assistance project.
 - c. This Field Manual describes and explains the procurement requirements for grantees and subgrantees under 44 C.F.R. § 13.36 and 2 C.F.R. §§ 215.40-48. In December 2014, FEMA will be joining with the Department of Homeland Security (“DHS”) in adopting the new “Governmentwide Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards” codified at 2 C.F.R. pt. 200. FEMA will, as part of adopting the new Common Rule, remove the administrative requirements at 44 C.F.R. pt. 13 and no longer follow the procurement requirements at 2 C.F.R. pt. 215 (which have already been removed from the Code of Federal Regulations) for Stafford Act declarations after the date of promulgation. FEMA will, however, continue to apply 44 C.F.R. pt. 13 and 2 C.F.R. pt. 215 for declarations occurring before that date and this Field Manual will continue to provide guidance to FEMA employees for those declarations.
5. DISSEMINATION. This Field Manual is intended for use by FEMA personnel in applying the procurement standards under the Federal regulations. The Field Manual may be made available to grantees and subgrantees to increase their understanding as to how FEMA interprets procurement requirements under the Federal regulations.
 6. UPDATES. The FEMA Office of Chief Counsel (“OCC”) will continue to update this Field Manual by identifying, capturing, and validating information and interpretations based on agency experience.
 7. PROCUREMENT DISASTER ASSISTANCE TEAM (PDAT). The PDAT is a group of attorneys within OCC that trains and advises Public Assistance staff; works with Public Assistance staff to provide training and guidance to grantees and subgrantees; reviews grantee and subgrantee procurement policies and procedures; and provides general guidance regarding concerns with a proposed grantee or subgrantee procurement action. This includes the PDAT providing various tools to FEMA staff, such as this Field Manual. FEMA employees may contact PDAT at FEMA-PFLDPDAT@fema.dhs.gov.

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I. INTRODUCTION

A. USE OF CONTRACTORS BY GRANTEES AND SUBGRANTEES

Grantees and subgrantees often use contractors to help them carry out their Public Assistance project awards. For example, a subgrantee may receive financial assistance under a Public Assistance Category E project award to repair a building damaged by a major disaster, and it may then award a contract to a construction company to do the work. FEMA's regulations specifically make contractor costs an "allowable cost" under the Public Assistance Grant Program.¹

Such a contract is a commercial transaction between the grantee/subgrantee and its contractor, and there is privity of contract between the grantee/subgrantee and its contractor. The Federal Government, on the other hand, is not a party to that contract and has no privity of contract with that contractor.² The Federal Government's only legal relationship is with the grantee, not with the subgrantee or contractors. Therefore, there is no contractual liability on the part of the Federal Government to the grantee's/subgrantee's contractor because there is no privity of contract between them.³

¹ 44 C.F.R. § 13.22(a) ("(a) Limitation on the use of funds. Grant funds may be used only for: (1) The allowable costs of the grantees, subgrantees and cost-type contractors, including allowable costs in the form of payments to fixed-price contractors; and (2) Reasonable fees or profit to cost-type contractors...").

² The United States has waived sovereign immunity from suit under the Tucker Act in actions brought in the Court of Federal Claims "founded either upon the Constitution, or any act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages not sounding in tort." 28 U.S.C. § 1491(a)(1). The United States Court of Appeals for the Federal Circuit has "consistently held that for the government to be sued on a contract pursuant to the Tucker Act, there must be privity of contract between the plaintiff and the United States." Chancellor Manor v. United States, 331 F. 3d 891 (Fed. Cir. 2003).

³ See *D.R. Smalley & Sons, Inc. v. United States*, 179 Ct. Cl. 594, 372 F. 2d 505 (1967):

"The National Government makes many hundreds of grants each year to the various States, to municipalities, to schools and colleges and to other public organizations and agencies for many kinds of public works, including roads and highways. It requires the projects to be completed in accordance with certain standards before the proceeds of the grant will be paid. Otherwise the will of Congress would be thwarted and taxpayers' money would be wasted. (citation omitted) These grants are in reality gifts or gratuities. It would be farfetched indeed to impose liability on the Government for the acts and omissions of the parties who contract to build the projects, simply because it requires the work to meet certain standards and upon approval thereof reimburses the public agency for a part of the costs."

See also 2 U.S. Government Accountability Office, Office of the General Counsel, *Principles of Federal Appropriations Law*, pp. 10-55 to 10-57 (3rd Ed. 2006).

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B. ROLE OF THE FEDERAL GOVERNMENT IN GRANTEE AND SUBGRANTEE CONTRACTING

Although the Federal Government is not a party to a grantee's or subgrantee's contract, it plays a large role in a grantee's or subgrantee's contracting with outside sources under the Public Assistance Grant Program. Grantees and subgrantees⁴ that use Public Assistance funding must comply with the procurement requirements imposed by Federal law, executive orders, Federal regulations, and terms of the grant award. These requirements will control over non-Federal authorities (such as State or local rules for contracting) to the extent they conflict with Federal requirements.⁵

FEMA regulations impose procurement requirements on grantees and subgrantees at 44 C.F.R. § 13.36 (which applies to States and local and Indian tribal governments)⁶ and 2 C.F.R. §§ 215.40-48 (which apply to institutions of higher education, hospitals, and other nonprofit organizations).⁷ The rules in both sets of regulations are similar, but not the same. Most notably, the requirements in 2 C.F.R. pt. 215 are far less descriptive and prescriptive than those in 44 C.F.R. pt. 13. For example, 44 C.F.R. pt. 13 devotes a great deal of attention to the procurement methods of sealed bidding, competitive negotiations, procurement through competitive proposals, and procurement through noncompetitive proposals, while 2 C.F.R. pt. 215 does not discuss these methods at all. Regardless of any such differences, it is important to recognize that the purpose of the procurement standards in these regulations is not just to obtain the best value for a particular service or good, but also to further various public policy

⁴ Although FEMA has no direct financial relationship with a subgrantee, only with the grantee, the grantee will "flow down" to the subgrantee the obligations that the grantee has under Federal law, regulations, executive orders, and the terms and conditions of the FEMA-State Agreement for the use of Public Assistance funding. This includes compliance with 44 C.F.R. pt. 13 and 2 C.F.R. pt. 215. This makes the subgrantee accountable to the grantee to comply with the "flowed down" requirements. See 44 C.F.R. § 13.37(a).

⁵ See Illinois Equal Employment Opportunity Regulations for Public Contracts, B-167015, 54 Comp. Gen. 6 (1974) ("It is clear that a grantee receiving Federal funds takes such funds subject to any statutory or regulatory restrictions which may be imposed by the Federal Government. (citations omitted). Therefore, although the Federal Government is not a party to contracts awarded by its grantees, a grantee must comply with conditions attached to the grant in awarding federally assisted contracts."); see also King v. Smith, 392 U.S. 309, 333 n. 34 (1968) ("There is of course no question that the Federal Government, unless barred by some controlling constitutional prohibition, may impose the terms and conditions upon which its money allotments to the States shall be disbursed, and that any State law or regulation inconsistent with such Federal terms and conditions is to that extent invalid.").

⁶ FEMA codified the Common Rule of OMB Circular A-102 at 44 C.F.R. pt. 13 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments).

⁷ OMB codified OMB Circular A-100 at 2 C.F.R. pt. 215 (Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Nonprofit Organizations). Unlike many other agencies, FEMA has not codified its own version of OMB Circular A-110, which means that 2 C.F.R. pt. 215 applies to a Public Assistance grant.

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objectives.⁸

C. STATE AND LOCAL LAWS AND REGULATIONS

The regulations at 44 C.F.R. § 13.36 and 2 C.F.R. pt. 215 provide that grantees and subgrantees will use their own procurement procedures that comply with applicable State and local laws and regulations, and also comply with applicable Federal laws and regulations. If State or local laws or regulations do not adequately address a particular aspect of procurement, the Federal Acquisition Regulations (“FAR”) may provide useful guidance. To be clear, the Federal Government’s rules for its own procurements under Federal law do not apply to grantee and subgrantee contracting under Public Assistance awards. However, in the case where the regulations at 44 C.F.R. pt. 13 or 2 C.F.R. pt. 215 are not clear or need amplification/clarification, FEMA may rely on FAR provisions that provide background for how similar terms and provisions are interpreted for federal procurements. FEMA staff should also review and consider audit findings of the OIG and FEMA Public Assistance appeals decisions.

D. STANDARD OF FEMA REVIEW

The regulations at 44 C.F.R. § 13.36 and 2 C.F.R. pt. 215 set forth various procurement standards that can be mandatory or discretionary. In some cases, a regulation will set forth a mandatory requirement—for example, 44 C.F.R. § 13.36(f) requires grantees and subgrantees to perform a price or cost analysis in connection with every procurement action including contract modifications. FEMA affords no deference to a grantee or subgrantee when making the determination of whether the grantee or subgrantee complied with the mandatory regulation. In the case of a cost or price analysis, FEMA will make the determination of whether or not the grantee or subgrantee conducted an analysis that met the regulatory requirement.

In other cases, a regulation will allow the grantee or subgrantee to take an action that involves the exercise of discretion. One example is the regulation at 44 C.F.R. § 13.36(b)(10), which provides that a local or Indian tribal government may use a time and materials contract only after, among other things, it makes a determination that no other contract is suitable. Another example is 44 C.F.R. § 13.36(d)(4), which provides that a local or Indian tribal government may use a noncompetitive procurement only if it is infeasible to award a contract through small purchase procedures, sealed bids, or competitive proposals and if the public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation. A third example is the decision by the subgrantee to conduct a competitive acquisition through

⁸ See Department of Homeland Security (“DHS”) Office of Inspector General, Report No. 14-46-D, *FEMA’s Dissemination of Procurement Advice Early in Disaster Response Periods*, pp. 5-6 (Feb. 28, 2014) (“Contracting practices that do not comply with Federal procurement regulations result in high-risk contracts that can cost taxpayers millions of dollars in excessive costs and that often do not provide full and open competition to all qualified bidders, including small firms and women- and minority-owned businesses. In addition, full and open competition helps prevent favoritism, collusion, fraud, waste, and abuse.”).

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either sealed bidding or competitive proposals. In these examples, the subgrantees must exercise its discretion in making the required determinations and should justify its determination in writing.

The regulations do not identify the “standard of review” with which FEMA, as the federal awarding agency, should evaluate grantee and subgrantee procurement discretionary decisions. A “standard of review” is the criterion or level of deference by which a FEMA will measure the propriety of a decision or action made by a grantee or subgrantee. Consistent with the overall direction of 44 C.F.R. § 13.36 and 2 C.F.R. pt. 215 to not impose additional administrative requirements than those already set forth in the regulations⁹ and consistent with principles of federalism,¹⁰ FEMA will review discretionary procurement decisions by grantees and their subgrantees to determine whether: (1) the grantee’s or subgrantee’s decision lacked a rational basis; or (2) the procurement procedure involved a violation of federal law, regulation, or FEMA policy.¹¹ In reviewing whether a decision lacked a rational basis, FEMA does not substitute its judgment for that of its grantees and their subgrantees.

E. CONFLICTING FEDERAL REQUIREMENTS

A grantee or subgrantee may use both Public Assistance funding and another federal agency’s funding for a particular project. In these cases, the grantee or subgrantee that uses funding for a third party procurement provided by FEMA and the other federal agency must comply with the procurement requirements of both FEMA and the other federal agency. These requirements may sometimes differ, with the result that FEMA expects the grantee or subgrantee to comply with both sets of requirements. If compliance with all applicable Federal requirements is impossible, the grantee or subgrantee should notify FEMA for resolution.

F. ORGANIZATION OF MANUAL

The following section of this Field Manual provides an overview of contracts and describes various contract types. This overview section liberally cites to the FAR as a common point of

⁹ 44 C.F.R. § 13.6(a) (“(a) For classes of grants and grantees subject to this part, Federal agencies may not impose additional administrative requirements except in codified regulations published in the Federal Register.”); 2 C.F.R. § 215.4 (“Federal awarding agencies may apply more restrictive requirements to a class of recipients when approved by OMB.”).

¹⁰ See Executive Order No. 13132, *Federalism* (Aug. 4, 1999), 64 Fed. Reg. 43255, 5 U.S.C. § 601 notes.

¹¹ For comparison purposes, the GAO will review federal agency bid protest decisions for reasonableness, consistency with the solicitation, and applicable procurement statutes and regulations. See *Matter of Analytical Innovative Solutions, LLC*, B-408727, 2013 Comp. Gen. Proc. Dec. P 263 (Nov. 6, 2013) (“In reviewing a protest challenging an agency’s evaluation, our Office will not reevaluate proposals, nor substitute our judgment for that of the agency, as the evaluation of proposals is a matter within the agency’s discretion...Rather, we will review the record only to determine whether the agency’s evaluation was reasonable and consistent with the stated evaluation criteria and with applicable procurement statutes and regulations.”) [internal citations omitted]. The scope of this review is similar to that of the Administrative Procedures Act, 5 U.S.C. § 706.

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reference to facilitate a general discussion on contract types. To reemphasize, the Federal Government's rules for its own procurements under Federal law do not apply to grantee and subgrantee contracting under Public Assistance awards. The next three sections then provide an overview of the procurement standards applicable to States (44 C.F.R. § 13.36(a)), local and Indian tribal governments (44 C.F.R. §13.36(b)-(i)), and institutions of higher education, hospitals, and private nonprofit organizations (2 C.F.R. §§ 215.40-48). These subsections, at various points, will use examples to illustrate the application of a particular procurement standard under the regulations, and several such examples involve fact patterns from OIG audits. Although findings from OIG audits are not binding precedent on FEMA (and FEMA may have disagreed with the OIG's finding(s) in cited audits), they do comprise a useful body of administrative determinations that help inform an understanding of a particular standard. The last section describes the consequences of a grantee or subgrantee failing to comply with the procurement standards applicable to that organization.

Following these five sections, the Field Manual includes two appendices. Appendix A provides synopses of each OIG audit report in the past four years that had a finding related to grantee or subgrantee procurement, and Appendix B provides synopses of the Public Assistance second appeal decisions that addressed a grantee or subgrantee procurement issue as part of the decision.

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II. OVERVIEW OF CONTRACTS

A. DEFINITION OF CONTRACT AND DISTINCTION FROM A SUBGRANT

A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.¹² There are three elements necessary to form a contract—mutual assent (known as offer and acceptance), consideration or a substitute, and no defenses to formation. Contracts are generally governed by the common law, although contracts for the sale of goods (movable, tangible property) are governed by Article 2 of the Uniform Commercial Code as well as the common law.

The term “contract” is generic and includes a number of different varieties or types.¹³ For example, one could categorize a contract type by subject matter (construction, research, supply, service) or by the manner in which it can be formed and accepted (such as bilateral or unilateral). Grantees and subgrantees are free to select the type of contract they award consistent with 44 C.F.R. § 13.36, 2 C.F.R. pt. 215, Federal law and regulations, and applicable State and local law and regulations, and within the bounds of good commercial business practice.

It is important to recognize the difference between a subgrantee and a contractor. Through a grantee, a subgrantee performs work to accomplish a public purpose authorized by law—in other words, a subgrantee performs substantive work on an award project.¹⁴ A contractor, in contrast, does not seek to accomplish a public benefit, and does not perform substantive work on the project. It is merely a vendor providing goods or services to directly benefit the grantee. FEMA’s regulation at 44 C.F.R. § 13.3 defines a “subgrant” as follows:

Subgrant means an award of financial assistance in the form of money, or property in lieu of money, made under a grant by a grantee to an eligible subgrantee. The term includes financial assistance when provided by contractual legal agreement, but does not include procurement purchases, nor does it include any form of assistance which is excluded from the definition of grant in this part.

By comparison, the regulation provides that a contract “means...a procurement contract under a grant or subgrant, and means a procurement subcontract under a contract.” In making a determination of whether a subgrantee or vendor relationship exists, the substance of the

¹² Restatement (Second) of Contract, § 1 (1981).

¹³ Id.

¹⁴ Compare 31 U.S.C. §§ 6301-6308. These statutes require the federal government’s choice and use of legal instruments reflect the type of basic relationship which it expects to have with the nonfederal parties. There are three basic relationships between federal agencies and those who receive contracts and federal assistance awards: procurement contracts, grants, and cooperative agreements. Sections 6303-6305 of Title 31 provide the criteria for selecting the most appropriate funding arrangement.

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relationship is more important than the form of the agreement.¹⁵

OMB Circular A-133 states that the characteristics indicative of a federal award received by a subgrantee are when the organization: (1) determines who is eligible to receive financial assistance; (2) has its performance measured against whether the objective of the Federal program are met; (3) has responsibility for programmatic decision making; (4) has responsibility for adherence to applicable Federal program compliance requirements; and (5) uses Federal funds to carry out a program of the organization as compared to providing goods or services for a program of the grantee.¹⁶

In contrast, OMB Circular A-133 states that the characteristics indicative of a payment for goods and services received by a vendor are when the organization: (1) provides the goods and services within normal business operations; (2) provides similar goods and services to many different purchasers; (3) operates in a competitive environment; (4) provides goods or services that are ancillary to the operation of the Federal program; and (5) is not subject to compliance requirements of the Federal program.¹⁷

The distinctions between a subgrant and contract necessitate that different requirements apply. For example, a subgrantee must comply with the cost principles based on the nature of the subgrantee, whereas a contractor has no such requirement. Profit, furthermore, is allowable and indeed expected. In addition, a contractor also has no requirement to comply with any of the administrative requirements in 44 C.F.R. pt. 13 or 2 C.F.R. pt. 215, including procurement.

B. CONTRACT PAYMENT OBLIGATIONS

There are basically three types of contract payment obligations: fixed-price, cost-reimbursement, and time and materials (“T&M”). All three types of contracts are referenced in 44 C.F.R. pt. 13, and fixed price and cost-reimbursement contracts are referenced in 2 C.F.R. pt. 215. Because neither set of regulations defines nor fully describes these types of contracts, the following provides a general overview of these contracts that is largely based on the concepts and principles from the FAR. As noted earlier, although the FAR does not govern grantee and subgrantee procurement, it is a useful general reference tool to describe terms and concepts not delineated in the 44 C.F.R. pt. 13 and 2 C.F.R. pt. 215.

¹⁵ See also FEMA Directive 205-1, *Properly Selecting Between Grants, Cooperative Agreements or Procurements When Transferring Federal Funds to Non-Federal Entities* (Apr. 07, 2014) for guidance regarding the distinction between grants and procurement contracts.

¹⁶ OMB Circular No. A-133, *Audits of States, Local Governments, and Non-Profit Organizations*, § __.210(b) (2003) (as amended)

¹⁷ *Id.* § __.201(d).

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1. Fixed Price and Cost-Reimbursement Contracts

With respect to fixed price and cost-reimbursement contracts, the specific contract types range from firm-fixed price, in which the contractor has full responsibility for the performance costs and resulting profit (or loss), to a cost-plus-fixed-fee, in which the contractor has minimal responsibility for the performance costs and the negotiated fee (profit) is fixed. In between these two ends of the spectrum, there are various incentive contracts in which the contractor's responsibilities for the performance costs and the profit or fee incentives offered are tailored to the uncertainties involved in contract performance.

Fixed price contracts provide for a firm price or, in appropriate cases, an adjustable price.¹⁸ The risk of performing the required work, at the fixed price, is borne by the contractor.¹⁹ Firm-fixed price contracts are generally appropriate where the requirement (such as, scope of work) is well-defined and of a commercial nature.²⁰ Construction contracts, for example, are often firm-fixed price contracts. T&M contracts and labor-hour contracts are not firm-fixed-price contracts.²¹

Cost-reimbursement types of contracts provide for payment of certain incurred costs to the extent provided in the contract.²² They normally provide for the reimbursement of the contractor for its reasonable, allocable, actual, and allowable costs, with an agreed-upon fee.²³ There is a limit to the costs that a contractor may incur at the time of contract award, and the contractor may not exceed those costs without the grantee's or subgrantee's approval or at the contractor's own risk. In a cost-reimbursement contract, the grantee/subgrantee bears more risk than in a firm-fixed price contract.²⁴ A cost-reimbursement contract is appropriate when the details of the required scope of work are not well-defined.²⁵ There are many varieties of cost-reimbursement contracts, such as cost-plus-fixed-fee, cost-plus-incentive-fee, and cost-plus-award-fee contracts.²⁶

¹⁸ Cf. 48 C.F.R. subpart 16.2 (Fixed-Price Contracts). A fixed price contract can be adjusted, but this normally occurs only through the operation of contract clauses providing for equitable adjustment or other revisions of the contract price under certain circumstances. Cf. also, 48 C.F.R. § 16.203 (Fixed-Price Contracts with Economic Price Adjustment).

¹⁹ Bowsher v. Merck & Co., 460 U.S. 824, 826 at n. 1 (U.S. 1983) (“A pure fixed-price contract requires the contractor to furnish the goods or services for a fixed amount of compensation regardless of the costs of performance, thereby placing the risk of incurring unforeseen costs of performance on the contractor rather than the Government.”).

²⁰ Cf. 48 C.F.R. § 16.202-2.

²¹ Cf. 48 C.F.R. § 16.201(b).

²² Cf. 48 C.F.R. subpart 16.3 (Cost-Reimbursement Contracts).

²³ Cf. 48 C.F.R. subpart 16.3.

²⁴ Kellogg Brown & Root Servs. v. United States, 742 F.3d 967, 971 (Fed. Cir. 2014) (“...cost-reimbursement contracts are intended to shift to the Government the risk of unexpected performance costs...”).

²⁵ Cf. 48 C.F.R. § 16.301-2(a).

²⁶ Cf. 48 C.F.R. subpart 16.3.

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However, the cost-plus-a-percentage-of-cost type contract, which is discussed in detail later on in this manual, is strictly prohibited.²⁷

2. Time and Materials (T&M) Contracts

This type of contract is one that typically provides for the acquisition of supplies or services on the basis of (1) direct labor hours at specified fixed hourly rates that include wages, overhead, general and administrative expenses, and profit; and (2) actual costs for materials.²⁸ A T&M contract is generally used when it is not possible at the time of awarding the contract to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of confidence.²⁹ T&M contracts are neither fixed-price nor cost-reimbursement contracts, but constitute their own unique contract type. A labor-rate contract is a type of T&M contract.

C. TYPES OF CONTRACT BASED ON PROCUREMENT METHOD

Another type of contract concern is the method of procurement, which is the process followed by a grantee or subgrantee to solicit contractors, evaluate offers, and selects a contractor through the use of evaluation criteria. The Federal procurement standards for local and Indian tribal governments recognize four methods of procurement: small purchase procedures, sealed bidding, procurement through competitive proposals, and procurement through noncompetitive proposals. A grantee's or subgrantee's method of procurement will most likely align to one of these four methods (although there may be various permutations). The following provides a brief overview of these four procurement methods, which are discussed in greater detail in later sections of this Field Manual.

1. Small Purchase Procedures

This method comprises those relatively simple and informal procurement methods for securing services, supplies, or other property for awards below the simplified acquisition threshold of \$150,000.³⁰ Contract awards can be based on either lowest price submitted (such as in sealed bidding) or on technical qualifications and price (such as in procurement through competitive

²⁷ See 44 C.F.R. § 13.36(f)(4), 2 C.F.R. § 215.44(c); DHS Office of Inspector General, Report No. OIG-14-44-D, *FEMA Should Recover \$5.3 Million of the \$52.1 Million of Public Assistance Grant Funds Awarded to the Bay St. Louis Waveland School District in Mississippi-Hurricane Katrina*, p. 4 (Feb. 25, 2014) ("Federal regulations prohibit cost-plus-percentage-of-cost contracts because they provide no incentive for contractors to control costs—the more contractors charge, the more profit they make."). See also Section IV(E)(4), *infra*.

²⁸ See 48 C.F.R. § 16.601(b).

²⁹ Cf. 48 C.F.R. § 16.601(c).

³⁰ The simplified acquisition threshold, which is currently \$150,000, is set by the Federal Acquisition Regulation at 48 C.F.R. subpart 2.1 (Definitions) and in accordance with 41 U.S.C. § 1908. Note, however, that if applicable state or local law or regulation sets a threshold for simplified acquisitions at a dollar amount below \$150,000, then that threshold will control per 44 C.F.R. § 13.36(b)(1).

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proposals).

2. Sealed Bidding

Sealed bidding is a method of contracting that employs competitive bids, public opening of bids, and awards. In this method, the grantee or subgrantee prepares an invitation for bid that describes its requirements clearly, accurately, and completely and publicizes the invitation. Bidders submit sealed bids in response to the invitation to be opened publicly, and the grantee or subgrantee evaluates those bids without discussions. After evaluating the bids, the grantee or subgrantee makes an award to the responsible bidder whose bid was responsive and most advantageous to the grantee or subgrantee, considering only price and price-related factors (such as warranties, life-cycle costs, and transportation costs).³¹ The type of contract awarded under sealed bidding is a firm fixed price contract.³² Construction contracts and commercial-off-the-shelf items are examples of when sealed bidding is normally appropriate.

3. Procurement through Competitive Proposals (or Negotiated Procurement)

Under this method, either a fixed-price or cost-reimbursement contract is awarded to the responsible firm whose proposal is determined to be the most advantageous to the grantee or subgrantee with price and other factors, such as technical and past performance, considered.³³ The competitive negotiation process includes the solicitation and receipt of proposals from offerors, permits negotiations with offerors...³⁴

This is the method of procurement most often used for professional services in connection with construction, such as program management, construction management, feasibility studies, preliminary engineering, design, architectural, engineering, surveying, mapping, and related services.³⁵ But it is not the method commonly used for actual construction, alteration, or repair to real property, as the regulations include a preference for sealed bidding to be used for these types of services (unless it would be infeasible to do so).³⁶

4. Noncompetitive Procurement

This method of procurement involves the award of a contract by the grantee or subgrantee

³¹ Cf. 48 C.F.R. § 14.101.

³² 44 C.F.R. § 13.36(d)(2).

³³ See 44 C.F.R. § 13.36(d)(3).

³⁴ Cf. 48 C.F.R. pt. 15.

³⁵ See 44 C.F.R. § 13.36(d)(3); cf. 48 C.F.R. pt. 36 (Construction and Architect-Engineer Contracts) and 37 (Service Contracting).

³⁶ 44 C.F.R. § 13.36(d)(2).

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without providing for full and open competition.³⁷

III. PROCUREMENT BY A STATE

The Federal procurement standards at 44 C.F.R. § 13.36(a) require a State³⁸ to follow the same policies and procedures it uses for procurements from its non-Federal funds when it procures property and services under a Public Assistance grant award.³⁹ In addition, the State must ensure that every purchase order or other contract includes any clauses required by Federal statutes and executive orders and their implementing regulations.⁴⁰

The procurement standards at 44 C.F.R. § 13.36(a) apply to a State not only when the State is acting as a grantee under a Federal grant, but also when a State agency is a subgrantee.⁴¹ Within the context of the Public Assistance grant, a State will designate a State agency that has responsibility for Public Assistance grant administration (and that State administrative agency serves the role as the “grantee”).⁴² But, in most cases, FEMA will approve a Project Worksheet for a scope of work to be completed by a State agency applicant other than the state

³⁷ 44 C.F.R. § 13.36(d)(4); cf. 48 C.F.R. § 6.302.

³⁸ A “State” means “any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency or instrumentality of a State exclusive of local governments. The term does not include any public and Indian housing agency under United States Housing Act of 1937.” 44 C.F.R. § 13.3.

³⁹ 44 C.F.R. § 13.36(a); see also DHS Office of Inspector General, Report No. 14-46-D, *FEMA’s Dissemination of Procurement Advice Early in Disaster Response Periods*, p. 3 (Feb. 28, 2014) (“Federal Regulation 44 CFR 13.36(a) allows States, as grantees, to use their own procurement procedures.”).

⁴⁰ Id. Many of the laws with which a State must comply as a condition of receiving federal assistance and which will apply to state contractors are set forth in the DHS Standard Terms and Conditions, although that document does not contain mandatory or model contract clauses. In addition, the regulation at 44 C.F.R. § 13.36(i) identifies several additional laws, regulations, and executive orders. Such laws include, but are not limited to, the Clean Air Act; Federal Water Pollution Control Act; Copeland Anti-Kickback Act; Contract Work Hours and Safety Standards Act; False Claims Act; Age Discrimination Act of 1975; Americans with Disabilities Act of 1990; Title VI of the Civil Rights Act of 1964; Title VIII of the Civil Rights Act of 1968; Title IX of the Education Amendments of 1975; Rehabilitation Act of 1973; Trafficking Victims Protection Act of 2000; Executive Orders 12549 and 12689 concerning debarment and suspension; Drug Free Workplace Act of 1988; Hotel and Motel Fire Safety Act of 1990; and the lobbying prohibitions of 31 U.S.C. § 1352.

⁴¹ See, e.g. DHS Office of Inspector General, Report No. DS-13-09, *The Alaska Department of Transportation and Public Facilities Did Not Properly Account for and Expend \$1.5 Million in FEMA Public Assistance Grant Funds*, p. 3 at n. 3 (Apr. 30, 2013) (“The Central Region is a State agency and, according to Federal regulations, officials must therefore comply with the same policies and procedures used for procurements from its non-Federal funds (44 CFR 13.36(a).”); DHS Office of Inspector General, Report No. DS-13-05, *The California Department of Parks and Recreation Did Not Account for or Expend \$1.8 Million in FEMA Public Assistance Grant Funds According to Federal Regulations and FEMA Guidelines*, p. 4 (Mar. 27, 2013) (“The Department is a State entity and officials must therefore comply with the same policies and procedures used for procurements for its non-Federal funds (44 CFR 13.36(a).”).

⁴² 44 C.F.R. § 206.207(b)(1).

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administrative agency for the Public Assistance grant.

Upon FEMA's approval of the project, FEMA's regulation at 44 C.F.R. 206.202(e)(1) directs that the grantee, in turn, would approve "subgrants based on the Project Worksheets approved for each applicant."⁴³ The procurement standards applicable to the State agency applicant in this case would still be 44 C.F.R. § 13.36(a). In other words, approval of a "subgrant" from the State administrative agency to the other State agency applicant does not change or otherwise affect the procurement standard applicable to the "State" applicant.⁴⁴

Even if a State complies with its own policies and procedures it uses for procurements from its non-Federal funds when it procures property and services under a Public Assistance grant award, FEMA will still evaluate the method of procurement and associated costs for, among other things, reasonableness.⁴⁵ FEMA will, for example, scrutinize a State's noncompetitive

⁴³ 44 C.F.R. § 206.202(e)(1) ("(e) Grant approval. (1)...After we receive the SF 424 and 424D, the Regional Administrator will obligate funds to the Grantee based on the approved Project Worksheets. *The Grantee will then approve subgrants based on the Project Worksheets approved for each applicant.*") (emphasis added).

⁴⁴ See 53 Fed. Reg. 8034 (Mar. 11, 1988) (which finalized the common rule for the administration of grants and cooperative agreements to states, local and Indian tribal governments) ("As explained in E.O. 12612, Federalism, States possess unique constitutional authority, resources and competence. Under Federalism, States should be given the maximum administrative discretion possible with respect to national programs they administer. Intrusive, Federal oversight is neither necessary nor desirable... Consistent with the President's Federalism Executive Order, the proposed common rule provided that in three important areas (financial management systems, § XX .20, equipment, § XX .32, and procurement, § XX .36), States will expend and account for grant funds according to their own laws and procedures. This flexibility for States in these three areas applies only to funds expended by the State itself."); see also the DHS Office of Inspector General audits reports cited at supra note 41.

⁴⁵ See 2 C.F.R. pt. 225 (Cost Principles for State, Local, and Indian Tribal Governments), Appendix A (General Principles for Determining Allowable Costs), ¶ C.2:

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. The question of reasonableness is particularly important when government units or components are predominantly federally-funded. In determining reasonableness of a given cost, consideration shall be given to:

- a. Whether the cost is of a type generally recognized as ordinary and necessary for the operation of the governmental unit or the performance of the Federal award.
- b. The restraints or requirements imposed by such factors as: Sound business practices; arm's-length bargaining; Federal, State and other laws and regulations; and, terms and conditions of the Federal award.
- c. Market prices for comparable goods or services.
- d. Whether the individuals concerned acted with prudence in the circumstances considering their responsibilities to the governmental unit, its employees, the public at large, and the Federal Government.
- e. Significant deviations from the established practices of the governmental unit which may unjustifiably increase the Federal award's cost.

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procurement to determine whether or not circumstances warranted that method of procurement and resulted in unreasonable pricing, even if such a procurement otherwise complied with state policies and procedures.

Example of the Differing Procurement Standards for States and Local Governments – Geographic Preference

Scenario: The President declares a major disaster for the State of Z as a result of a hurricane, and the declaration authorizes the Public Assistance Grant Program for all counties in the State. The hurricane damaged a building of the State Z Agency of Transportation. Following approval of a Project Worksheet to repair the damaged building, State Z Agency of Transportation procures the services of a contractor to complete the repairs to the building by following the same policies and procedures it uses for procurements from its nonfederal funds when it procures construction services. The State Z Agency, when evaluating the bids for the work, uses a state statutorily imposed geographic preference and awards a contract, and the contract includes all clauses required by federal law, regulation, and executive order. The Disaster Recovery Manager has asked whether the use of the geographic preference was permissible under 44 C.F.R. pt. 13.

Answer: Yes, the use of the geographic preference was permissible under 44 C.F.R. pt. 13. The federal regulation at 44 C.F.R. § 13.36(a) provides, in relevant part, that a state must follow the same policies and procedures it uses for procurements from its nonfederal funds when it procures property and services under a Public Assistance grant award. In this case, the State Z Agency of Transportation followed these procedures, which included adhering to a statutorily imposed geographic preference when evaluating the bids.⁴⁶

It is important to recognize that the procurement standards are different for states than they are for local and Indian tribal governments. As it relates to those entities, the federal regulation at 44 C.F.R. § 13.36(c)(2) provides that “grantees and subgrantees will conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographic preferences in the evaluation of bids or proposals,” except in those cases where “applicable federal statutes expressly mandate or encourage geographic preference.” However, because the state is not subject to regulation at 44 C.F.R. § 13.36(c)(2), the regulation bears no applicability to the question presented.

⁴⁶ Whether or not a particular geographic preference regime imposed by a State raises Constitutional issues under the dormant commerce clause is outside the scope of this Field Manual.

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IV. PROCUREMENT BY LOCAL AND INDIAN TRIBAL GOVERNMENTS

Local⁴⁷ and Indian tribal governments⁴⁸ must use their own procurement procedures that reflect State and local law and regulations, provided that the procurements conform to applicable Federal law and standards identified at 44 C.F.R. § 13.36(b)-(i).⁴⁹ The following provides a summary of the eight subsections to 44 C.F.R. § 13.36. Notably, an Indian tribal government can be, in certain circumstances, a Public Assistance grantee, and the Indian tribal government must still meet the requirements of 44 C.F.R. § 13.36(b)-(i) when serving as a grantee or subgrantee.⁵⁰ The term “subgrantee” as used in the following subsections, therefore, includes a local government (which will never serve as a Public Assistance grantee) and an Indian tribal government acting as either a subgrantee or grantee.

A. GENERAL PROCUREMENT STANDARDS (44 C.F.R. § 13.36(b))

The regulation at 44 C.F.R. § 13.36(b) sets forth twelve general procurement standards, nine of which are mandatory. The first standard at 44 C.F.R. § 13.36(b)(1), as summarized above,

⁴⁷ A “local government” means “a county, municipality, city, town, township, local public authority (including any public and Indian housing agency under the United States Housing Act of 1937) school district, special district, intrastate district, council of governments (whether or not incorporated as a nonprofit corporation under State law), any other regional or interstate government entity, or any agency or instrumentality of a local government.” 44 C.F.R. § 13.3.

⁴⁸ A “federally recognized Indian tribal government” means the “governing body or a governmental agency of any Indian tribe, band, nation, or other organized group or community (including any Native village as defined in section 3 of the Alaska Native Claims Settlement Act, 85 Stat 688) certified by the Secretary of the Interior as eligible for the special programs and services provided by him through the Bureau of Indian Affairs.” 44 C.F.R. § 13.3.

⁴⁹ 44 C.F.R. § 13.36(b)(1); *see also* DHS Office of Inspector General, Report No. 14-46-D, *FEMA’s Dissemination of Procurement Advice Early in Disaster Response Periods*, p. 3 (Feb. 28, 2014) (“Federal Regulation 44 CFR 13.36(a) allows States, as grantees, to use their own procurement procedures. ***Other grantees and subgrantees may also use their own procurement procedures, but those procedures must conform to Federal law and standards stated in 44 CFR 13.36(b) through (i)*** [emphasis added].”).

⁵⁰ The regulation at 44 C.F.R. § 13.4(a) provides that subparts A through D of 44 C.F.R. pt. 13 apply to all grants and subgrants to “governments,” with limited exceptions. A “government” is defined as including a State or local government and a federally recognized Indian tribal government. Accordingly, the regulations in subparts A through D of 44 C.F.R. pt. 13—which includes 44 C.F.R. § 13.36—apply to Indian tribal governments.

Next, the regulation at 44 C.F.R. § 13.36(a) provides that “[w]hen procuring property and services under a grant, a ***State*** will follow the same policies and procedures it uses for procurements from its non-Federal funds...” (emphasis added). The regulation then states that “[o]ther grantees and subgrantees will follow paragraphs (b) through (i) in this section.” The definition of “State” under 44 C.F.R. § 13.3 (*see supra* note 38) does not include an Indian tribal government.

FEMA has interpreted the regulations at 44 C.F.R. §§ 13.4 and 13.36 to mean that Indian tribal governments, whether serving as a grantee or subgrantee, must adhere to their procurement procedures, but those procedures must conform to applicable federal law and the Federal procurement standards at 44 C.F.R. § 13.36(b)-(i), with the Federal standards controlling to the extent that the Indian tribal procedures do not conform to these Federal standards.

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requires a subgrantee to use its own procurement procedures, which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law and the standards under 44 C.F.R. § 13.36(b)-(i). The following provide a summary of the remaining eleven standards at 44 C.F.R. § 13.36(b)(2)-(12).

1. Contract Administration (44 C.F.R. § 13.36(b)(2))

Local and Indian tribal governments will maintain a contract administration system to ensure that contractors perform in accordance with terms, conditions, and specifications of their contracts or purchase orders.⁵¹ The regulation does not provide any additional detail as to what the content of such an administration system should be, such that the content of any such administration system is left to the discretion of the subgrantee.

If reviewing a subgrantee's contract administration system, FEMA would look for at least the following basic elements that should reasonably be part of any such system.

- ***Contract Monitoring.*** The subgrantee should have identified methods for monitoring the performance of the contractor to ensure that work conforms to project design and the scope of work in the Project Worksheet, quality controls are being met, and potential delays or cost overruns are identified.⁵² The extent of monitoring may vary depending upon the type and scope of the contract.
- ***Voucher Processing.*** The subgrantee should have clearly defined roles and responsibilities for the payment of the contractor. This will, among other things, ensure that the nature, type, and quantity of effort or materials being expended are in general accord with the progress of work under the contract, and that claimed costs are reasonable for the period covered by the voucher.
- ***Contract Closeout.*** Contract closeout begins when the contract has been physically completed (all services performed and/or products delivered). The subgrantee should have a defined process for closeout that includes, among other things, final inspection,

⁵¹ 44 C.F.R. § 13.36(b)(2).

⁵² See 44 C.F.R. § 13.40 (Monitoring and Reporting Program Performance); cf. 48 C.F.R. § 42.11 (related to surveillance of Federal contracts for supplies and services other than construction); 48 C.F.R. § 37.6 (regarding surveillance of Federal contracts for services); see also DHS Office of Inspector General, Report No. 14-63-D, *FEMA Should Recover \$1.7 Million of Public Assistance Grant Funds Awarded to the City of Waveland, Mississippi-Hurricane Katrina*, p. 4 (Apr. 15, 2014) (The subgrantee claimed costs for installing a temporary sewer collection system that the contractor improperly billed for excessive contract costs because the costs did not comply with contract terms. Among other violations, this violated the subgrantee's requirement to maintain an adequate contract administration system.); DHS Office of Inspector General, Report No. 11-24, *FEMA Public Assistance Grant Awarded to Wayne County, Mississippi, Board of Supervisors*, p. 6 (Sep. 15, 2011) (Subgrantee's failure to have adequate debris monitoring procedures constituted a failure to have an adequate contract administration system. The performance of the debris monitoring contractor suffered from multiple failures: the contractor has no experience and was provided no training in debris monitoring, load tickets were deficient, and there was no means to verify truck capacities.).

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settlement of any disputes, and final payments.

A subgrantee, in establishing its administrative system, should also review the guidance provided by OMB under the FY 2013 Compliance Supplement to OMB Circular A-133 to auditors that will be auditing subgrantees that are subject to an audit under the Single Audit Act. Specifically, Section I of Part 6 of the Compliance Supplement provides specific guidance for “Procurement and Suspension and Debarment.”

One of the key “risk assessment” activities is for an auditor to evaluate whether a subgrantee has “procedures to identify risks arising from vendor inadequacy, e.g., quality of goods and services, delivery schedules, warrant assurances, user support.”⁵³ In addition, the Compliance Supplement states that relevant “control activities” include that a “contractor’s performance with the terms, conditions, and specifications of the contract is monitored and documented.”

As it relates to debris removal (Public Assistance Category A), FEMA has promulgated specific guidance as to monitoring performance under the contract.⁵⁴ Specifically, FEMA has stated that an applicant should establish debris monitoring procedures and include those procedures in an applicant’s debris management plan for the applicant’s financial interest, especially if the applicant has contracted for any component of the debris removal operation.⁵⁵ Monitoring contracted debris removal operations achieves two objectives. First, it verifies that work completed by the contractor is within the contract scope of work. Second, it provides the required documentation for Public Assistance reimbursement.⁵⁶ Applicants can use force account resources, contractors, or a combination of both to monitor debris removal operations. FEMA periodically validates an applicant’s monitoring and validation of the debris operation, including inspection of truck loads.

2. Written Code of Procurement Standards of Conduct (44 C.F.R. § 13.36(b)(3))

Subgrantees are required to have a written code of standards of conduct for their employees who are engaged in the award and administration of contracts.⁵⁷ FEMA expects an applicant, when contracting with Public Assistance grant funding, to ensure that procurement transactions are conducted in a manner beyond reproach, at arm’s length, with impartiality, and without preferential treatment. FEMA’s regulations require the subgrantee’s written standards to provide for, at a minimum, the following items.

⁵³ OMB Circular A-133 Compliance Supplement, pt. 6, § I (Mar. 2013).

⁵⁴ See FEMA 325, Public Assistance Debris Management Guide, Chapter 11 (Jul. 2007) [“Debris Management Guide”].

⁵⁵ Id. at 105.

⁵⁶ Id.

⁵⁷ 44 C.F.R. § 13.36(b)(3); see also 48 C.F.R. subpart 3.1.

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i. No Conflicts of Interest

The regulation at 44 C.F.R. § 13.36(b)(3) requires subgrantees to maintain a written code of conduct governing the performance of their employees engaged in the award and administration of contracts.⁵⁸ The regulation then makes clear that “no employee, officer, or agent of the... subgrantee shall participate in the selection, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved.”⁵⁹ The purpose of this code and the prohibition is to ensure, at a minimum, that employees involved in the award and administration of contracts are free of undisclosed personal or organizational conflicts of interest—both in appearance and fact.

An organizational conflict of interest is one form of a prohibited conflict of interest and discussed later in this chapter. A second form is a personal conflict of interest. The regulation at 44 C.F.R. § 13.36(b)(3) provides that such a conflict would arise when the employee, officer, or agent, or any member of his or her immediate family, or a partner, or an organization that employs (or is about to employ) any of the above, has a financial or other interest in the contractor that is selected for award.⁶⁰

Although the term “financial interest” is not defined or otherwise described in the regulation, the following provides a non-exhaustive list of the types of financial interest that may give rise to a personal conflict of interest:

- Compensation, including wages, salaries, commissions, professional fees, or fees for business referrals;
- Consulting relationships (such as commercial and professional consulting and service arrangements);
- Investment in the form of stock or bond ownership or partnership interest;
- Real estate investments; and
- Business ownership.⁶¹

⁵⁸ 44 C.F.R. § 13.36(b)(3).

⁵⁹ *Id.*

⁶⁰ 44 C.F.R. § 13.36(b)(3)(i)-(iv). *See also* 18 U.S.C. § 208 and 5 C.F.R. pts. 2635 and 2640, subpart D (which prohibit a Federal employee from having a financial interest in an organization with which he or she is dealing); 48 C.F.R. § 52.203-16 (Preventing Personal Conflicts of Interest) (defining “personal conflict of interest” as it relates to an individual who performs an acquisition function closely associated with an inherently governmental function and is an employee of the contractor or a subcontractor).

⁶¹ Federal criminal law at 18 U.S.C. § 208 prohibits an employee (subject to certain exceptions) from participating personally and substantially in an official capacity in any particular matter in which, to his knowledge, he or any other person specified in the statute has a *financial interest*, if the particular matter will have a direct and predictable effect on that interest. The implementing federal regulation provides that a “disqualifying financial interest” means:

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Example – Personal Conflict of Interest under a Federal Grant

In Town of Fallsburg v. United States, the Town of Fallsburg awarded a contract, under an Environmental Protection Agency (EPA) grant, to purchase equipment to maintain its sewage facility.⁶² The town was governed by a town board and the town supervisor, who served as the project manager. The equipment contract was awarded to a business connected with the town supervisor's family. The town supervisor had no ownership interest in the business, but drew a small salary from it. After suspecting a conflict of interest, the EPA withheld payment under the grant. The town supervisor was eventually convicted of mail fraud for executing the bonding instrument needed for the equipment contract on behalf of the business and held guilty of fraudulently accelerating payments to the business.

The court affirmed the EPA's decision, reviewing the administrative decision under the arbitrary and capricious standard, and held that the town negligently failed to avoid a conflict of interest under 40 C.F.R. § 33.300(a), failed to exercise the degree of care required to effectively manage its public trust under 40 C.F.R. § 30.210, and failed to prohibit the appearance or actuality of favoritism in the awarding and administration of the contract as required by the grant. Notably, the EPA's regulations were different than 44 C.F.R. § 13.36(b)(3),⁶³ but the case is illustrative of the types of conflict of interest that FEMA would find prohibited.

ii. Prohibitions Against Gratuities

The subgrantee's officers, employees, and agents can neither solicit nor accept gratuities, favors, or anything of monetary value from contractors, potential contractors, or parties to subagreements.⁶⁴ This would include entertainment, hospitality, loan, and forbearance. It would

“[T]he potential for gain or loss to the employee, or other person specified in [18 U.S.C. § 208], as a result of governmental action on the particular matter. The disqualifying financial interest might arise from ownership of certain financial instruments or investments such as stock, bonds, mutual funds, or real estate. Additionally, a disqualifying financial interest might derive from a salary, indebtedness, job offer, or any similar interest that may be affected by the matter.”

5 C.F.R. § 2640.103(b).

⁶² Town of Fallsburg v. United States, 22 Cl. Ct. 633, 1991 U.S. Cl. Ct. LEXIS 76 (1991).

⁶³ Id. at 644, footnote 8 (“8. Under the provisions of 40 C.F.R. § 33.300(a), the Town, as grantee was required to avoid conflicts of interest and to maintain a code or standards of conduct governing the performance of its officers, employees, and agents in the conduct of project work, including procurement and the expending of project funds, which would prohibit such officers, employees, and agents from accepting anything of monetary value from contractors.”) and footnote 9 (“Under the provisions of 40 C.F.R. § 30.210, the grantee is required to efficiently and effectively manage grant funds which are deemed to constitute a public trust.”).

⁶⁴ 44 C.F.R. § 13.36(b)(3); see, e.g. DHS Office of Inspector General, Report No. DD-13-11, *FEMA Should Recover \$46.2 Million of Improper Contracting Costs from Federal Funds Awarded to the Administrators of the Tulane Educational Fund, New Orleans, Louisiana*, pp. 16-18 (Aug. 15, 2013) (which involved a conflict of interest and is further described at infra note 376).

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also include services as well as gifts of training, transportation, local travel, and lodgings and meals, whether provided in-kind, by purchase of a ticket, payment in advance, or reimbursement after the expense has been incurred.⁶⁵

iii. Permitted Financial Interests and Gratuities

As an exception to the general prohibition against gratuities and financial interests, the subgrantee may set minimum rules where the financial interest is not substantial or the gift is an *unsolicited* item of nominal intrinsic value.⁶⁶ The regulations do not provide any additional clarity as to what comprises “substantial” or “nominal intrinsic value,” such that the content of any such exception is left to the discretion of the subgrantee. In any case, the Standards of Conduct for Employees of the Executive Branch provide a useful guide in analyzing a subgrantee’s exceptions.⁶⁷

iv. Penalties for Violations

The subgrantee’s standards of conduct must, to the extent permitted by State or local law or regulations, provide for penalties, sanctions, or other disciplinary actions for violations by the subgrantee’s officers, employees, agents, or by contractors or their agents.⁶⁸ For example, the penalty for a subgrantee’s employee may be dismissal, and the penalty for a contractor might be the termination of the contract by the subgrantee.

v. Additional Restrictions

Federal agencies are permitted to impose additional restrictions in the case of real, apparent, or potential conflicts of interest.⁶⁹ As of the date of publication, FEMA has not imposed any such additional restrictions.

3. Review of Proposed Procurements (44 C.F.R. § 13.36(b)(4))

Subgrantee procurement procedures must provide for a review of proposed procurements to

⁶⁵ Cf. 5 C.F.R. § 2635.203(b) (defining “gift” under the Standards of Conduct for Employees of the Executive Branch).

⁶⁶ 44 C.F.R. § 13.36(b)(3).

⁶⁷ See 5 C.F.R. §§ 2635.203 (providing exclusions for the meaning of gift, such modest items of food and refreshments offered other than part of a meal) and 2635.204 (providing exceptions to the gift prohibitions, such unsolicited non-cash gifts of a fair market value of \$20 per occasion with a limit of \$50 per year per source); see also 5 C.F.R. pt. 2640, subpart B (identifying exemptions for financial interests from the prohibitions of 18 U.S.C. § 208 for federal employees).

⁶⁸ 44 C.F.R. § 13.36(b)(3).

⁶⁹ *Id.*

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avoid purchase of unnecessary or duplicative items pursuant to 44 C.F.R. § 13.36(b)(4).⁷⁰ Under these procedures, the subgrantee should give consideration to consolidating or breaking out procurements to obtain a more economical purchase.⁷¹ Where appropriate, the subgrantee must make an analysis of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.⁷² Within the context of the Public Assistance Program, there will be various occasions when a subgrantee would perform this analysis.

i. Eligibility

The property and services to be acquired must be eligible under the Stafford Act and the Public Assistance regulations at 44 C.F.R. pt. 206 and within the scope of the specific Project Worksheet.

ii. Necessity

FEMA expects grantees and subgrantees to limit the acquisition of federally-assisted property and services to the amount it needs to support its Public Assistance project(s). In monitoring whether a grantee or subgrantee has complied with its procedures to determine what property or services are unnecessary, FEMA bases its determinations on what would have been a grantee's or subgrantee's reasonable expectations at the time it entered into the contract.

iii. Examples

Acquisition of Equipment

One example is when a subgrantee needs to obtain equipment⁷³ that is necessary to respond to and/or recover from a major disaster in areas designated for Public Assistance.⁷⁴ In those circumstances, the subgrantee must analyze its options to either lease or purchase equipment, although the regulation at 44 C.F.R. § 13.36(b)(4) does not provide any detail or amplifying information on how such an analysis should be performed, leaving such details to the discretion of the subgrantee.

Although FEMA will not mandate that an applicant pursue a specific option for obtaining

⁷⁰ 44 C.F.R. § 13.36(b)(4).

⁷¹ Id.

⁷² Id.

⁷³ Equipment is "tangible, non-expendable, personal property having a useful life of more than one year and an acquisition cost of \$5000 or more per unit. 44 C.F.R. § 13.3.

⁷⁴ There may be instances after a major disaster when an applicant will not have sufficient equipment and supplies to respond to the incident in an effective manner. FEMA may, in those circumstances, provide financial assistance for the acquisition of equipment and supplies purchased or leased by an applicant. See FEMA Disaster Assistance Policy No. 9525.12, *Disposition of Equipment, Supplies, and Salvageable Materials*, § VI (Jul. 14, 2008).

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equipment, FEMA will generally fund only the most cost-effective option. FEMA will analyze the applicant's decision to either lease or purchase equipment on a case-by-case basis by evaluating comparative costs and other factors. The following provides a non-exhaustive list of the considerations FEMA may use in this analysis:

- Estimated length of the period the equipment is to be used and the extent of use within that period;
- Financial and operating advantages of alternative types and makes of equipment;
- Cumulative rental payments for the estimated period of use;
- Net purchase price;
- Transportation and installation costs;
- Maintenance and other service costs;
- Availability of purchase options;
- Trade-in or salvage value;
- Availability of a servicing capability.⁷⁵

Temporary Facilities

Another example of where a lease vs. purchase option analysis will be necessary is in the case of “temporary facilities.” As a result of major disasters and emergencies, services provided at public and private nonprofit facilities may be disrupted to the extent that they cannot continue unless they are temporarily relocated to another facility.⁷⁶ Applicants may request temporary facilities to continue that service, and may lease, purchase, or construct eligible temporary facilities.⁷⁷ Whichever option is selected, the option must be reasonable, cost-effective, and temporary in nature.⁷⁸

FEMA will not mandate that the applicant pursue a specific option for a temporary facility, but FEMA will fund only the most cost effective option.⁷⁹ In its policy guidance, FEMA has asserted that it will use various considerations in determining whether to fund a temporary facility. One such consideration is that an applicant must supply FEMA with sufficient information so as to enable FEMA to conduct a “cost comparison,” and this information should

⁷⁵ Cf. 48 C.F.R. pt. 7, subpart 7.4 (Equipment Lease or Purchase).

⁷⁶ Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 93-288, § 403(a)(3)(D) (1974) (codified as amended at 42 U.S.C. § 5170b(a)(3)(D)) [“Stafford Act”]; FEMA Recovery Policy No. 9523.3, *Provision of Temporary Relocation Facilities* (Dec. 14, 2010).

⁷⁷ FEMA DAP No. 9523.3, supra note 76, § VII(D).

⁷⁸ Id.

⁷⁹ Id.

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consist of at least three proposals with cost estimates.⁸⁰

4. Awards to Responsible Contractors (44 C.F.R. § 13.36(b)(8))

A subgrantee must make awards only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement.⁸¹ In awarding a contract, the subgrantee must give consideration to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.⁸²

As a preliminary matter, a subgrantee may not enter into a contract with a contractor that is debarred or suspended as detailed in 44 C.F.R. § 13.35. But it is important to recognize that a contractor, even if not debarred or suspended, may still not be a “responsible” contractor for the purposes of 44 C.F.R. § 13.36(b)(8). For example, a contractor may not have the necessary “technical and financial resources” to properly perform a contract, such as the necessary equipment and technical skills (or the ability to obtain them) to perform a particular scope of work.

The Federal Acquisition Regulation (“FAR”) sets forth general standards for determining contractor responsibility that provide a useful guide within the Public Assistance contracting context.⁸³ To be determined responsible, the FAR states that a prospective contractor, among other things, must:

- Have adequate financial resources to perform the contract, or the ability to obtain them;
- Be able to comply with the required proposed delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments;
- Have a satisfactory performance record;
- Have a satisfactory record of integrity and business ethics;
- Have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them (including, as appropriate, such elements as production control procedures, property control systems, quality assurance measures, and safety programs applicable to materials to be produced or services to be performed by the prospective contractor and subcontractors);
- Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them; and

⁸⁰ Id. § VII(D)(1).

⁸¹ 44 C.F.R. § 13.36(b)(8).

⁸² Id.

⁸³ 48 C.F.R. pt. 9 (Contractor Qualifications), subpart 9.1 (Responsible Prospective Contractors).

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- Be otherwise qualified and eligible to receive an award under applicable laws and regulations.⁸⁴

5. Procurement Records (44 C.F.R. § 13.36(b)(9))

A subgrantee must maintain sufficiently detailed records that document the procurement history.⁸⁵ These records must include, but are not necessarily limited to, the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.⁸⁶ Although not mentioned in the regulation, these records must also include the contract document and any contract modifications with the signatures of all parties. In addition, the procurement documentation file should also contain:

- Purchase request, acquisition planning information, and other pre-solicitation documents;
- List of sources solicited;
- Independent cost estimate;
- Statement of work/scope of services;
- Copies of published notices of proposed contract action;
- Copy of the solicitation, all addenda, and all amendments;
- An abstract of each offer or quote;
- Determination of contractor's responsiveness and responsibility;
- Cost or pricing data;
- Determination that price is fair and reasonable, including an analysis of the cost and price data;
- Notice of award;
- Notice to unsuccessful bidders or offerors and record of any debriefing;
- Record of any protest;
- Bid, performance, payment, or other bond documents;
- Notice to proceed

⁸⁴ See 48 C.F.R. § 9.104-1.

⁸⁵ 44 C.F.R. § 13.36(b)(9).

⁸⁶ Id.

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Example – Insufficient Records Detailing a Procurement

Second Appeal, County of Hyde, NC, Debris Removal, FEMA-4019-DR

Background. In August 2011, strong winds from Hurricane Irene downed tree limbs and generated vegetative debris throughout Hyde County, North Carolina. FEMA prepared Project Worksheet (PW) 1296 for \$1,833,070 to fund Hyde County’s (Applicant) debris removal activities countywide. The Applicant employed a contractor through a “pre-event contract” it entered into in 2010 for debris removal services.

During the review of the PW, FEMA determined that of the total cost claimed by the Applicant, only \$1,425,627 was eligible for reimbursement. FEMA reduced the eligible amount by \$407,442, based on the contract rates proposed by the lowest bidder that had responded to the Applicant’s request for proposals (RFP) for the pre-event contract. The contractor the Applicant selected for the pre-event contract was the highest bidder.

Applicant’s Rationale. Following the original solicitation in 2010, the Applicant received four bids in response to the RFP and awarded the corresponding Pre-Event Agreement for Debris Management and Removal Services on September 2, 2010, to J.B. Coxwell, a contracting firm that was the highest bidder. The contractor’s response to the RFP was the only response out of the four that included unit prices for ferry rides in its proposal. The Applicant maintained that by including the unit prices for the ferry rides, J.B. Coxwell was the only “responsible” bidder. The Applicant stated that J.B. Coxwell was the only bidder that had previous experience removing debris from Ocracoke Island and that it considered costs related to the County’s unique geographical setting and the North Carolina Ferry System by including fees for debris transported by ferry from the island.

Second Appeal Decision. FEMA denied the Applicant’s second appeal, largely basing its decision on the fact that the Applicant did not provide documentation supporting that it had evaluated all four RFPs based on the evaluation factors in the original RFP. The second appeal decision stated the following:

While the Applicant provides statements in support of its decision to award the contract to the highest bidder, the Applicant did not provide documentation supporting that it evaluated all four RFPs based on the areas of consideration listed in its RFP. The Applicant refers to “proposer rankings” in its appeal but has provided no documentation supporting that it ranked all bids. The Applicant asserts that the contractors that were not selected were not “responsive” because they failed to address the special considerations outlined in the RFP. However, there is no indication that the three other contractors did not take those special considerations into account when developing the bid unit prices. Simply because J.B. Coxwell was the only contractor to include unit prices for the ferry rides does not justify disqualifying the other three bids. Based on the documentation, the Applicant did not follow the State procurement procedures detailed above. Therefore, the actual costs associated with the debris removal activities performed by J.B. Coxwell are not eligible for

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funding.

6. Time and Material (T&M) Contracts (44 C.F.R. § 13.36(b)(10))

The regulation at 44 C.F.R. § 13.36(b)(10) provides that a subgrantee may use a T&M contract 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.⁸⁷ The ceiling price must not be so high as to render it meaningless as a cost control measure.⁸⁸ Although the regulation does not define the term “T&M” contract, this type of contract is one that typically provides for the acquisition of supplies or services on the basis of (1) direct labor hours at specified fixed hourly rates that include wages, overhead, general and administrative expenses, and profit; and (2) actual costs for materials.⁸⁹ A T&M contract is generally used when it is not possible at the time of placing the contract to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of confidence.⁹⁰

⁸⁷ For examples of subgrantees failing to include cost ceiling limitations, see DHS Office of Inspector General, Report No. DA-13-07, *FEMA Should Recover \$701,028 of Public Assistance Grant Funds Awarded to Memphis Light, Gas and Water Division – Severe Weather February 2008*, p. 3 (Nov. 20, 2012); DHS Office of Inspector General, Report No. DA-13-05, *FEMA Should Recover \$2.2 Million of Public Assistance Grant Funds Awarded to Memphis Light, Gas and Water Division - Severe Weather, June 2009*, p. 3 (Nov. 20, 2012); DHS Office of Inspector General, Report No. DA-13-04, *FEMA Should Recover \$7.7 Million of Public Assistance Grant Funds Awarded to the City of Lake Worth, Florida Hurricane Wilma*, p. 3 (Nov. 20, 2012); DHS Office of Inspector General, *FEMA Public Assistance Grant Awarded to Henderson County, Illinois*, p. 3 (Sep. 27, 2011); see also Letter from Deborah Ingram, Assistant Administrator, FEMA Recovery Directorate, to Mark S. Ghilarducci, Secretary, California Emergency Management Agency *re: Second Appeal—Santa Barbara County, PA ID 083-99083-00, OIG Audit Report DS-11-04, FEMA-1577-DR-CA, Multiple Project Worksheets, Enclosed Analysis* (Nov. 4, 2013); Letter from Deborah Ingram, Assistant Administrator, FEMA Recovery Directorate, to Jonathon E. Monken, Director, Illinois Emergency Management Agency, *re: Second Appeal Henderson County, PA ID 071-99071-00, Procurement Standards, FEMA-1771-DR-IL, Office of the Inspector General (OIG) Audit DD-11-22, Enclosed Analysis* (Sep. 20, 2013).

⁸⁸ See DHS Office of Inspector General, Report No. DD-13-06 *FEMA Should Recover \$6.7 Million of Ineligible or Unused Public Assistance Funds Awarded to Cameron Parish, Louisiana, for Hurricane Rita*, p. 9 (Feb. 27, 2013) (Subgrantee awarded a time and materials contract for program management that contained a limit of \$50 million, however, this ceiling was unreasonably high and therefore meaningless as a cost control measure for a contract award of \$9.4 million.).

⁸⁹ See e.g. 48 C.F.R. § 16.601(b).

⁹⁰ FEMA 322, Public Assistance Guide, p. 53 (Jun. 2007) [“Public Assistance Guide”]:

Applicants should avoid using time and materials contracts. FEMA may provide assistance for work completed under such contracts for a limited period (generally not more than 70 hours) **for work that is necessary immediately after the disaster has occurred when a clear scope of work cannot be developed**. Monitoring is critical and a competitive process still should be used to include labor and equipment rates. ... Applicants must carefully monitor and document contractor expenses, and a cost ceiling or “not to exceed” provision must be included in the contract. If a time and materials contract has been used, the applicant should contact the State to ensure proper guidelines are followed. (emphasis added).

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FEMA, as a matter of policy, has advised the following with respect to the use of T&M contracts under Public Assistance projects:

- Since this type of contract creates the risk that costs could be beyond what the parties anticipated, FEMA generally discourages the use of T&M contracts except when circumstances warrant such use and when no other contract type is suitable.⁹¹
- T&M contracts may, on occasion, be extended for a short period when absolutely necessary, for example, until appropriate unit price contracts have been prepared and executed.⁹²
- Applicants must carefully monitor and document contractor expenses.⁹³
- When T&M contracting is employed, the applicant should notify the State to ensure proper guidelines are followed.⁹⁴
- FEMA has advised that these contracts should be limited to work that is necessary immediately after an incident and should not exceed 70 hours.⁹⁵

FEMA has cited these policies above in various second appeal decisions,⁹⁶ and the OIG has also cited those policies in various OIG audits. The inappropriate use of T&M contracts is a relatively frequent finding of the OIG during audits of Public Assistance projects.

⁹¹ Id.; FEMA Recovery Fact Sheet No. 9580.212, *Public Assistance Frequently Asked Questions (FAQ)*, ¶ 6 (Oct. 28, 2012):

6. Are there any procurement actions that are discouraged by FEMA?

Time and materials contracts. Applicants should avoid using time and materials contracts in their procurement actions. This contract type creates the risk that costs could go beyond what the parties anticipated, so applicants should only use it when no other contract type is suitable. In light of this risk, time and materials contracts must include a ceiling amount on the price of the contract. [footnote omitted] Including a ceiling shifts the risk to the contractor for any overages. For Public Assistance, contracts should be limited for work that is necessary immediately after a disaster and should not exceed 70 hours. [footnote omitted].

⁹² FEMA P-323, *Public Assistance Applicant Handbook*, p. 45 (Mar. 2010).

⁹³ *Public Assistance Guide*, *supra* note 90, p. 53; Letter from Deborah Ingram, Assistant Administrator, FEMA Recovery Directorate, to Jonathon E. Monken, Director, Illinois Emergency Management Agency *re: Second Appeal—Henderson County, PA ID 071-99071-00, Emergency Levee Repairs and Dewatering, FEMA-1771-DR-IL, Project Worksheet (PW) 1524 v2*, Enclosed Analysis (Sep. 11, 2012).

⁹⁴ *Public Assistance Guide*, *supra* note 90, p. 53.

⁹⁵ See supra note 90.

⁹⁶ See, e.g. Letter from Deborah Ingram, Assistant Administrator, FEMA Recovery Directorate, to Mark S. Ghilarducci, Secretary, California Emergency Management Agency *re: Second Appeal—Santa Barbara County, PA ID 083-99083-00, OIG Audit Report DS-11-04, FEMA-1577-DR-CA, Multiple Project Worksheets, Enclosed Analysis* (Nov. 4, 2013).

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Example – Use of Time and Materials Contract

DHS Office of Inspector General Report No. DA-13-08 (Dec. 2012)
FEMA Should Recover \$470,244 of Public Assistance Grant Funds to the City of Lake Worth, Florida – Hurricanes Frances and Jeanne

Background. Hurricane Frances struck the City of Lake Worth (City) on September 3, 2004, and caused widespread damage to the City’s electrical distribution system. Using its emergency contracting procedures, the City hired multiple electrical contractors under noncompetitive time and equipment contracts to repair damages caused by the storm. The City hired the contractors without performing a cost or price analysis to determine the reasonableness of the proposed prices, and without establishing ceiling prices that the contractors exceeded at their own risk.

Before the City could complete all electrical repair work resulting from Hurricane Frances, the City’s electrical distribution system suffered additional damage from Hurricane Jeanne on September 24, 2004. According to the City’s utility department, electrical power was restored to all of the City’s customers by September 29, 2004. However, additional work was required to complete permanent repairs necessitated by the two storms. The City did not solicit competitive bids for the permanent work. Instead, it continued to use the contractors hired under the noncompetitive contracts for the contract work, which was completed December 5, 2004.

General Summary of OIG Finding. The OIG concluded that the need to restore electrical power constituted exigent circumstances that warranted the use of noncompetitive contracts through September 29, 2004, because lives and property were at risk. However, the City should have performed a cost/price analysis and established contract ceiling prices for the time-and-material work. In addition, the OIG concluded that the City should have openly competed the permanent repair work after that date because exigent circumstances no longer existed to justify the use of noncompetitive contracts.

It is important to recognize that, in some cases, a T&M contract may be appropriate in the immediate response to an incident to protect lives, public health, and safety, as it may be impossible to accurately estimate the extent or duration of the required scope of work or to anticipate costs with any reasonable degree of confidence in the immediate aftermath of the incident. Such a contract must still include a contract ceiling price and, furthermore, the applicant should recognize that the use of the contract in perpetuity may not be appropriate. Specifically, after a period of exigency or emergency has ended, the applicant should normally be able to formulate a detailed scope of work so as to allow a contract to be competitively awarded and/or transitioned to a non-T&M basis.

Example – Use of Time and Materials Contract Beyond the Exigent or Emergency Period

DHS Office of Inspector General Report No. DS-13-11 (Jul. 2013)
Los Angeles County, California, Did Not Properly Account for and Expend \$3.9 Million in

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FEMA Grant Funds for Debris-Related Costs

Background. County officials noncompetitively awarded debris-related T&M contracts to various contractors for four FEMA-funded projects. The County awarded these contracts without full and open competition; after the exigency period; and when a scope of work could be formulated. The County selected the contractors from an on-call list that the County established approximately 3 years before the disaster for its internal operations. Because the County's selection occurred before the disaster, pricing could not be predicated upon a FEMA- (or otherwise-) specified scope of work, nor could a comparison be made to other contractors who may have offered more competitive pricing on a particular, defined, post-disaster scope of work.

General Summary of OIG Finding. Using these preselected/on-call contractors may have been advantageous in the immediate aftermath of the disaster (*i.e.*, the exigency period), when a scope of work could not be easily defined and a streamlined procurement process was necessary to ensure the safety of lives and property. However, the OIG stated that it was not appropriate to claim costs associated with these contracts for the full extent of disaster-related projects ultimately reimbursed by the Federal Government when there was no exigency or actual assurance that contract costs were reasonable.

After the exigency period had passed, "full and open competition—through competitive bidding on an appropriate type of contract (*i.e.*, non-T&M)—should have occurred." Instead, County officials allowed the four contractors to complete the projects on a T&M basis, and without project-specific contracts and project-specific scopes of work. Further, the OIG asserted that (1) the circumstances did not warrant the award of noncompetitive/T&M contract after the exigency period passed; (2) there was no evidence that only T&M contracts would be suitable; (3) the contracts did not include project-specific cost ceilings; and (4) contractor expenses were not carefully and consistently monitored.

7. Settlement of Contractual and Administrative Issues (44 C.F.R. § 13.36(b)(11))

Subgrantees alone will be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of their procurements.⁹⁷ These issues include, but are not limited to, source evaluation, protests, disputes, and claims. These standards do not relieve the subgrantee of any contractual responsibilities under its contracts. FEMA will not substitute its judgment for that of the subgrantee unless the matter is primarily a Federal concern, such as the subgrantee's compliance with the requirements of 44 C.F.R. § 13.36. Violations of law will be referred to the local, State, or Federal authority having proper jurisdiction.

⁹⁷ 44 C.F.R. § 13.36(b)(11).

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8. Protest and Dispute Procedures (44 C.F.R. § 13.36(b)(12))

A subgrantee must have “protest procedures” to handle and resolve “disputes” relating to their procurements and shall in all instances disclose information regarding the protest to the State.⁹⁸ A protestor must exhaust all administrative remedies with the subgrantee and State before pursuing a protest with FEMA.⁹⁹

The regulation at 44 C.F.R. § 13.36(b)(12) appears to use the terms “protests” and “disputes” interchangeably. Under Federal acquisitions, the terms are distinct—a “protest” pertains to disagreements before or over the award of a contract,¹⁰⁰ and a “dispute” pertains to disagreements after a contract has been awarded.¹⁰¹ Because 44 C.F.R. § 13.36(b)(12) uses the terms interchangeably, it appears that the regulation extends to both protests and disputes.

Reviews of disputes or protests by FEMA will be limited to:

- Violations of Federal law or regulations (violations of State or local law will be under the jurisdiction of State or local authorities);
- Subgrantee’s noncompliance with FEMA’s regulation for subgrantee procurement at 44 C.F.R. § 13.36; and
- Violations of the subgrantee’s protest procedures for failure to review a complaint or protest.¹⁰²

FEMA will review the protests within its jurisdiction *de novo*, that is, FEMA will review such protests without reference to the legal conclusions and assumptions reached of the grantee or subgrantee. Protests or disputes received by FEMA other than those specified above will be

⁹⁸ 44 C.F.R. § 13.36(b)(12).

⁹⁹ Id.

¹⁰⁰ A “protest” is defined under 48 C.F.R. § 33.101 as a written objection by an interested party to any of the following:

- (1) a solicitation or other request by an agency for offers for a contract for the procurement of property or services;
- (2) the cancellation of the solicitation or other request;
- (3) an award or proposed award of the contract;
- (4) a termination or cancellation of an award of the contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.

Protests are also known as “bid protests,” “award protests,” or “protests against award.”

¹⁰¹ A “dispute” is a disagreement between the contractor and the contractor officer regarding the rights of a party under a contract.

¹⁰² 44 C.F.R. § 13.36(b)(12). FEMA has not adopted any formal process for reviewing such actions.

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referred to the State or subgrantee.¹⁰³

Examples – FEMA Review of Protests and Disputes

Example 1: A contractor, after exhausting all administrative remedies with the State and Town, submits a request to FEMA for a review of the contractor’s protest to the Town’s procurement of construction services. The Town, a Public Assistance subgrantee, had solicited bids to a contract to repair a damaged Town building. The sole ground for the protest was that the Town used a local geographic preference in evaluating bids in violation of 44 C.F.R. § 13.36(c)(2). As this protest relates to the Town’s compliance with FEMA’s procurement regulations, this is a matter that FEMA would review.

Example 2: An architectural firm, after exhausting all administrative remedies with the State and Town, submits a request to FEMA for a review of the architectural firm’s protest to the Town’s procurement of architectural and engineering services. The Town, a Public Assistance subgrantee, had solicited bids for architectural and engineering services to design a new Town Hall to replace the Town Hall that was destroyed by a major disaster. The sole ground for the protest was that the architectural firm was more qualified than the firm to whom the Town ultimately awarded the contract. As this protest does not involve a potential violation of Federal law, regulation, executive order, noncompliance with FEMA’s regulation for subgrantee procurement at 44 C.F.R. § 13.36, or the Town’s violation of its own protest procedures, FEMA would not review this matter and would return it to the State for action.

9. Encouraging Intergovernmental Agreements (44 C.F.R. § 13.36(b)(5))

To foster “greater economy and efficiency,” the regulation at 44 C.F.R. § 13.36(b)(5) encourages grantees and subgrantees to enter into “State and local intergovernmental agreements for procurement or use of common goods and services.” The regulation does not, however, provide any additional context as to the attributes of such an intergovernmental agreement and what procedures parties would need to implement in order to satisfy the requirements of 44 C.F.R. § 13.36 when procuring goods and services in support of such an agreement.

FEMA has generally interpreted this regulation as encouraging jurisdictions to collaborate in joint procurements (or a “cooperative procurement”) for goods and services where economies of scale would result in savings or using purchasing schedules or contracts. A joint procurement means a method of contracting in which two or more purchasers agree from the outset to use a single solicitation document and enter into a single contract with a vendor for the delivery of property and services. This is typically done to obtain advantages unavailable for smaller procurements. Unlike a State or local purchasing schedule or contract, a joint procurement is not drafted for the purposes of accommodating the needs of other parties that may later choose to

¹⁰³ Id.

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participate in the benefits of the contract.

The subgrantee responsible for undertaking the joint procurement may, upon contract award, assign to the other participants responsibilities for administering those parts of the contract affecting their property or services. Participation in a joint procurement, however, does not relieve any participating subgrantee from the requirements and responsibilities it would have if it were procuring the property or services itself, and does not relinquish responsibility for the actions of other participants merely because the primary administrative responsibility for a particular action resides in an entity other than itself.

Example – Intergovernmental Agreements / Joint Procurements

Hypothetical: Two jurisdictions collaborate to promulgate a joint solicitation for a contract for debris removal services in both jurisdictions. Following the solicitation and receipt of bids, both jurisdictions jointly evaluate the responses and jointly award a contract to a debris removal contractor. The procurement meets all of the other requirements of 44 C.F.R. §§ 13.36(b)-(i), such as including the required contract clauses, and the parties having taken all required affirmative steps to ensure minority firms, women-owned business enterprises, and labor surplus area firms are used when possible. A major disaster declaration occurs one week after the contract is awarded, and the jurisdictions both use the contract for the debris removal services for two weeks.

Analysis: Both jurisdictions worked together to prepare the solicitation and conducted the evaluations of bids, both are parties to the agreement, and the scope of work under the contract expressly describes that the performance of services will occur in both jurisdictions. Presuming that the procurement meets all of the other requirements of 44 C.F.R. § 13.36, this contract could be used by both jurisdictions for debris removal services during a major disaster.

It is important to understand, however, that FEMA and the OIG have not interpreted this regulation so as to enable one jurisdiction to satisfy the procurement requirements of 44 C.F.R. § 13.36 by just using another jurisdiction's contractor after entering into an intergovernmental agreement with that other jurisdiction.¹⁰⁴ This is the case even if the use of another jurisdiction's contractor through an interlocal agreement would satisfy local and State procurement laws and regulations. In that case, the jurisdiction that availed itself of the other jurisdiction's contract was not an original party to the contract, and the scope of work under that contract did not involve work in the jurisdiction where the work was ultimately being performed. FEMA often refers to the assignment of contracts from one jurisdiction to another as "piggybacking."¹⁰⁵

¹⁰⁴ FEMA has expressed in various policy documents that it disfavors an applicant's use of another jurisdiction's contractor, and how such use can jeopardize reimbursement. See Debris Management Guide, *supra* note 54, p. 19; FEMA Recovery Fact Sheet No. 9580.212, *supra* note 91, ¶ 6.

¹⁰⁵ FEMA Recovery Fact Sheet No. 9580.212, *supra* note 91, ¶ 6.

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FEMA guidance provides that “[b]ecause the competitive process for the existing contract could not have included the full scope of the new work, the new work has not been competitively bid. The resulting costs may therefore be higher than if the work had been bid out separately. FEMA therefore discourages such contracts and will use the reasonableness of eligible work as a basis to determine reimbursable cost.”¹⁰⁶ There are, notwithstanding, limited circumstances where the acquisition of contract rights through assignment from another entity may be permissible as discussed in section IV(C)(5). In cases falling outside these limited circumstances, it may be the case that awarding a short-term, non-competitive emergency work contract (such as debris removal) to another jurisdiction’s contractor for site-specific work may be appropriate to meet the immediate, exigent or emergency needs. However, if the contract is for a long-term operation lasting weeks or months, the contract should be competitively bid as soon as possible (*see* section II(D)(3)(iv) below for a more detailed discussion of “infeasibility” and emergency/exigent procurements).

The use of state, local or tribal supply schedules or contracts is prohibited unless the underlying transaction complies with all of the applicable provisions of 44 C.F.R. § 13.36(b)-(i), to include the requirement for open and full competition. .

10. Purchasing From the General Services Administration’s Schedules

The General Services Administration (“GSA”) establishes long-term governmentwide multiple award schedule (“MAS”) contracts with commercial firms to provide access to millions of commercial products and services at volume discount pricing.¹⁰⁷ The MAS contracts, also referred to GSA Schedule and Federal Supply Schedule contracts, are indefinite delivery, indefinite quantity contracts.¹⁰⁸ Use of the GSA Schedules Program by a federal agency is considered a “competitive procedure” under the Competition in Contracting Act of 1984 when certain ordering procedures are followed.¹⁰⁹

Disaster Purchasing¹¹⁰ is a GSA program that allows state and local governments access to buy goods and services from ALL GSA Federal Supply Schedules to facilitate disaster preparation¹¹¹

¹⁰⁶ Id.

¹⁰⁷ GSA awards and administers MAS contracts pursuant to 40 U.S.C. § 501.

¹⁰⁸ The GSA Schedules program is prescribed in the Federal Acquisition Regulations at 48 C.F.R. pt. 8, subpart 8.4 and 48 C.F.R. pt. 38.

¹⁰⁹ 48 C.F.R. § 6.102(d)(3).

¹¹⁰ See U.S. General Services Administration, *State and Local Disaster Purchasing* (available at http://www.gsa.gov/portal/content/202321?utm_source=FAS&utm_medium=print-radio&utm_term=disasterrecovery&utm_campaign=shortcuts).

¹¹¹ “Preparedness” means actions that involve a combination of planning, resources, training, exercising, and organizing to build, sustain, and improve operational capabilities. Preparedness is the process of identifying the personnel, training, and equipment needed for a wide range of potential incidents, and developing jurisdiction –

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or response¹¹²; facilitate recovery¹¹³ from a major disaster declared by the President under the Stafford Act, or to facilitate recovery from terrorism or nuclear, biological, chemical, or radiological attack.¹¹⁴ A “State or local government” authorized to use the GSA schedules includes any State, local, regional, or tribal government, or any instrumentality of such an entity (including any local educational agency or institution of higher education).¹¹⁵ The use of a GSA schedule is voluntary for a State or local government, and agreement by a schedule contractor to offer recovery purchasing under the contract and acceptance of any order for recovery purchasing from a State or local government is voluntary.¹¹⁶

FEMA promulgated Disaster Assistance Fact Sheet No. 9580.103 to set forth amplifying guidance for State and local governments’ use of the GSA supply schedules.¹¹⁷ This Fact Sheet states that applicants who purchase goods and services under the DRPP should follow the GSA ordering procedures found at 48 C.F.R. §§ 8.405-1 and 405-2.¹¹⁸ The Fact Sheet states that by using these procedures, applicants that participate in the DRPP will satisfy the requirements to procure products and/or services through full and open competition.¹¹⁹

State and local governments may be able to avail themselves of other GSA federal supply schedules or similar purchasing arrangements as authorized by federal law.

specific plans for delivering capabilities when needed for an incident. See U.S. General Services Administration, *Disaster Purchasing FAQs* (available at <http://www.gsa.gov/portal/content/202557#Question5>).

¹¹² “Response” means immediate actions to save lives, protect property and the environment, and meet basic human needs. Response also includes the execution of emergency plans and actions to support short-term recovery. *Id.*

¹¹³ “Recovery” means the development, coordination, and execution of service- and site-restoration plans; the reconstitution of government operations and services; individual, private-sector, nongovernmental, and public-assistance programs to provide housing and to promote restoration; long-term care and treatment of affected persons; additional measures for social, political, environmental, and economic restoration; evaluation of the incident to identify lessons learned; post incident reporting; and development of initiatives to mitigate the effects of future incidents. *Id.*

¹¹⁴ 40 U.S.C. § 502(d). Section 502(d) was created by the John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083, § 833 (2006) and later amended by Federal Supply Schedules Usage Act of 2010, Pub. L. No. 111-263, § 4 (2010).

¹¹⁵ 40 U.S.C. § 502(d), (c)(3); 48 C.F.R. § 538.7001.

¹¹⁶ 48 C.F.R. § 538.7001(a).

¹¹⁷ Disaster Assistance Fact Sheet No. 9580.103, *General Services Administration Disaster Recovery Purchasing Program* (Jul. 7, 2008).

¹¹⁸ *Id.* at 3 (“FEMA may reimburse Public Assistance State, local, and tribal government applicants for products and/or services purchased under DRPP if they were procured competitively and are otherwise eligible under the Public Assistance Program. Public Assistance applicants who purchase goods or services under the DRPP should follow the GSA ordering procedures found in 48 CFR §§ 8.405 – 8.405-2. By using these outlined procedures, [] State, local, and tribal governments that participate in GSA DRPP will satisfy the requirements to procure products and/or services through full and open competition.”).

¹¹⁹ *Id.*

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11. Obtaining Goods and Services through Mutual Aid Agreements

FEMA, pursuant to FEMA Recovery Policy No. 9523.6, allows a subgrantee to use Public Assistance funding to pay for work performed by another entity through a mutual aid agreement.¹²⁰ This policy applies to all forms of mutual aid assistance, including agreements between a requesting and providing entity, statewide mutual aid agreements, and mutual aid services provided under the Emergency Management Assistance Compact (“EMAC”).¹²¹ There are three types of mutual aid work eligible for FEMA assistance:

- ***Emergency Work (Public Assistance Categories A and B)*** – Mutual aid work provided in the performance of emergency work necessary to meet immediate threats to life, public safety, and improved property.
- ***Permanent Work Related to Utilities (Public Assistance Category F)*** – Work that is of a permanent nature but is necessary for emergency restoration of utilities. For example, work performed to restore electrical and other power.
- ***Grant Management Work*** – For Public Assistance only, work associated with the performance of the grantee’s responsibilities as grant administrator outlined in 44 C.F.R. § 206.202(g). Use of Emergency Management Assistance Compact (“EMAC”) provided assistance to perform these tasks is eligible mutual aid work.¹²²

If mutual aid work falls within the scope described above, then FEMA will next look to see if the providing entity performed the work using force account labor or contract resources.¹²³ A subgrantee (the requesting entity) may use Public Assistance funding to pay for the costs of the *force account labor* of the entity providing assistance (the providing entity) consistent with FEMA Recovery Policy No. 9523.6.¹²⁴ If, however, the providing entity performs mutual aid work through contract, then FEMA will perform the following analysis.

Contract Services or Supplies Are Incidental to the Work Performed by the Providing Entity. In those cases where contract services or supplies are incidental to the work performed by the

¹²⁰ FEMA Recovery Policy No. 9523.6, *Mutual Aid Agreements for Public Assistance and Fire Management Assistance* (Nov. 10, 2012). FEMA does not treat a mutual aid agreement as a procurement for the purposes of 44 C.F.R. pt. 13 (or 2 C.F.R. pt. 215 in the case of private nonprofit organizations) so long as the work provided under the agreement falls within certain categories of work. Rather, FEMA treats the mutual aid assistance performed by a providing entity’s employees as akin to temporary hires of the requesting entity.

¹²¹ *Id.* § VI(C).

¹²² *Id.* § VI(B).

¹²³ If mutual aid work does not fall within these three eligible types of work, then FEMA treats the mutual aid agreement as a procurement and evaluates it against the criteria of 44 C.F.R. § 13.36(b)-(i).

¹²⁴ The providing entity’s force account labor is treated akin to temporary hires.

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providing entity, then FEMA will generally not treat the mutual aid agreement as a procurement and evaluate it according to the criteria at 44 C.F.R. § 13.36.

The Providing Entity Predominantly or Exclusively Performs Mutual Aid Work Through Contract. In other cases, however, a providing entity may perform the work under the mutual aid agreement predominantly or exclusively through contract. FEMA will, in these cases, treat the mutual aid agreement as a procurement and evaluate it against the criteria of 44 C.F.R. § 13.36(b)-(i). The following example illustrates the approach.

Examples –Mutual Aid Work Performed Through Contract

Example 1: The City of X (requesting entity) requests 30 police officers from the City of W (providing entity) to provide police officers to perform law enforcement operations immediately following a tornado in the requesting entity’s jurisdiction. This request is pursuant to an existing mutual aid agreement for police support. The providing entity contracts with a bus company to transport the police officers to the requesting entity’s jurisdiction, and includes the costs of this transportation along with its force account labor costs in its bill to the providing entity. Such contract services are incidental to the law enforcement services performed by the providing entity, and FEMA would treat those costs as eligible so long as all other requirements of FEMA Recovery Policy No. 9523.6 were met.

Example 2: The City of Z is impacted by a tornado that generates widespread debris throughout the jurisdiction. In order to obtain debris removal services, the City of Z contacts the City of Y, which has an existing contractor for debris removal. Rather than entering into a contract directly with Debris Removal Contractor, the City of Z enters into a mutual aid agreement with the City of Y for the provision of debris removal assistance. The City of Y, after the mutual aid agreement is executed, sends Debris Removal Contractor to the City of Z, and the Contractor performs debris removal throughout the City of Z for 90 days. This would not be a mutual aid agreement falling within the scope of FEMA Recovery Policy No. 9523.6. As such, FEMA would treat this transaction as a procurement, and would evaluate City of Z’s procurement of the debris removal services of the City of Y through the mutual aid agreement according to 44 C.F.R. § 13.36(b)-(i).¹²⁵

¹²⁵ In limited circumstances (and although not encouraged by FEMA), it may be possible for the City of X to acquire the contract rights of the City of Y (the “Providing Entity”), which would avoid the need for the contract work to be performed through mutual aid and would be a method of procurement which could satisfy the requirements of 44 C.F.R. § 13.36. See infra section IV(A)(12). It may also be the case that, based on individual facts and circumstances, the procurement may fall within exception for noncompetitive procurements at 44 C.F.R. § 13.36(d)(4). See infra section IV(C)(4).

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12. Using Another Jurisdiction's Contract

A grantee or subgrantee may find it useful to acquire contract rights through assignment by another jurisdiction.¹²⁶ FEMA refers to the assignment of contracts from one jurisdiction to another as “piggybacking,” and as discussed earlier in this manual, discourages the use of such contracts.¹²⁷ Although FEMA generally discourages the practice, a grantee or subgrantee that obtains contractual rights through assignment¹²⁸ may use them after first determining that:

- The original contract was procured in compliance with 44 C.F.R. § 13.36.
- The original contract contains appropriate assignability provisions that permit the assignment of all or a portion of the specified deliverables under the terms originally advertised, competed, evaluated, and awarded, or contains other appropriate assignment provisions.
- The contract price is fair and reasonable;¹²⁹
- The contract provisions are adequate for compliance with all Federal requirements.¹³⁰
- The scope of work to be performed falls within the scope of work under the original contract and there are no cardinal changes to the contract.¹³¹
- The scope of the assigned contract originally procured by the assigning party *does not exceed the amount of property and services required to meet the assigning party's original, reasonably expected needs*. The regulation at 44 C.F.R. § 13.36 requires the grantee or subgrantee to have procurement procedures that preclude it from acquiring property or services it does not need. Therefore, a contract would have an improper original scope if the original party added excess capacity in the original procurement primarily to permit assignment of those contract rights to another entity. Moreover, an assignable contract with an overbroad scope of work may lead to unreasonable pricing

¹²⁶ The assignment of contracts or portions of contracts from the original purchasing entity to another entity to purchase equipment, supplies, and services is separate and distinct from joint procurements and state and local supply schedules.

¹²⁷ FEMA Recovery Fact Sheet No. 9580.212, supra note 91, ¶ 6.

¹²⁸ An “assignment” is the transfer of contract rights from one party to another. Black's Law Dictionary 138 (9th Ed. 2009) (defining “assignment of rights”).

¹²⁹ The grantee or subgrantee need not perform a second price analysis if a price analysis was performed for the original contract. However, FEMA expects the grantee or subgrantee to determine whether the contract price or prices originally established are still fair and reasonable before using those rights.

¹³⁰ The grantee or subgrantee using assigned contract rights is responsible for ensuring the contractor's compliance with required Federal provisions.

¹³¹ See section IV(A)(14) for a discussion of cardinal changes.

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and thus should not be used. For example, a statewide debris removal contract that does not have pricing that accounts for variables in the actual scope of work required by a local government subgrantee or the specific conditions of that local market may lead to unreasonable pricing.

- The quantities the assigning party acquired, coupled with the quantities the acquiring grantee or subgrantee seeks, do not exceed the amounts available under the assigning entity's contract.

If these circumstances are not met, then FEMA considers the subgrantee's contract with its vendor as a sole-source award. The subgrantee may still be able to use the existing contract if the conditions precedent for a sole-source award at 44 C.F.R. § 13.36(d)(4) (and discussed in section VII(C)(4)) are met.

13. Using an Existing Contract of the Subgrantee

A subgrantee may have an existing contract in place for a particular service or supplies that it wishes to utilize to perform work under a Public Assistance project award. The use of such an existing contract may be permissible in the following circumstances:

- The subgrantee originally procured the contract in full compliance with the federal procurement standards at 44 C.F.R. § 13.36(b)-(i).
- The work to be performed falls within the scope of work of the original contract and there are no cardinal changes.¹³²
- The scope of the original contract originally procured does not exceed the amount of property and services required to meet the subgrantee's original, reasonably expected needs. The regulation at 44 C.F.R. § 13.36 requires the grantee or subgrantee to have procurement procedures that preclude it from acquiring property or services it does not need. Therefore, a contract could have an improper original scope if the subgrantee added excess capacity in the original procurement primarily to permit not only its present use, but also its future use in an incident.¹³³ Moreover, an existing contract with an overbroad scope of work may lead to unreasonable pricing and thus should not be used. For example, a standing debris removal contract that does not have pricing that accounts for variables in the actual scope of work required by a local government subgrantee or the specific conditions of the specific event may lead to unreasonable pricing.

¹³² Id.

¹³³ We note that jurisdictions may, as a matter of prudence, procure "advance contracts" that are only to be used in the case of a future incident, such as contracts for debris removal. If procured in full compliance with 44 C.F.R. § 13.36(b)-(i), such a method of advance procurement is permissible.

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If these circumstances are not met, then FEMA considers the subgrantee's contract with its vendor as a sole-source award. The subgrantee may still be able to use the existing contract if the conditions precedent for a sole-source award at 44 C.F.R. § 13.36(d)(4) (and discussed in section VII(C)(4)) are met.

14. Changes in Contracts

Subgrantee contracts will not be perfect when awarded. During performance, many changes may be required in order to fix inaccurate or defective specifications, react to newly encountered circumstances, or modify the work to ensure the contract meets subgrantee requirements. A contract "change" is any addition, subtraction, or modification of work required under a contract during contract performance. Notwithstanding the need to make appropriate contract changes, all such modifications must be within the scope of the original contract. "Cardinal" changes, however, are not permissible.

A significant change in contract work (property or services) that causes a major deviation from the original purpose of the work or the intended method of achievement, or causes a revision of contract work so extensive, significant, or cumulative that, in effect, the contractor is required to perform very different work from that described in the original contract, is a cardinal change. Such practices are sometimes informally referred to as "tag-ons." A change within the scope of the contract (sometimes referred to as an "in-scope" change) is not a "tag-on" or cardinal change. Issues related to impermissible, cardinal changes may arise within the context of a subgrantee using an existing contract or obtaining assigned contract rights from another jurisdiction.

FEMA has not developed a finite list of acceptable contract changes. Recognizing a cardinal change contract can be difficult, and a cardinal change cannot be identified easily by assigning a specific percentage, dollar value, number of changes, or other objective measure that would apply to all cases. The following provide some amplifying guidance.

i. Changes in Quantity

To categorize virtually any change in quantity as a prohibited cardinal change (sometimes referred to as an "out-of-scope" change) fails to account for the realities of the marketplace and unnecessarily restricts a subgrantee from exercising reasonable freedom to make minor adjustments contemplated fairly and reasonably by the parties when they entered into the contract.

ii. Tests

Among other things, customary marketing practices can influence the determination of which changes will be "cardinal." Other tests involve the nature and extent of the work to be performed, the amount of effort involved, whether the change was originally contemplated at the time the original contract was entered into, or the cumulative impact on the contract's quantity, quality, costs, and delivery terms.

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iii. Federal Contracting Standards

The broader standards applied in Federal contracting practice reflected in Federal court decisions, Federal Boards of Contract Appeals decisions, and Comptroller General decisions provide guidance in determining whether a change would be treated as a cardinal change. FEMA does not imply that these Federal procurement decisions are controlling, but FEMA intends to consider the collective wisdom within these decisions in determining the nature of third party contract changes along the broad spectrum between permissible changes and impermissible cardinal changes.

15. Encouraging the Use of Federal Excess and Surplus Property (44 C.F.R. § 13.36(b)(6))

The Federal regulation at 44 C.F.R. § 13.36(b)(6) encourages subgrantees to use Federal excess and surplus property in lieu of purchasing new equipment and property whenever this is feasible and reduces project costs. A subgrantee would acquire such equipment and property through the Federal Surplus Personal Property Donation Program.

Various Federal laws, including 40 U.S.C. § 549,¹³⁴ authorize the Administrator of General Services to carry out the Federal Surplus Personal Property Donation Program.¹³⁵ Under this Program, GSA will donate surplus Federal property—through a State agency for surplus property (SASP)—to eligible “public agencies”¹³⁶ and eligible “nonprofit educational or public health institutions.”¹³⁷ Surplus personal property (surplus property) means excess personal property (as defined in 41 U.S.C. § 102-36.40) not required for the needs of any Federal agency, as determined by GSA.¹³⁸

A SASP, under state law, is the agency responsible for fair and equitable distribution, through

¹³⁴ See 41 C.F.R. § 102-37.380 (What is the statutory authority for donations of surplus Federal property made under this subpart?).

¹³⁵ See 41 C.F.R. pt. 102-37 (Donation of Surplus Personal Property).

¹³⁶ 40 U.S.C. § 549(a):

“The term “public agency” means—

- (A) a State;
- (B) a political subdivision of a State (including a unit of local government or economic development district);
- (C) a department, agency, or instrumentality of a State (including instrumentalities created by compact or other agreement between States or political subdivisions); or
- (D) an Indian tribe, band, group, pueblo, or community located on a state reservation.

¹³⁷ 40 U.S.C. § 549(c)(3); 41 C.F.R. § 102-37.380(b).

¹³⁸ 41 C.F.R. § 102-37.25.

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donation, of property transferred by GSA.¹³⁹ For most public and nonprofit activities, the SASP determines if an applicant is eligible to receive property as a public agency, a nonprofit educational or public health institution, or for a program for older individuals.¹⁴⁰ A SASP may request GSA assistance or guidance in making such determinations.¹⁴¹

The process for requesting surplus property for donation varies, depending on who is making the request. As a general matter, most prospective donation recipients should submit requests for property directly to the appropriate SASP, and SASPs and public airports submit their requests to the appropriate GSA regional office.¹⁴²

16. Encouraging the Use of Value Engineering (44 C.F.R. § 13.36(b)(7))

The Federal regulation at 44 C.F.R. § 13.36(b)(7) encourages subgrantees to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions.¹⁴³ Value engineering, according to the regulation, is a “systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lower cost.”¹⁴⁴ The regulation, however, does not offer any additional explanation, and it is useful to examine the meaning of “value engineering” as used in Federal contracting for additional context.

As it relates to Federal procurement, Federal law defines “value engineering” as an “analysis of the functions of a program, project, system, product, item of equipment, building, facility, service, or supply of an executive agency” that is “performed by qualified agency or contractor personnel” and “directed at improving performance, reliability, quality, safety, and life cycle costs.”¹⁴⁵ Simply stated, value engineering is a systematic and organized approach to provide the necessary functions in a project at the lowest cost, and promotes the substitution of materials and methods with less expensive alternatives without sacrificing functionality.¹⁴⁶

¹³⁹ 40 U.S.C. § 549(a)(3); 41 C.F.R. pt. 102-37, subpart D (State Agency for Surplus Property).

¹⁴⁰ 41 C.F.R. § 102.37-385 (Who determines if a prospective donee applicant is eligible to receive surplus property under this subpart?); see also 41 C.F.R. § 102-37.130 (What are a SASP’s responsibilities in the donation of surplus property?).

¹⁴¹ Id.

¹⁴² 41 C.F.R. § 102-37.50 (What is the general process for requesting surplus property for donation?).

¹⁴³ 44 C.F.R. § 13.36(b)(7).

¹⁴⁴ Id.

¹⁴⁵ 41 U.S.C. § 1711 (Value Engineering). The law requires Federal agencies to establish and maintain value engineering processes and procedures, and such policies and procedures are prescribed in the Federal Acquisition Regulations. See 48 C.F.R. pt. 48 (Value Engineering).

¹⁴⁶ The Federal Acquisition Regulation requires Federal agencies to provide contractors a substantial financial incentive to develop and submit value engineering change proposals, and Federal contracting activities will include

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For example, GSA states that value engineering can be used in both the design and construction phase of Federal buildings. In the design phase of Federal building development, properly applied value engineering considers alternative design solutions to optimize the expected cost/worth ratio of projects at completion and elicits ideas for maintaining or enhancing results while reducing life cycle costs. In the construction phase, GSA contractors are encouraged through shared savings to draw on their special “know-how” to propose changes that cut costs while maintaining or enhancing quality, value, and functional performance.

B. COMPETITION (44 C.F.R. § 13.36(c))

The regulation at 44 C.F.R. § 13.36(c) requires a subgrantee to conduct all procurement transactions in a manner providing “full and open competition” consistent with the standards of 44 C.F.R. § 13.36. Although not defined in the regulation, “full and open competition” generally means that a complete requirement is publicly solicited and all responsible sources are permitted to compete.¹⁴⁷ The full and open competition requirement has proven to be one of the most common problems with subgrantee procurements in recent years and comprises a majority of audit findings by the OIG.

There are numerous benefits to full and open competition, such as increasing the probability of reasonable pricing from the most qualified contractors, and helping discourage and prevent favoritism, collusion, fraud, waste, and abuse.¹⁴⁸ It also allows the opportunity for minority firms, women’s business enterprises, and labor surplus area firms to participate in federally-funded work.¹⁴⁹

Noncompetitive procurements not providing for full and open competition will be scrutinized by FEMA and may be scrutinized by the OIG during an audit, even if they result in the same or lower price than if the procurement was conducted through full and open competition.

1. Situations Restrictive of Competition (44 C.F.R. § 13.36(c)(1))

The regulation at 44 C.F.R. § 13.36(c)(1) identifies seven situations that are considered to be restrictive of competition. This is an illustrative and non-exclusive list, such that FEMA may consider other situations similar to those on the list as restrictive of competition, even though

value engineering provisions in appropriate supply, service, architect-engineer, and construction contracts (except where exemptions are granted). 48 C.F.R. § 48.102.

¹⁴⁷ Cf. 48 C.F.R. § 2.101 (“Full and open competition, when used with respect to a contract action, means that all responsible sources are permitted to compete.”).

¹⁴⁸ DHS Office of Inspector General, Report No. 14-11-D, *FEMA Should Recover \$6.1 Million of Public Assistance Grant Funds Awarded to Orlando Utilities Commission under Hurricane Frances*, p. 5 (Dec. 3, 2013).

¹⁴⁹ *Id.*

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they are not specifically listed.¹⁵⁰

i. Requiring Unnecessary Experience and Excessive Bonding (44 C.F.R. § 13.36(c)(1)(i))

A subgrantee must not require unnecessary experience and excessive bonding.¹⁵¹ First, as it relates to experience, this could include requiring unnecessary levels or years of experience for contractors as organizations, the contractors' workforce, or the contractors' key personnel on a project.

Second, as it relates to bonding, the regulation discourages unnecessary bonding because it increases the cost of the contract and restricts competition, particularly by disadvantaging and small business enterprises. Many bidders have limited "bonding capacity" and unnecessary performance bonding requirements reduce a prospective bidder's or offeror's capability to bid or offer a proposal on bonded work. Small and disadvantaged businesses with a limited record of performance may have particular difficulty obtaining bonds.

FEMA does not require any additional bonding requirements other than construction bonding set forth at 44 C.F.R. § 13.36(h). However, a subgrantee might find bid, performance, or payment bonds to be desirable for work other than construction work or in amounts in excess of those required at 44 C.F.R. § 13.36(h), even though bonding can be expensive. In these cases, because bonding requirements can limit contractor participation, FEMA expects the subgrantee's bonding requirements to be reasonable and not unduly restrictive.

ii. Placing Unreasonable Requirements on Firms in Order for Them to Qualify to Do Business (44 C.F.R. § 13.36(c)(1)(ii))

The subgrantee must not place unreasonable requirements on firms in order for them to do business.¹⁵² This means that the subgrantee should include only those requirements that are the least restrictive to meet the purposes necessitating the establishment of the qualification requirements.

iii. Noncompetitive Pricing Practices between Firms or Between Affiliated Companies (44 C.F.R. § 13.36(c)(1)(iii))

Noncompetitive pricing practices between firms or between affiliated companies are restrictive

¹⁵⁰ The regulation provides that "Some of the situations considered to be restrictive of competition *include but are not limited to...*" (emphasis added). Applying the interpretive principle of ejusdem generis, this means that the list is not exhaustive.

¹⁵¹ 44 C.F.R. § 13.36(c)(1)(i).

¹⁵² 44 C.F.R. § 13.36(c)(1)(ii).

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of competition.¹⁵³ The most prominent form of noncompetitive pricing is referred to as “bid rigging,” which is the practice where conspiring competitors effectively raise prices where a purchaser acquires goods or services by soliciting competing bids. Essentially, competitors agree in advance who will submit the winning bid on a contract being awarded through the competitive bidding process.¹⁵⁴ Bid rigging takes many forms, but bid-rigging conspiracies usually fall into one or more of the following categories: bid suppression, complementary bidding, and bid rotation.

The following provides some additional explanations for these types of schemes, which are predominantly based on the Department of Justice, Anti-Trust Division’s description of them within the Federal context.

- In *bid suppression* schemes, one or more competitors, who otherwise would be expected to bid, or who have previously bid, agree to refrain from bidding or withdraw a previously submitted bid so that the designated winning competitor’s bid will be accepted.¹⁵⁵
- *Complementary bidding* (also known as “cover” or “courtesy” bidding) occurs when some competitors agree to submit bids that are either too high to be accepted or contain special terms that will not be acceptable to the buyer. Such bids are not intended to secure the buyer’s acceptance, but are merely designed to give the appearance of genuine competitive bidding. Complementary bidding schemes are the most frequently occurring forms of bid rigging, and they defraud purchasers by creating the appearance of competition to conceal secretly inflated prices.¹⁵⁶
- In *bid rotation* schemes, all conspirators submit bids but take turns being the low bidder. The terms of the rotation may vary. For example, competitors may take turns on contracts according to the size of the contract, allocating equal amounts to each conspirator or allocating volumes that correspond to the size of each conspirator company.¹⁵⁷

iv. Noncompetitive Awards to Consultants that Are on Retainer Contracts (44 C.F.R. § 13.36(c)(1)(iv))

Noncompetitive awards to consultants on retainer contracts are restrictive of competition.¹⁵⁸ The term “retainer contract” is not defined in the regulations, but is basically a form of agreement for

¹⁵³ 44 C.F.R. § 13.36(c)(1)(iii).

¹⁵⁴ U.S. Department of Justice Anti-Trust Division, *Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What to Look For* (available at <http://www.justice.gov/atr/public/guidelines/211578.pdf>).

¹⁵⁵ *Id.* at 2.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ 44 C.F.R. § 13.36(c)(1)(iv).

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general, unspecified services entered into in advance of work to be done. Under such an agreement, the consultant remains available when the client needs services during a specific period or on a specified matter.¹⁵⁹ As applied here, the regulation is making clear that it would be restrictive of competition if a subgrantee simply made a noncompetitive award for work to be done under a Public Assistance award to a consultant that was already on retainer, specifically where the noncompetitive award was for property or services not specified for delivery under the retainer contract and where the retainer contract was not originally procured in a manner that met all of the conditions of 44 C.F.R. § 13.36(b)-(i).

Example of Situation Restrictive of Competition
Use of Architect-Engineering Firm on Retainer

Background: The President declares a major disaster for the State of Z as a result of a hurricane, and the declaration authorizes Public Assistance for all counties in the State. The hurricane damaged Town W’s building and FEMA approves a project worksheet for the repair of the building. The scope of work under the project includes architectural and engineering services because of the complexity of project, with FEMA estimating the cost of these services using a cost curve. The Town has had the same architectural and engineering firm (“**Firm**”) on a retainer contract that was originally awarded 20 years earlier and has used that firm for all “needed professional services related to construction.” The retainer contract simply provides for the Firm to provide any and all architectural and engineering services needed by the Town, and the contract was not procured in compliance with the requirements at 44 C.F.R. § 13.36(b)-(i).

Following approval of the Public Assistance project, the Town orders the architectural and engineering services from Firm, and the services are subject to the same rates in the existing contract between the Firm and the Town.

Analysis: First, the Town did not conduct the original procurement through full and open competition and in compliance with 44 C.F.R. § 13.36(b)-(i). Second, the scope of work under the contract was not specifically for architectural and engineering services for building repairs, but instead for “all professional services related to construction.” This type of practice is specifically enumerated as a situation that is restrictive of competition at 44 C.F.R. § 13.36(c)(1)(iv). The Town, therefore, has not met the required procurement standards under 44 C.F.R. pt. 13.

v. Organizational Conflicts of Interest (44 C.F.R. § 13.36(c)(1)(v))

¹⁵⁹ Within the legal services industry, a “retainer” means, among other things, an advance payment of fees for work that the lawyer will perform in the future or a fee that a client pays to a lawyer simply to be available when the client needs legal help during a specified period or on a specified matter. *Black’s Law Dictionary* 1430 (9th ed. 2009).

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The regulation at 44 C.F.R. § 13.36(b)(3)—discussed earlier in this chapter—provides that “no employee, officer, or agent of the... subgrantee shall participate in selection, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved.” In addition to personal conflicts of interest, it is also important to recognize that organizational conflicts of interest can also present issues under a subgrantee’s procurement. The regulation later discusses organizational conflicts of interest at 44 C.F.R. § 13.36(c)(1)(v), providing that an “organizational conflict of interest” is a situation considered “restrictive of competition.” The regulation, however, does not define or provide additional guidance as to the scope and meaning of “organizational conflict of interest.” It is, therefore, helpful to understand the meaning and scope of organizational conflicts of interest within the Federal Government’s procurement contracting rules and processes.

Subpart 9.5 of the FAR sets the regulatory guidance governing organizational conflicts of interest in the case of Federal acquisitions. Such a conflict arises where “because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the government, or the person’s objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.”¹⁶⁰ Federal contracting officers are to avoid, neutralize, or mitigate potential significant conflicts of interest so as to prevent unfair competitive advantage or the existence of conflicting roles that might impair a contractor’s objectivity.¹⁶¹

Because conflicts may arise in factual situations not expressly described in the relevant FAR sections, the regulation advises contracting officers to examine each situation individually and to exercise “common sense, good judgment, and sound discretion” in assessing whether a significant potential conflict exists and in developing an appropriate way to resolve it.¹⁶² The situations in which organizational conflicts of interest arise, as addressed in FAR subpart 9.5 and in the decisions of the Comptroller General, can be broadly categorized into the following three groups: *unequal access to information, biased ground rules, and impaired objectivity*.

a. *Unequal Access to Information*

The first group consists of situations where a firm has access to nonpublic information as part of its performance of a government contract and where that information may provide the firm a competitive advantage in a later competition for a government contract. In these “unequal access to information” cases, the concern is limited to the risk of the firm gaining a competitive advantage; there is no issue of bias.¹⁶³

¹⁶⁰ 48 C.F.R. § 9.501.

¹⁶¹ 48 C.F.R. §§ 9.504(a), 9.505.

¹⁶² 48 C.F.R. § 9.505.

¹⁶³ Cf. *Pragmatics Inc.*, B-407320.2, 2013 U.S. Comp. Gen. LEXIS 61 (Mar. 26, 2013); *Aetna Government Health Plans*, B-254397.15, 1995 Comp. Gen. LEXIS 502 (Jul. 27, 1995).

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b. *Biased Ground Rules*

The second group consists of situations in which a firm, as part of its performance of work of a government contract, has in some sense set the ground rules for another government contract by, for example, writing the statement of work or the specifications. In these “biased ground rules” cases, the primary concern is that the firm could skew the competition, whether intentionally or not, in favor of itself.¹⁶⁴ These situations may also involve a concern that the firm, by virtue of its special knowledge of the subgrantee’s future requirements, would have an unfair advantage in the completion for those requirements.¹⁶⁵ The rules apply to the firm later serving as a prime contractor or a subcontractor on the contract for which the firm has written the statement of work or specifications.¹⁶⁶

c. *Impaired Objectivity*

The third group comprises cases where a firm’s work under one government contract could entail its evaluating itself, either through an assessment of performance under another contract or an evaluation of proposals.¹⁶⁷ In these “impaired objectivity” cases, the concern is that the firm’s ability to render impartial advice to the government could appear to be undermined by its relationship with the entity whose work product is being evaluated.¹⁶⁸

Example – Organizational and Personal Conflict of Interest

Background. The President declares a major disaster for the State of Z as a result of severe storms and flooding, and the declaration authorizes the Public Assistance for all counties in the State. In the Town of Maple, the flooding severely damages 225 private homes and public infrastructure and deposits enormous and wide scale quantities of debris across the entire Town.

FEMA considers debris removal from private property and demolition of private structures as the responsibility of a private property owner, and does not generally provide funding for such activities. However, upon a written request from the local government, FEMA may provide financial assistance for the removal of debris from private property in areas where debris is so widespread that debris removal is in the public interest and to for the demolition of unsafe private structures that endanger the public under sections 407 and 403 of the Stafford Act,

¹⁶⁴ 48 C.F.R. §§ 9.505-1, 9.505-2.

¹⁶⁵ See *The Pragma Corporation.*, B-255236, 1994 U.S. Comp. Gen. LEXIS 132 (Feb. 18, 1994).

¹⁶⁶ See, e.g. DHS Office of Inspector General, Report No. DD-11-15, *FEMA Public Assistance Grant Awarded to Saint Mary’s Academy (SMA), New Orleans, Louisiana*, p. 3 (Aug. 5, 2011) (identifying an organizational conflict of interest arising in a private nonprofit organization’s procurement; see *infra* note 397).

¹⁶⁷ 48 C.F.R. § 9.505-3.

¹⁶⁸ *Id.*

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respectively.

The Mayor of the Town requests FEMA approval for the private property debris removal and demolition of unsafe structures. FEMA, after working to obtain various information and certifications from the Mayor, approves the request. The City submits a proposed scope of work for the projects, FEMA approves them, and FEMA then awards Public Assistance projects for the private property demolition and debris removal.

The Town then publicizes a solicitation for the debris removal and demolition work on private property. The Mayor, who owns Debris Company, wants to take advantage of this contracting opportunity and resigns from his position. Following his resignation, he submits a bid on the solicitation on behalf of Debris Company and the Town awards the contract to Debris Company.

Analysis. This situation would comprise an actual or apparent organizational conflict of interest. In this case, the Mayor was individually involved in preparing the request for financial assistance to FEMA, preparing the project worksheet, and preparing the solicitation. He likely had access, therefore, to information that would have given him and his company an unfair competitive advantage over other companies. In addition, the Mayor was involved in preparing the scope of work for the project worksheet and solicitation, such that he could have, intentionally or not, skewed the solicitation in favor of his company.

vi. Specifying Only a Brand Name Product Instead of Allowing an Equal Product to Be Offered (44 C.F.R. § 13.36(c)(1)(vi))

It would be restrictive of competition for a subgrantee to specify only a “brand name” product instead of allowing “an equal” product to be offered.¹⁶⁹ This would include specifying only a “brand name” product without allowing offers of “an equal” product, or allowing “an equal” product without listing the salient characteristics that the “equal” product must meet to be acceptable for award.

When it is impractical or uneconomical to write a clear and accurate description of the technical requirements of the property to be acquired, a “brand name or equal” description may be used to define the performance or other salient characteristics of the property sought. The specific features or salient characteristics of the named brand that must be met by offerors of “an equal” proposal should be clearly stated.¹⁷⁰

¹⁶⁹ 44 C.F.R. § 13.36(c)(1)(vi).

¹⁷⁰ Cf. DHS Office of Inspector General, Report No. DD-11-15, *FEMA Public Assistance Grant Awarded to Saint Mary’s Academy (SMA), New Orleans, Louisiana*, p. 3 (Aug. 5, 2011) (Subgrantee gave a particular contractor an additional advantage on the same contract because it identified “[contractor name] or equal” in its request for bid documents but did not describe the specific technical requirements that would equal that contractor’s product.

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vii. Any Arbitrary Action in the Procurement Process (44 C.F.R. § 13.36(c)(1)(vii))

Any “arbitrary action” in the procurement process is also restrictive of competition.¹⁷¹ The term “arbitrary” means within the legal context that an action or decision was “founded on prejudice or preference rather than on reason or fact” and/or “depended on individual discretion.”¹⁷² It also means, as used in common parlance, something that is unreasonable or unsupported. Accordingly, an “arbitrary action” within the procurement context would include, among other things, a discretionary action that showed preference or prejudice to certain contractors in a manner not consistent with full and open competition. This would be the case, for example, where a subgrantee only solicits bids for a limited set of contractors for contracts exceeding \$150,000.

Arbitrary Procurement Not Consistent with the Full and Open Competition Standard

DHS Office of Inspector General Report No. 14-11-D (Dec. 2013)

FEMA Should Recover \$6.1 Million of Public Assistance Grant Funds to Orlando Utilities Commission under Hurricane Frances

Background. The Orlando Utilities Commission (“Utility”) received a Public Assistance award that included, among other things, \$6.1 million for debris removal and permanent electrical repair work necessitated by damage resulting from Hurricane Frances. The Utility solicited bids for the work only from contractors that it had used before the storm or ones that it believed had the requisite knowledge, expertise, and work force to perform the required work. As part of the audit, Utility officials stated that the Utility procured the contracts under exigent circumstances.

General Summary of OIG Finding. The OIG found, in relevant part,¹⁷³ that the solicitation of bids from only a limited pool of contractors was not full and open competition. The OIG did not question about \$2.6 million in contract costs related to emergency restoration of power. However, the OIG disagreed that emergency conditions warranted the use of the noncompetitive contracts in question to perform \$6.1 million in debris removal and electrical repair work that the Utility completed after it restored emergency power to its customers.

Please note that this audit is applying 2 C.F.R. § 215.44(a)(3)(iii)-(iv), however, those provisions are substantively similar to those at 44 C.F.R. § 13.36(c)(1)(vi).

¹⁷¹ 44 C.F.R. § 13.36(c)(1)(vii).

¹⁷² Black’s Law Dictionary 119 (9th ed. 2009) (“Arbitrary, adj. (1) Depending on individual discretion; specif., determined by a judge rather than by fixed rules, procedures, or law. (2) (Of a judicial decision) founded on prejudice or preference rather than on reason or fact.”).

¹⁷³ The OIG made other findings concerning the Utility’s procurement that are not discussed here.

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2. Local Preferences in Contractor Selection (44 C.F.R. § 13.36(c)(2))

Subgrantees must, pursuant to 44 C.F.R. § 13.36(c)(2), conduct their procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals.¹⁷⁴ Such geographic preferences may come in a variety of forms, such as the following examples.

Examples of In-State and Local Preferences

Price Matching Policies: A price matching policy is where a local jurisdiction will give an opportunity for a local vendor—within a certain percentage of the lowest bid to the solicitation—to match the lowest bid. If the local vendor does not match the bid, then the jurisdiction awards the contract to the original low bidder.

Reducing Bids During Sealed Bidding Evaluation. A jurisdiction may reduce by a certain percentage a bid submitted by a local vendor during the evaluation of bids submitted during a sealed bid process. For example, a local preference may provide that “the jurisdiction shall deem a bid submitted by a resident business to be five percent lower than the bid actually submitted.”

Adding Weight to Evaluation Factor Score During Procurement by Competitive Proposals. A jurisdiction may add weight on all evaluation factors to a resident business during procurement by competitive proposals. For example, a local preference may provide that “The jurisdiction shall award an additional five percent of total weight on all evaluation factors to a resident business.”

Set Asides. A local jurisdiction may simply set aside certain contracts for only resident companies.

There are, however, several exceptions to geographic preferences set forth in the regulation concerning licensing, architectural and engineering services, and Federal statutes.

- ***State Licensing Requirements.*** The regulation provides that subgrantees are permitted to require their contractors to be licensed in accordance with state licensing requirements.¹⁷⁵
- ***Preference for Local Architectural and Engineering Services.*** When contracting for architectural and engineering services, geographic location may be used as a selection criterion, provided there are an appropriate number of qualified firms for consideration

¹⁷⁴ 44 C.F.R. § 13.36(c)(2).

¹⁷⁵ 44 C.F.R. § 13.36(c)(2) (“Nothing in this section preempts State licensing laws.”).

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given the nature and size of the project.¹⁷⁶

- ***Geographic Preferences Mandated or Encouraged by Federal Statute.*** The regulation provides that a subgrantee may impose a state or local geographic preference when such a preference is expressly mandated or encouraged by Federal statute.¹⁷⁷

Example – Use of Prohibited In-State Geographical Preference

Scenario: The President declares a major disaster for the State of Z as a result of a hurricane, and the declaration authorizes Public Assistance for all counties in the State. The hurricane damaged Town X’s building. Following approval of a Project Worksheet to repair the damaged building, the Town solicits bids for the work to repair the building. The Town, when evaluating the bids for the work, uses a state statutorily imposed geographic preference that results in an award to a local contractor.

Answer: The use of the geographic preference was not permissible. The Federal regulation at 44 C.F.R. § 13.36(c)(2) provides that “grantees and subgrantees will conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographic preferences in the evaluation of bids or proposals,” except in those cases where “applicable Federal statutes expressly mandate or encourage geographic preference.” In this case, no Federal statute authorized the preference. The Town, therefore, has violated the Federal procurement standards at 44 C.F.R. § 13.36, even though the geographic preference was required by State law.

As it relates to the exception described above for geographic preference mandated or encouraged by Federal statute, subgrantees frequently inquire as to whether two particular Federal statutes provide the required basis to impose a geographic preference, each of which is discussed below.

i. Section 307 of the Stafford Act

Section 307 of the Stafford Act requires that, in the “expenditure of funds for debris clearance, distribution of supplies, reconstruction, or other major disaster or emergency assistance activities,” which may be carried out by contract or agreement with private organizations, firms, and individuals, “preference shall be given” to the extent “practicable and feasible” to those organizations, firms, and individuals “residing or doing business primarily in the area affected by such major disaster or emergency.”¹⁷⁸ In carrying out this authority, a contract or agreement

¹⁷⁶ 44 C.F.R. § 13.36(c)(2) (“When contracting for architectural and engineering (A/E) services, geographic location may be a selection criteria provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.”).

¹⁷⁷ *Id.*

¹⁷⁸ Stafford Act, *supra* note 76, § 307 (codified as amended at 42 U.S.C. § 5150); 44 C.F.R. § 206.10.

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may be set aside for award based on a specific geographic area.¹⁷⁹ The statute also provides that the “head of a Federal agency, as feasible and practicable, shall formulate requirements to facilitate compliance with this section.”¹⁸⁰

For direct expenditures of the Federal Government, FEMA regulations implement Section 307 at 44 C.F.R. § 206.10 and the Federal Acquisition Regulations implement Section 307 for Federal procurement at 48 C.F.R. § 26.200. FEMA has interpreted Section 307 as not applying to grantee and subgrantee procurements.

ii. Tribal Self-Determination and Education Assistance Act

Tribal preferences may be permissible if certain requirements are met under the Indian Self-Determination and Education Assistance Act.¹⁸¹ The Indian Self-Determination and Education Assistance Act sets forth the broad Federal policy to respond to the:

“... [S]trong expression of the Indian people for self-determination by assuring maximum participation in the direction of... Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.”¹⁸²

As it relates to tribal preferences, Section 7(b) (entitled “Wage and Labor Standards”) of the Indian Self-Determination and Education Assistance Act provides, in relevant part, the following:

“(b) Preference requirements for wages and grants. Any contract, subcontract, grant, or subgrant pursuant to this Act, the Act of April 16, 1934 (48 Stat. 596), as amended, **or any other Act authorizing Federal contracts with or grants to Indian organizations or for the benefit of Indians**, shall **require** that to the greatest extent feasible—

(1) preferences and opportunities for training and employment in connection with the administration of such contracts or grants shall be given to Indians; and

(2) preference in the award of subcontracts and subgrants in connection with the administration of such contracts or grants shall be given to **Indian organizations** and to **Indian-owned economic enterprises** as defined in section 3 of the Indian Financing Act of 1974... ”¹⁸³

¹⁷⁹ Stafford Act, supra note 76, § 307(a)(3) (codified as amended at 42 U.S.C. § 5150(a)(3)).

¹⁸⁰ Id. § 307(b)(3) (codified as amended at 42 U.S.C. § 5150(b)(3)).

¹⁸¹ Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2205 (1975) (codified as amended at 25 U.S.C. § 450 *et seq.*).

¹⁸² Id. § 3 (codified as amended at 25 U.S.C. § 450a).

¹⁸³ Id. § 7 (codified as amended at 25 U.S.C. § 450e).

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Applying Section 7(b) to the Public Assistance grant program, an Indian tribal government acting as either a grantee or subgrantee may give a preference in the award of contracts funded in whole or in part with Public Assistance funding to businesses falling within the meaning of “Indian organizations” or “Indian-owned economic enterprises” under the Indian Self-Determination and Education Assistance Act.

An “*Indian-owned economic enterprise*” is defined by Section 3 of the Indian Financing Act of 1974 as “any Indian-owned (as defined by the Secretary of the Interior) commercial, industrial, or business activity established or organized for the purpose of profit” provided that “such Indian ownership shall constitute not less than 51 per centum of the enterprise.”¹⁸⁴ The term “*organization*” is defined by Section 3 of the Indian Financing Act of 1974 as “unless otherwise specified, . . . the governing body of any Indian tribe . . . or entity established or recognized by such governing body for the purpose of this [Indian Financing Act of 1974].”¹⁸⁵

3. Contract Award Selection Procedures (44 C.F.R. § 13.36(c)(3))

The regulation at 44 C.F.R. § 13.36(b)(3) requires grantees to have written selection procedures for procurement transactions.¹⁸⁶ This requirement would apply, therefore, to Indian tribal governments when serving as a Public Assistance grantee, but would not apply to Indian tribal or local governments serving as a subgrantee. The requirements under the regulation are aimed at not only ensuring competition, but also avoiding dishonest and unfair practices. These written selection procedures must have the following features.

i. Clear and Accurate Description of Requirements (44 C.F.R. § 13.36(c)(3)(i))

Solicitations must have clear and accurate descriptions of the technical requirements for the materials, products, or services to be procured.¹⁸⁷ The purpose of these descriptions is to enable vendors to understand the requirements and prepare sound proposals to satisfy those requirements. The description of requirements may include a statement of the qualitative nature

¹⁸⁴ Indian Financing Act of 1974, Pub. L. No. 93-262, § 2(e), 88 Stat. 77 (codified as amended at 25 U.S.C. § 1452(e)) (“‘Economic enterprise’ means any Indian-owned (as defined by the Secretary of the Interior) commercial, industrial, or business activity established or organized for the purpose of profit: Provided, That such Indian ownership shall constitute not less than 51 per centum of the enterprise.”); see also 25 C.F.R. § 276.2(d) (which is part of the Secretary of Interior’s Uniform Administrative Requirements for Grants) (“(d) ‘Economic enterprise’ means any commercial, industrial, agricultural or business activity that is at least 51 percent Indian owned, established or organized for the purpose of profit.”).

¹⁸⁵ Id. § 2(f) (codified as amended at 25 U.S.C. § 1452(f)) (“‘Organization,’ unless otherwise specified, shall be the governing body of any Indian tribe, as defined in subsection (c) hereof, or entity established or recognized by such governing body for the purpose of this Act.”). The statute does not, however, define the term “*Indian organization*,” but separately defines the words “organization” and “Indian.”

¹⁸⁶ 44 C.F.R. § 13.36(c)(3) (“Grantees will have written selection procedures for procurement transactions.”).

¹⁸⁷ 44 C.F.R. § 13.36(c)(3)(i).

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of the material, product, or service to be procured and, when necessary, must set forth the minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use.¹⁸⁸

Grantees should avoid detailed product specifications “if at all possible.”¹⁸⁹ When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a “brand name or equal” description may be used as a means to define the performance or other salient requirements of a procurement.¹⁹⁰ The specific features of a name brand, which must be met by offerors, must be clearly stated.¹⁹¹ The description of requirements must not, in competitive procurements, contain features that unduly restrict competition.¹⁹²

This regulation notably expresses a preference for performance or functional specifications, but does not prohibit the use of detailed technical specifications when appropriate. A performance specification describes an end result, an objective, or standard to be achieved, and leaves the determination of how to reach the result to the contractor.¹⁹³ Using such a model, the grantee should describe what the product should be able to do or the services to accomplish without imposing unnecessarily detailed requirements on how to accomplish the tasks.

ii. Identification of Requirements and Evaluation Factors (44 C.F.R. § 13.36(c)(3)(ii))

The solicitation must identify all requirements that offerors must fulfill and all other factors to be used in evaluating bids or proposals (called “evaluation factors”).¹⁹⁴ FEMA does not mandate or dictate any specific evaluation factors, except that the evaluation factors must support the purposes and scope of work of the Public Assistance project award.

4. Use of Prequalified Lists (44 C.F.R. § 13.36(c)(4))

A subgrantee may use a prequalified list of persons, firms, and products among which to

¹⁸⁸ Id.

¹⁸⁹ Id.

¹⁹⁰ Id.

¹⁹¹ Id.

¹⁹² 44 C.F.R. § 13.36(c)(3)(i). A list of some of the features considered to be restrictive of competition are set forth at 44 C.F.R. § 13.36(c)(1) and discussed in supra section IV(B)(1) of this Field Manual.

¹⁹³ See Stuyvesant Dredging Co. v. United States, 834 F.2d 1576 (Fed. Cir. 1987). Design specifications, on other hand, set forth in detail the materials to be employed and the manner in which the work is to be performed, and the contractor is required to follow them as one would a road map and without deviation. See L.L. Simmons Co. v. United States, 412 F.2d 1360 (Ct. Cl. 1969).

¹⁹⁴ 44 C.F.R. § 13.36(b)(3)(ii); cf. 48 C.F.R. subpart 15.3 (Source Selection).

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compete a future procurement for services or goods.¹⁹⁵ There are, however, several conditions precedent that must be met in using such a list. First, the subgrantee will ensure that all prequalified lists of persons, firms, or products used in acquiring goods and services are current and include enough qualified sources to ensure maximum full and open competition.¹⁹⁶ Second, subgrantees must not preclude potential bidders from qualifying during the solicitation period.¹⁹⁷ In addition, the subgrantee should take care to ensure prequalification procedures are not used to restrict full and open competition and should document its justification for the use of such a list in procurement using federal funds.¹⁹⁸

Some subgrantees may have different policies as to either bids offering services where the contractor has not been pre-qualified before the solicitation or bids offering products where the products have not been prequalified before the solicitation. When using nonfederal funds, it may be the case that the subgrantee may not allow a non-qualified contractor to submit a proposal for services or products, such that vendors must obtain pre-qualification independent of any solicitation. *However, when using Public Assistance funds, subgrantees must allow vendors an opportunity to qualify during the solicitation period*, although FEMA does not expect a subgrantee to delay a proposed award (extend the solicitation period) in order to afford a vendor the opportunity to demonstrate that its product or services meet the pre-qualification requirements (*e.g.*, technical capability, management capability, prior experience, and past performance).¹⁹⁹

FEMA encourages applicants to pre-qualify debris removal contractors before an event and then conduct full and open competition among that list. In that case, the solicitation for pre-qualifying contractors must adequately define in the proposed scope of work all potential debris types, anticipated haul distances, and size of events. It is important to recognize, however, that only soliciting bids from members of that list and not allowing other vendors to qualify for that

¹⁹⁵ 44 C.F.R. § 13.36(c)(4); *cf.* 48 C.F.R. subpart 9.2 (Qualifications Requirements).

¹⁹⁶ *Id.* The regulation does not provide any amplification of what makes a pre-qualified list “current.” In the absence of any regulatory guidance, FEMA generally evaluates the currency of a list based on an amalgamation of various factors, to include whether the subgrantee updates the list with enough frequency to: (1) ensure vendors on the list continue to possess the required qualifications; (2) ensure the pre-qualification criteria apply to the current requirement being solicited; and (3) ensure that enough vendors remain on the list to ensure full and open competition.

¹⁹⁷ *Id.*

¹⁹⁸ *Cf.* 44 C.F.R. § 13.36(c)(1)(i); 48 C.F.R. § 9.202 (directing a federal agency to prepare a written justification before establishing a qualification requirement).

¹⁹⁹ *Cf.* 48 C.F.R. § 9.202(e) (which provides that a federal contracting officer need not delay a proposed award in order to provide a potential offeror with an opportunity to demonstrate its ability to meet the standards specified for qualification).

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list during the solicitation period would violate the regulation.²⁰⁰

Example – Use of a Pre-Qualified List

Scenario: The Town of Z, following a public solicitation for a Request for Qualifications, pre-qualifies five contractors to perform debris removal in the jurisdiction in the case of a disaster. A year later, the President declares a major disaster as a result of a hurricane and the declaration authorizes Public Assistance in the county in which the Town is located. The hurricane generated large quantities of debris. The Town solicits sealed bids for debris removal services only from the list of pre-qualified contractors and does not allow other contractors to qualify to be on the list during the solicitation period. The FEMA Disaster Recovery Manager (“DRM”) asks whether this procurement met the requirements of full and open competition under 44 C.F.R. § 13.36(c).

Analysis: The answer is no, the procurement did not meet the requirements of full and open competition. In this case, the Town used a pre-qualified list and did not allow other contractors to qualify to be on the list during the solicitation period. This is an express violation of 44 C.F.R. § 13.36(c)(4).

That being said, it may be the case that awarding a short-term, non-competitive debris removal work contract to one of the contractors on the pre-qualified list as described above may be permissible if the requirements of 44 C.F.R. § 13.36(d)(4) have been met, such as where the work was so time-sensitive so as to make full and open competition infeasible. However, if the contract is for a long-term operation lasting weeks or months, the contract should be competitively bid in a manner that complies with full and open competition as soon as possible.

C. METHODS OF PROCUREMENT (44 C.F.R. § 13.36(d))

The regulation at 44 C.F.R. § 13.36(d) sets forth four methods of procurement to be followed by a subgrantee. A subgrantee should use competitive procedures appropriate for the acquisition undertaken, and the procurement method must comply with state and local laws, regulations, and

²⁰⁰ See, e.g. DHS Office of Inspector General, Report No. 14-49-D, *FEMA Should Recover \$8.2 Million of the \$14.9 Million of Public Assistance Grant Funds Awarded to the Harrison County School District, Mississippi - Hurricane Katrina*, pp. 4-5 (Mar. 13, 2014) (subgrantee circumvented full and open competition when it sent bid invitations (based on qualifications) to nine sources but did not advertise publicly to allow other qualified parties the opportunity to bid); DHS Office of Inspector General, Report No. DS-13-14, *FEMA Should Recover \$4.2 Million of Public Assistance Grant Funds Awarded to the Department of Design and Construction, Honolulu, Hawaii*, p. 6 (Sep. 24, 2013) (subgrantee circumvented full and open competition and invited four *specific* contractors—with whom they were familiar—to bid on roadwork repairs); DHS Office of Inspector General, Report No. DA-13-17, *FEMA Should Recover \$3.5 Million of Public Assistance Grant Funds Awarded to the City of Gautier, Mississippi - Hurricane Katrina*, p. 3 (Jun. 7, 2013) (the subgrantee hired a debris removal contractor from a list of contractors it had contacted for price quotes approximately 1 month prior to the disaster instead of openly competing the work).

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procedures, so long as the methods of procurement at least comply with the minimum requirements of 44 C.F.R. § 13.36(d).

1. Procurement by Small Purchase Procedures (44 C.F.R. § 13.36(d)(1))

“Small purchase procedures” are those relatively simple and informal procurement methods for securing services, supplies, or other property. The regulation at 44 C.F.R. § 13.36(d)(1) authorizes such procedures for the acquisition of services, supplies, or other property valued at less than the Federal simplified acquisition threshold fixed at 41 U.S.C. § 134, and which is currently set at \$150,000.²⁰¹ A subgrantee may set lower thresholds for small purchase procedures in compliance with state or local law.

This type of procurement is often accomplished by inviting vendors to submit quotes, which the buyer then evaluates and makes an offer.²⁰² When using these procedures, a subgrantee must ensure the following:

- **Competition.** The subgrantee must obtain price or rate quotations from an “adequate number of sources,”²⁰³ which FEMA has interpreted as at least three sources.²⁰⁴
- **Prohibited Divisions.** The subgrantee may not divide or reduce the size of its procurement so as to avoid the additional procurement requirements applicable to larger acquisitions.²⁰⁵

2. Procurement by Sealed Bids (Formal Advertising) (44 C.F.R. § 13.36(d)(2))

The regulation at 44 C.F.R. § 13.36(d)(2) recognizes sealed bidding as a generally accepted method of procurement by a subgrantee. Under this method, bids are publicly solicited and a firm-fixed price contract (lump sum or unit price²⁰⁶) is awarded to the responsible offeror whose

²⁰¹ On August 30, 2010, the Civilian Agency Acquisition Council published an updated simplified acquisition threshold of \$150,000 in the Federal Register. 75 Fed. Reg. 53,129 (Aug. 30, 2010). This adjusted dollar threshold took effect on the date of publication. See Ronald Reagan National Defense Authorization Act for FY 2005, Pub. L. No. 108-375, § 807 (2005).

²⁰² Cf. 48 C.F.R. pt. 13 (Simplified Acquisition Procedures), subpart 13.1 (Procedures). In the Federal contracting context, the basis of an award can be on lowest price and/or quality. See 48 C.F.R. § 13.106-2 (Evaluation of Quotations or Offers).

²⁰³ 44 C.F.R. § 13.36(d)(1).

²⁰⁴ FEMA Recovery Fact Sheet No. 9580.212, *supra* note 91, ¶ 3.

²⁰⁵ DHS Office of Inspector General, Report No. DD-11-22, *FEMA Public Assistance Grant Awarded to Henderson County, Illinois*, pp. 3-4 (Sep. 27, 2011) (“The Federal Acquisition Regulation prohibits breaking down a proposed large purchase into multiple small purchases merely to permit use of simplified acquisition procedures. Further, although 44 CFR 13.36 does not include a specific prohibition against such circumvention, *we believe that any action specifically designed to circumvent a Federal regulation is not allowable* [emphasis added].”).

²⁰⁶ A “lump sum” is the entire contract price, and a “unit price” is the cost of one unit.

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bid, conforming to all the material terms and conditions of the invitation for bids, is the lowest in price.²⁰⁷ The steps in sealed bidding involve preparation of the invitation for bids; publicizing the invitation for bids; submission of bids; evaluation of bids; and contract award.

i. When Sealed Bidding Is Appropriate (44 C.F.R. § 13.36(d)(2)(i))

The regulation states that, in order for sealed bidding to be feasible, the following conditions should be present:

- ***Precise Specifications.*** A complete, adequate, and realistic specification or purchase description is available.²⁰⁸ As such, a vendor can simply bid a price in response to the solicitation.
- ***Adequate Sources.*** Two or more responsible bidders are willing and able to compete effectively for the business.²⁰⁹
- ***Fixed Price Contract.*** The procurement generally lends itself to a firm fixed-price contract.²¹⁰
- ***Price Determinative.*** The successful bidder can be selected on the basis of price.²¹¹ This would include price-related factors listed in the solicitation, such as transportation costs, discounts, etc. Apart from the responsibility determination discussed earlier in this Field Manual, contractor selection is not determined on the basis of other factors whose costs cannot be measured at the time of award.
- ***Discussions Unnecessary.*** Although not discussed in the regulation, another factor to be considered in determining whether sealed bidding is feasible is whether discussions with one or more bidders are expected to be unnecessary, because award can be based on price and price-related factors alone. However, this does not include pre-bid conferences with prospective bidders, which can often be useful.

The regulation also states that, for procuring construction, sealed bidding is the preferred method of procurement when it is feasible, which FEMA has reiterated in policy.²¹²

²⁰⁷ 44 C.F.R. § 13.36(d)(2). *Cf.* 48 C.F.R. § 14.103-2 (“An award is made to the responsible bidder [] whose bid is responsive to the terms of the invitation for bids and is most advantageous to the government, considering only price and the price-related factors included in the invitation...”).

²⁰⁸ 44 C.F.R. § 13.36(d)(2)(i)(A).

²⁰⁹ 44 C.F.R. § 13.36(d)(2)(i)(B).

²¹⁰ 44 C.F.R. § 13.36(d)(2)(i)(C).

²¹¹ *Id.*

²¹² FEMA Recovery Fact Sheet No. 9580.212, *supra* note 91, ¶ 5.

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ii. Requirements for Sealed Bidding (44 C.F.R. § 13.36(d)(2)(ii))

If a subgrantee uses sealed bid procedures, the regulation sets forth the following requirements.

Publicity. The subgrantee must publicly advertise the invitation for bids.²¹³ There is, however, no detailed discussion or set of guidelines in the regulation, such as the method of advertising (e.g., internet, trade journals, newspapers and other periodicals), the number of times the notice must be published, the target circulation of any advertising, and the number of days before the receipt of bids that it must be published. Therefore, the precise manner of the advertising is at the subgrantee's discretion and subject to state and local requirements.

Adequate Sources. The subgrantee must solicit bids from an adequate number of known suppliers.²¹⁴ There is, however, no detailed discussion or set of guidelines in the regulation, such as the method for soliciting bids (e.g., e-mail or letters), how many suppliers must be solicited, and the number of days before the receipt of bids a supplier must receive the solicitation. Therefore, the precise manner of such solicitations is at the subgrantee's discretion and subject to state and local requirements. As a best practice, FEMA recommends a subgrantee develop, manage, and use a solicitation mailing/e-mail list as a critical part of the procurement process. This list should include all eligible and qualified vendors that have expressed interest in receiving solicitations for the type of work, or that the subgrantee considers capable of filling the requirements of a particular procurement. The subgrantee should manage this list to ensure it is kept current and that firms expressing an interest or desire in an upcoming procurements are added. This list will also serve as the record detailing which firms received the solicitation so as to enable the subgrantee to demonstrate that it met the regulatory requirement.

Adequate Specifications. The invitation for bids, including any specifications and pertinent attachments, must describe the property or services sought in sufficient detail that a prospective bidder will be able to submit a proper bid.²¹⁵ FEMA has held that soliciting bids on a scope of work that a subgrantee intentionally misrepresents violates this requirement.²¹⁶

²¹³ 44 C.F.R. § 13.36(d)(2)(ii)(A).

²¹⁴ *Id.*

²¹⁵ 44 C.F.R. § 13.36(c)(2)(ii)(B).

²¹⁶ See Letter from Deborah Ingram, Assistant Administrator, FEMA Recovery Directorate, to Mark Schouten, Iowa Homeland Security and Emergency Management Division *re: Second Appeal—City of Cedar Rapids, PA ID 113-12000-00, Regulated Asbestos Material (RACM) Demolition and Debris Removal, FEMA-1763-DR-IA, Projects Worksheets (PW) 10433, 10523, 10524, 10525, and 10445*, Enclosed Analysis (Dec. 19, 2013):

“The Applicant then re-bid the project; however, this procurement action indicated that the estimated quantity of demolition debris was 65,000 tons as opposed to the original estimate of 100,000 tons. The Applicant intentionally bid the project at almost half the estimated debris quantity in order to allow contractors to avoid acquiring performance and payment bonds for the higher contract cost of the higher quantity of debris... Soliciting bids on a scope of work intentionally represented as approximately half of the estimated quantity does

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Sufficient Time. The invitation for bids must provide bidders sufficient time to prepare and submit bids before the date set for opening the bids and must comport with state and local requirements.²¹⁷ For comparative purposes, the Federal Acquisition Regulation identifies a variety of factors to analyze when determining the length of time to submit a bid, including the degree of urgency, complexity of the requirement, anticipated extent of subcontracting, whether use was made of pre-solicitation notices, geographic distribution of bidders, and normal transmission time for both invitations and bids.²¹⁸

Public Opening. The subgrantee must open all bids at the time and place prescribed in the invitation for bids.²¹⁹

Fixed Price Contract. A firm fixed price contract is awarded in writing to the lowest responsive and responsible bidder.²²⁰ When specified in the bidding documents, other price factors such as transportation costs and life cycle costs affect the determination of the lowest bid; payment discounts are used to determine the low bid only when prior experience indicates that such discounts are typically taken.²²¹ The subgrantee may reject any and all bids if there is a sound, documented business reason.²²² Although not provided in the regulations, the following provide some examples of circumstances under which a subgrantee may reject individual bids:

- A bid fails to conform to the essential requirements or applicable specifications of the invitation for bids.
- A bid fails to conform to the delivery schedule in the invitation for bids.
- A bid imposes conditions that would modify the requirements of the invitation for bids (since allowing the bidder to impose such conditions would be prejudicial to other bidders).
- Subgrantee determines that the bid is unreasonable as to price.
- A bid is from an entity that is suspended or debarred.

not fulfill the requirements to provide a complete, adequate and realistic specification and does not properly define the services to be procured.”

²¹⁷ 44 C.F.R. § 13.36(c)(2)(ii)(A).

²¹⁸ 48 C.F.R. § 14.202-1(b).

²¹⁹ 44 C.F.R. § 13.36(d)(2)(ii)(C).

²²⁰ 44 C.F.R. § 13.36(d)(2)(ii)(D). Although not mentioned in the regulation, a fixed price incentive contract or inclusion of an economic price adjustment provision can sometimes be appropriate.

²²¹ *Id.*

²²² 44 C.F.R. § 13.36(d)(2)(E).

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- A bidder fails to furnish a bid guarantee (when a bid guarantee is required).²²³

3. Procurement by Competitive Proposals (44 C.F.R. § 13.36(d)(3))

The regulation at 44 C.F.R. § 13.36(d)(3) recognizes the use of competitive proposals to be a generally accepted procurement method when the nature of the procurement does not lend itself to sealed bidding and the subgrantee expects that more than one source will be willing and able to submit an offer or proposal. Under this method, a fixed-price or cost-reimbursement contract is awarded to the responsible firm whose proposal is most advantageous to the subgrantee, with price and other factors considered.²²⁴ This is the method of procurement most often used for professional services in connection with construction, such as program management, construction management, feasibility studies, preliminary engineering, design, architectural, engineering, surveying, mapping, and related services. But, it is not the method commonly used for actual construction, alteration, or repair to real property, as the regulations require sealed bidding to be used for these types of services (unless it would be infeasible to do so).

i. When Procurement by Competitive Proposals Is Appropriate (44 C.F.R. § 13.36(d)(3))

Procurement through competitive proposals (also known as “negotiation”) is the appropriate method when more than one source is expected to submit an offer and either a fixed-price or cost-reimbursement contract is appropriate.²²⁵ In addition to these two factors set forth in the regulation, the following comprise additional circumstances when procurement by competitive proposals should be used:

- ***Type of Specifications.*** Property or services to be acquired are performance or functional based—or, even if described in technical specifications, other circumstances such as the need for discussions or other factors for basing the contract award on something other than price are present.
- ***Price Is Not Determinative.*** Due to the nature of the service or good to be acquired, the subgrantee cannot base the contract award exclusively on price or price-related factors. In different types of procurements through competitive proposals, the relative importance of cost or price may vary. When the subgrantee’s material requirements are clearly definable and the risk of unsuccessful contract performance is minimal, cost or price may play a dominant role in source selection. The less definitive the requirements, the more development work required, or the greater the performance risk, the more technical or

²²³ Cf. 48 C.F.R. § 14.404-2 (Rejection of Individual Bids) (which sets forth the grounds for a Federal contracting officer to reject bids for sealed bidding for Federal procurements).

²²⁴ 44 C.F.R. § 13.36(d)(3).

²²⁵ Id.

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past performance considerations may play a dominant role in source selection and supersede low price.

- ***Discussions Needed or Expected.*** Separate discussions with individual offeror(s) are expected to be necessary after they have submitted proposals. This is a key distinction from sealed bidding, in which discussions with individual bidders are not permitted and the award of the contract will be made based on price and price-related factors alone

ii. Requirements for Competitive Proposals (44 C.F.R. § 13.36(d)(3)(i)-(iv))

If a subgrantee uses procurement through competitive proposals, the regulation sets forth the following requirements:

Public Announcement. The subgrantee must publicly advertise the request for proposals.²²⁶ There is, however, no detailed discussion or set of guidelines in the regulation, such as the method of advertising (*e.g.*, internet, trade journals, newspapers and other periodicals), the number of times the notice must be published, the target circulation of any advertising, and the number of days before the receipt of bids that it must be published. Therefore, the precise manner of the advertising is at the subgrantee's discretion and subject to state and local requirements.

Adequate Sources. The subgrantee must solicit proposals from an adequate number of qualified sources.²²⁷ There is, however, no detailed discussion or set of guidelines in the regulation, such as the method for soliciting bids (*e.g.*, e-mail or letters), how many sources must be solicited, and the number of days before the receipt of bids a source must receive the solicitation. Therefore, the precise manner of such solicitations is at the subgrantee's discretion and subject to state and local requirements. As a best practice, FEMA recommends a subgrantee develop, manage, and use a solicitation mailing/e-mail list as a critical part of the procurement process as discussed above in the sealed bidding section above.

Disclosure of Evaluation Factors and Their Relative Importance. The request for proposals must identify all evaluation factors and their relative importance.²²⁸ Although FEMA does not mandate or dictate any specific evaluation factors, a best practice for the subgrantee is to have the evaluation factors for a specific procurement reflect the subject matter and the elements that are most important to the subgrantee. Evaluation factors could include, for example, technical design, technical approach, length of delivery schedules, quality of proposed personnel, past performance, and management plan. Another best practice would be for the request for

²²⁶ 44 C.F.R. § 13.36(d)(3)(i).

²²⁷ 44 C.F.R. § 13.36(d)(3)(ii).

²²⁸ 44 C.F.R. § 13.36(d)(3)(i); *cf.* 48 C.F.R. § 15.203(a).

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proposals to set forth the basis for the award (*e.g.*, “tradeoff”²²⁹ or “technically qualified/low price”²³⁰). Although all evaluation factors and their relative importance must be specified in the solicitation, the numerical or percentage ratings or weights need not be disclosed. Solicitations, in other words, must provide offerors enough information to compete equally and intelligently, but they need not give precise details of the subgrantee’s evaluation plan.²³¹

Technical Evaluation. The subgrantee must have a method for conducting technical evaluations of the proposals received and for selecting awardees.²³²

Consideration of Proposals. The subgrantee must honor, to the maximum extent practical, any response to a publicized request for proposals.²³³

Award. The subgrantee will make an award to the responsible firm whose proposal is most advantageous to the program (“best value”), with price and other factors considered.²³⁴ The award must be consistent with the publicized evaluation and award criteria.

iii. Architectural and Engineering Services (44 C.F.R. § 13.36(d)(3)(v))

One of the more common types of services that a subgrantee will procure through the competitive proposal method is architectural and engineering services. Notably, the regulation at 44 C.F.R. § 13.36(d)(3)(v) provides that subgrantees may use competitive proposal procedures for *qualifications-based* procurement of architectural/engineering professional services. The regulation does not define what is meant by “architectural/engineering professional services,” but FEMA has generally considered the term to refer to services subject to the “architect-engineering services” contracting procedures set forth in Subpart 36.6 of the Federal Acquisition Regulation, which include the following:

- Professional services of an architectural or engineering nature, as defined by applicable State law, and which the State law requires to be performed or approved by a registered

²²⁹ Under the Federal Acquisition Regulations, a “tradeoff process” is appropriate when it may be in the best interest of the Federal Government to consider award to other than the lowest priced offeror or other than the highest technically rated offeror. The process permits “tradeoffs” among cost or price and non-cost factors and allows the Federal Government to accept other than the lowest price proposal. The perceived benefits of the higher priced proposal must merit the additional cost. 48 C.F.R. § 15.101-1.

²³⁰ Under the Federal Acquisition Regulations, the lowest price technically acceptable source selection process is appropriate when best value is expected to result from selection of the technically acceptable proposal with the lowest evaluated price. Tradeoffs are not permitted, and proposals are evaluated for acceptability but not ranked using the non-cost/price factors. 48 C.F.R. § 15.101-2.

²³¹ *Cf. QualMed, Inc.*, B-254397, 73 Comp. Gen. 235 (Jul. 20, 1994).

²³² 44 C.F.R. § 13.36(d)(3)(iii).

²³³ 44 C.F.R. § 13.36(d)(3)(i).

²³⁴ 44 C.F.R. § 13.36(d)(3)(iv).

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architect or engineer.

- Professional services of an architectural or engineering nature associated with design or construction of real property.
- Other professional services of an architectural or engineering nature or services incidental thereto (including studies, investigations, surveying and mapping, tests, evaluations, consultations, comprehensive planning, program management, conceptual designs, plans and specifications, value engineering, construction phase services, soils engineering, drawing reviews, preparation of operating and maintenance manuals and other related services) that logically or justifiably require performance by registered architects or engineers or their employees.
- Professional surveying and mapping services on an architectural or engineering nature.²³⁵

Under the qualifications based procurement described at 44 C.F.R. § 13.36(d)(3)(v), competitors' qualifications are evaluated and the most qualified competitor is selected, subject to fair and reasonable compensation.²³⁶ This method, where price is not used as a selection factor, can only be used in procurement of architectural/engineering services and cannot be used to purchase other types of services (even if an architectural/ engineering firm is the one providing those other types of services).²³⁷

The regulation does not, however, provide further detail as to the process for an architectural-engineering services' qualifications-based procurement. As such, the following provides some general guidance in the case where the subgrantee requests guidance for a process to be followed:²³⁸

- **Public Announcement.** The subgrantee publicly announces all requirements for architect-services, which will include all evaluation criteria.²³⁹

²³⁵ 48 C.F.R. § 36.601-4.

²³⁶ 44 C.F.R. § 13.36(d)(3)(v).

²³⁷ Id.; see, e.g. DHS Office of Inspector General, Report No. DA-12-22, *FEMA Public Assistance Grant Funds Awarded to the Long Beach Port Commission, Long Beach, Mississippi*, pp. 3-4 (Jul. 18, 2012) (The subgrantee solicited bids from A/E firms and selected one firm using a qualifications-based selection process, however, this method of contracting, where price is not used as a selection factor, may be used only in procurement of A/E professional services and may not be used to purchase other types of services, such as project management services, from A/E firms).

²³⁸ The process for Federal procurement of architect-engineering services is set forth in 48 C.F.R. pt. 36, subpart 36.6 (Architect-Engineer Services).

²³⁹ See, e.g. DHS Office of Inspector General, Report No. OIG-14-49-D, *FEMA Should Recover \$8.2 Million of the \$14.9 Million of Public Assistance Grant Funds Awarded to the Harrison County School District, Mississippi - Hurricane Katrina*, pp. 4-5 (Mar. 13, 2014) (Subgrantee circumvented full and open competition when it sent bid

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- ***Evaluation of Qualifications.*** The subgrantee evaluates all offerors' qualifications to determine the most qualified offeror, with price excluded as an evaluation factor. This evaluation is often completed by an evaluation board that reviews the responses to the solicitation, evaluates the firms in accordance with the evaluation criteria, holds discussions with the most highly qualified firms (usually the top three), and then prepares a report for the selection authority that summarizes the evaluations and provides recommendations.
- ***Selection.*** The subgrantee's selection authority makes a final decision.
- ***Negotiations.*** Negotiations are first conducted with the most qualified offeror.
- ***Negotiations with the Next Most Qualified Offeror.*** If failing to agree on a fair and reasonable price, the subgrantee may conduct negotiations with the next most qualified offeror. Then, if necessary, the subgrantee will conduct negotiations with successive offerors in descending order until contract award can be made to the offeror whose price the subgrantee believes is fair and reasonable.

4. Procurement by Noncompetitive Proposals (44 C.F.R. § 13.36(d)(4))

Procurement by noncompetitive proposals is procurement through solicitation of a proposal from only one source or where, after a solicitation of a number of sources, competition is determined inadequate. The regulations set forth various requirements that must be met in order for a subgrantee to use this procurement method. FEMA or the grantee may require the subgrantee to submit a proposed procurement for pre-award review.²⁴⁰ It is important to recognize that a subgrantee's noncompetitive procurement may meet the requirements of state and local procurement laws and regulations, but not meet the Federal procurement standards set forth at 44 C.F.R. § 13.36(d)(4)—such a procurement would not be compliant with 44 C.F.R. pt. 13.²⁴¹

There are several key requirements with which a subgrantee must comply when conducting a noncompetitive procurement. One of the requirements is that a subgrantee must conduct a cost analysis, under which the subgrantee verifies the proposed cost data, verifies the projections of the data, and evaluates the specific elements of costs and profits.²⁴² The subgrantee must also

invitations (based on qualifications) to nine sources, but did not advertise publicly to allow other qualified parties the opportunity to bid).

²⁴⁰ 44 C.F.R. § 13.36(d)(4)(iii) (“Grantees and subgrantees may be required to submit the proposed procurement to the awarding agency for pre-award review in accordance with paragraph (g) of this section.”).

²⁴¹ See Letter from Deborah Ingram, Assistant Administrator, FEMA Recovery Directorate, to Kristi Turman, Director, South Dakota Office of Emergency Management *re: Second Appeal—County (PA ID 015-99015-00), Embankment Erosion, FEMA-1915-DR-SD, Project Worksheet (PW) 847, Enclosed Analysis* (Jul. 25, 2012).

²⁴² 44 C.F.R. § 13.36(d)(4)(ii).

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negotiate profit as a separate element of price.²⁴³

Another requirement is that a subgrantee may use procurement by noncompetitive proposals only under two conditions precedent. The first condition precedent is that the award of a contract must be “*infeasible*” under small purchase procedures, sealed bids, or competitive proposals.²⁴⁴ The regulation does not define the term “infeasible,” but the term is generally defined as not feasible, impracticable, or not capable of being done, effected, or accomplished.²⁴⁵ Whether or not a form of competitive procurement is feasible includes an analysis of the facts and circumstances of a particular incident and is intertwined with the analysis of the second condition precedent. The subgrantee must, as with all other significant items in the history, document the basis and justification for procurement by noncompetitive proposals.²⁴⁶

The second condition precedent is that one of the following four circumstances applies, as detailed in the following four subsections.

i. The Item Is Only Available from a Single Source (44 C.F.R. § 13.36(d)(4)(i)(A))

A subgrantee may, pursuant to 44 C.F.R. § 13.36(d)(4)(i)(A), use the procurement through noncompetitive proposal method when it requires services or supplies that are available from only one responsible source and no other supplies or services will satisfy its requirements. When a subgrantee issues a change order to a contract that is beyond the scope of the contract, it has made a sole source award that must meet these requirements.

The regulations do not offer further detail as to when property or services are available from only one source so as to fall within the scope of the exception.²⁴⁷ The subgrantee may use its own judgment in determining whether this condition has been met, but it should contemporaneously

²⁴³ 44 C.F.R. § 13.36(f)(2).

²⁴⁴ 44 C.F.R. § 13.36(d)(4)(i).

²⁴⁵ “Infeasible.” Merriam-Webster.com. Accessed June 17, 2014. <http://www.merriam-webster.com/dictionary/infeasible> (defining “infeasible” as “not feasible; impracticable”). The term “impracticable” means something that is not capable of being done, effected, or accomplished. “Impracticable.” Merriam-Webster.com. Accessed June 17, 2014. <http://www.merriam-webster.com/dictionary/impracticable> (defining “impracticable” as “incapable of being performed or accomplished by the means employed or at command”).

²⁴⁶ See, e.g. DHS Office of Inspector General, Report No. DS-11-12, *FEMA Public Assistance Grant Awarded to City of Paso Robles, California*, p. 3 (Sep. 13, 2011) (“District officials did not solicit competitive bids in awarding contracts and services for Project 245. Further, they could not reasonably justify why full and open competition did not occur. For example, Federal regulations allow for flexible (e.g., noncompetitive) contracting under exigent circumstances. However, exigency was not a factor for this work; the work was permanent in nature and not emergency-oriented.”).

²⁴⁷ Cf. 48 C.F.R. § 6.302-1 (entitled “Only one responsible source and no other supplies or services will satisfy agency requirements), which is the Federal Acquisition Regulation’s equivalent to the exception at 44 C.F.R. § 13.36(d)(4)(i)(A).

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document its rationale in the procurement record. That being said, the following comprise a non-exhaustive list of when FEMA would consider property and services as available from only one source.

- ***Patents or Restricted Data.*** There are patent or data rights restrictions that would preclude competition.
- ***Substantial Duplication of Costs.*** In the case of a sole source award to an existing contractor already performing work before a major disaster, there would be a substantial duplication of costs that would not be expected to be recovered through competition. This situation would arise, for example, if a contractor was in the middle of constructing a facility when the facility was damaged by a major disaster, and the scope of work under the Public Assistance project was to repair the construction work completed as of the date of the incident.

A prior working relationship between the subgrantee and the contractor, or an assertion by the subgrantee that a particular contractor is familiar with the work, will be insufficient to meet the requirements of 44 C.F.R. § 13.36(d)(4)(i)(A).²⁴⁸ Nor is it sufficient to assert that the noncompetitive procurement was the most efficient and cost effective means of procuring the needed services.²⁴⁹

²⁴⁸ DHS Office of Inspector General, Report No. 14-63-D, *FEMA Should Recover \$1.7 Million of Public Assistance Grant Funds Awarded to the City of Waveland, Mississippi-Hurricane Katrina*, pp. 5-6 (Apr. 15, 2014) (subgrantee said that they did not seek competitive bids for A/E work because it had used a particular A/E firm since 1997 or 1998 and they were familiar with the firm's work); DHS Office of Inspector General, Report No. 14-44-D, *FEMA Should Recover \$5.3 Million of the \$52.1 Million of Public Assistance Grant Funds Awarded to the Bay St. Louis Waveland School District in Mississippi-Hurricane Katrina*, p. 5 (Feb. 25, 2014) (instead of seeking competitive bids for A/E work, the subgrantee hired an A/E firm it had previously employed, the subgrantee said they were familiar with the contractor's work and that other A/E firms did not have the capacity to meet their requirements, however, the subgrantee did not provide any evidence to support their assertion that no other qualified A/E firms were available for the project work); DHS Office of Inspector General, Report No. 14-08-D, *FEMA Should Recover \$615,613 of Public Assistance Grant Funds Awarded to Orlando Utilities Commission under Hurricane Jeanne*, p. 3 (Nov. 21, 2013) (subgrantee solicited bids only from contractors that it had used before or ones that it believed had the requisite knowledge, expertise, and work force to perform the required work); DHS Office of Inspector General, Report No. DA-13-18, *FEMA Should Recover \$4.1 Million of Public Assistance Grant Funds Awarded to Orlando Utilities Commission -Hurricane Charley*, p. 3 (Jun. 5, 2013) (subgrantee solicited bids only from contractors from which they already had secured services prior to the storm, or ones that they believed had the requisite knowledge, expertise, and workforce to perform the required work); DHS Office of Inspector General, Report No. DD-13-06, *FEMA Should Recover \$6.7 Million of Ineligible or Unused Public Assistance Funds Awarded to Cameron Parish, Louisiana, for Hurricane Rita*, p. 8 (subgrantee awarded a noncompetitive A/E contract a contractor that it had used before, this pre-existing contract was more than 2 decades old, and the subgrantee incorporated it by reference into at least 17 disaster-related construction contracts).

²⁴⁹ DHS Office of Inspector General, Report No. DA-13-13, *FEMA Should Recover \$3.2 Million of Public Assistance Grant Funds Awarded to the Moss Point School District Hurricane Katrina*, p. 5 (Mar. 15, 2013) (the subgrantee disagreed that FEMA should disallow costs because it procured the A/E services at issue in the most efficient and cost effective manner under the circumstances by procuring A/E services from the A/E firm that it had

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Example – Impermissible Sole Source Contract

Scenario: The City of X owns a wastewater treatment plant that provides secondary treatment to wastewater before discharging the water into the City River. Rather than operate the plant directly, the City has procured a 10-year contract with Safe Water to operate, maintain, repair, and manage the plant. The contract between the City and Safe Water provides that Safe Water is not responsible for major repairs to the plant necessitated by, among other things, acts of God.

Severe storms and flooding damage one of the major effluent pipes at the plant. The City replaces a temporary pipe in the days of the event that enables the plant to resume operations on a normal basis until permanent repairs can be effectuated. After performing an engineering study over the next several months, the City evaluates several options for repairing the pipe provided by its engineer and makes a decision on how to proceed. The City then issues a change order to the existing contract to have Safe Water make the repairs. Safe Water makes the repairs, which cost \$520,000, and City pays Safe Water for the work.

Analysis: The change order issued by the City comprised a sole source award. Pursuant to 44 C.F.R. § 13.36(d)(4), such a contract is only permissible if award of the contract was “infeasible” under small purchase procedures, sealed bids, or competitive proposals and one of the four circumstances outlined in 44 C.F.R. § 13.36(d)(4)(i)(A)-(D) has been met. In this case, there was nothing indicating that the repair of the pipe was a service only available from Safe Water, such that the City would not be able to rely upon the circumstance outlined at 44 C.F.R. § 13.36(d)(4)(i)(A) (the item is only available from a single source). There was also no information indicating that it was infeasible to award a contract through one of the competitive forms of procurement.

ii. **The Public Exigency or Emergency for the Requirement Will Not Permit Delay Resulting from Competitive Solicitation (44 C.F.R. § 13.36(d)(4)(i)(B))**

A subgrantee may use the procurement through the noncompetitive proposal method when the public *exigency* or *emergency* for the requirement will not permit delay resulting from competitive solicitation.²⁵⁰ The regulation does not provide any additional information or guidance about the use of this exception from full and open competition, and the subgrantee may use its own judgment in determining whether this condition has been met. The subgrantee

done business with since 1970 because it was satisfied with the firm’s performance and the A/E firm was familiar with its facilities and procedures).

²⁵⁰ 44 C.F.R. § 13.36(d)(4)(i)(B). The Federal Acquisition Regulation’s equivalent to this exception from full and open competition is 48 C.F.R. § 6.302-2, entitled “unusual and compelling urgency.”

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should, however, contemporaneously document its rationale in the procurement record. That being said, the following provides several key considerations in reviewing a subgrantee's procurement to determine whether it meets the "emergency" or "exigency" circumstance under 44 C.F.R. § 13.36(d)(4)(i)(B).

a. Exigency vs. Emergency

The term "exigency" is not necessarily the same as the term "emergency," although the terms are often used interchangeably. An "exigency" is generally defined as something that is necessary in a particular situation that requires or demands immediate aid or action.²⁵¹ By comparison, the term "emergency" means an unexpected and usually dangerous situation that calls for immediate action.²⁵² One of the key distinctions between the terms, accordingly, is that an emergency will typically involve a threat to the public or private property or some other form of dangerous situation, whereas an exigency is not necessarily limited.

Examples Illustrating the Meaning of Exigency and Emergency

Emergency. A tornado impacts the City of X and causes widespread and catastrophic damage, including loss of life, loss of power, damage to public and private structures, and millions of cubic yards of debris across the City, leaving almost the entire jurisdiction inaccessible. The City needs to begin debris clearance activities immediately to restore access to the community and support search and rescue operations and power restoration. This would be an example of an "emergency" for the purposes of 44 C.F.R. § 13.36(d)(4)(i)(B).

Exigency. A tornado impacts the City of X in June and causes widespread and catastrophic damage, including damage to a City school. The City wants to repair the school and have it ready for the beginning of the following school year in September. The City estimates, based on past experience, that the sealed bidding process will take at least 90 days, and the City's engineer estimates that the repair work would take another 60 days. This would bring the project completion to well after the beginning of the school year. Rather than going through sealed bidding, the City—in compliance with State and local law—wants to solicit bids from five contractors that have previously constructed schools in the State and award the contract to the lowest bidder among those five. This would be an example of an "exigency" for the purposes of 44 C.F.R. § 13.36(d)(4)(i)(B), such that sealed bidding would be infeasible under

²⁵¹ "Exigent." Merriam-Webster.com. Accessed June 17, 2014. <http://www.merriam-webster.com/dictionary/exigent>. (defining "exigent" as "(1) requiring immediate aid or action <exigent circumstances>; (2) requiring or calling for much; demanding <an exigent client>").

²⁵² "Emergency." Merriam-Webster.com. Accessed June 17, 2014. <http://www.merriam-webster.com/dictionary/emergency>. (defining "emergency" as "(1) an unforeseen combination of circumstances or the resulting state that calls for immediate action; (2) an urgent need for assistance or relief <the mayor declared a state of emergency after the flood>").

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the circumstances and the use of some other procurement method was necessary based on the particular situation.

b. *Interplay between Infeasibility and Emergency/Exigency*

The duration of “infeasibility” is not necessarily the same as the period of emergency or exigency. As stated above, in order to use the procurement through noncompetitive proposals, the award of the contract must be “infeasible” under small purchase procedures, sealed bids, or competitive proposals. And it may be the case that—while it may be infeasible in the short-term to pursue a competitive procurement process in light of an emergency or exigency that does not permit delay—it is possible for the subgrantee to proceed with a competitive procurement to transition the work into a contract that meets the full and open competition requirements of 44 C.F.R. § 13.36.²⁵³

Example – Transitioning into a Competitive Contract After the Period of Exigency or Emergency Has Ended

DHS Office of Inspector General Report No. 14-45-D (Feb. 2014)
New Jersey Complied with Applicable Federal and State Procurement Standards when Awarding Emergency Contracts for Hurricane Sandy Debris Removal Activities

Background. Hurricane Sandy impacted the State of New Jersey in October 2012 and caused historic devastation and substantial loss of life. The amount of debris generated throughout the State was unprecedented, leaving much of New Jersey inaccessible. Although the State had pre-storm debris removal contracts in place with four vendors, the contracts did not provide sufficient options to local entities given the extensive debris removal requirements. While one option available to local entities was to procure their own emergency contracts on a municipality-by-municipality basis, the State determined that the situation required a state-level option to municipalities for immediate use given the sheer volume of debris.

²⁵³ See DHS Office of Inspector General, Report No. 14-11-D, *FEMA Should Recover \$6.1 Million of Public Assistance Grant Funds Awarded to Orlando Utilities Commission under Hurricane Frances*, p. 3 (Dec. 3, 2013) (exigent circumstances no longer existed to warrant the use of noncompetitive contracts for work related to power restoration after power was restored to customer in the jurisdiction of the subgrantee, a public utility); DHS Office of Inspector General, Report No. DD-13-07, *FEMA Should Recover \$881,956 of Ineligible Public Assistance Funds and \$862,983 of Unused Funds Awarded to St. Charles Parish School Board, Luling, Louisiana*, p.4 (Feb. 27, 2013) (subgrantee continued to use noncompetitive contracts after the “danger” had passed, which in this instance was represented by the need to stabilize the school system); DHS Office of Inspector General, Report No. DA-13-08, *FEMA Should Recover \$470,244 of Public Assistance Grant Funds Awarded to the City of Lake Worth, Florida-Hurricanes Frances and Jeanne*, p.4 (Dec. 4, 2012) (the need to restore electrical power constituted exigent circumstances that warranted the use of noncompetitive contracts through September 29, 2004, because lives and property were at risk, however, the subgrantee should have openly competed the permanent repair work after that date because exigent circumstances no longer existed to justify the use of noncompetitive contracts).

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The State ultimately awarded a noncompetitive contract (permitted under state law during periods of public “exigency”) to a debris removal contractor, and then made this contractor available to local municipalities under the State’s cooperative purchasing program. After reviewing the State’s procurement process, FEMA notified the State that it would reimburse all eligible program costs under the noncompetitive contract for a period of 60 days.

General Summary of Relevant OIG Finding. The OIG concluded that that use of the debris removal contract by a municipality during FEMA’s 60-day authorization period would comply with State procurement standards and 44 C.F.R. § 13.36. However, the OIG also stated that a municipality would need to use a competitive process to award contracts for debris removal activities outside the 60-day period to comply with FEMA guidelines and 44 C.F.R. § 13.36.

c. “Emergency” and “Emergency Work” Are Distinguishable

The term “emergency” for the purposes of 44 C.F.R. § 13.36(d)(4)(i)(B) is separate and distinct from “emergency work” as that term is used in the Public Assistance context. “Emergency work” in the Public Assistance context means either Public Assistance Categories A (debris removal) or B (emergency protective measures) that is necessitated because of immediate threats to life, improved property, public health and safety. However, just because the subgrantee is performing “emergency work” does not relieve the subgrantee from the requirements of full and open competition, as not all emergency work is so time sensitive to the point where full and open competition is “infeasible.”

This situation will often arise within the context of debris removal performed after a major disaster or emergency. Under current FEMA policy, FEMA has stated that long-term debris removal lasting weeks or months generally requires competitive bidding to conform with the requirements of 44 C.F.R. § 13.36.²⁵⁴ FEMA guidance states that an applicant may use a noncompetitive contract for short-term debris removal, but should competitively bid the contract as soon as possible.²⁵⁵ This FEMA guidance is often quoted and applied by the Office of Inspector General (“OIG”) in various audits.²⁵⁶

²⁵⁴ FEMA Fact Sheet No. 9580.212, *supra* note 91, § 8.

²⁵⁵ *Id.*

²⁵⁶ See, e.g. DHS Office of Inspector General, Report No. 14-45-D, *New Jersey Complied with Applicable Federal and State Procurement Standards When Awarding Emergency Contracts for Hurricane Sandy Debris Removal Activities*, p. 6 (Feb. 27, 2014) (“Although considered ‘emergency work’ under FEMA’s Public Assistance program, FEMA has determined that long-term debris removal lasting weeks or months generally requires competitive bidding to conform with Federal law and procurement standards set forth in 44 CFR 13.36. FEMA guidance states that an applicant may use a noncompetitive contract for short-term debris removal, but should competitively bid the contract as soon as possible.”); DHS Office of Inspector General, Report No. DA-12-20, *FEMA Public Assistance Grant Funds Awarded to City of Miramar; Florida-Hurricane Wilma*, p. 4 (Jul. 15, 2012) (“the subgrantee said that exigent circumstances warranted the use of noncompetitive contracting and that they acted in the best interest of

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The other key principle to bear in mind is that an “emergency” or “exigency” circumstance under 44 C.F.R. § 13.36(d)(4)(i)(B) may apply to permanent work under a Public Assistance project. It is the nature of the exigency or emergency, not the category of work, upon which this circumstance depends. However, while not dispositive, the “permanent” versus “emergency” nature of the work is sometimes considered by the OIG in making the determination as to whether an exigency or emergency existed so as to warrant a noncompetitive procurement.²⁵⁷

iii. Awarding Agency Authorizes Noncompetitive Proposals (44 C.F.R. § 13.36(d)(4)(i)(C))

A subgrantee may use the procurement through the noncompetitive proposal method when the “awarding agency” authorizes noncompetitive proposals.²⁵⁸ The regulation at 44 C.F.R. § 13.36 defines an “awarding agency” to mean “(1) with respect to a grant, the Federal agency, and (2) with respect to a subgrant, the party that awarded the subgrant.” As applied to a non-state Public Assistance subgrantee, therefore, the “awarding agency” is the State.²⁵⁹ It should be reemphasized here that the Federal procurement standards at 44 C.F.R. § 13.36(a) require a State to follow the same policies and procedures it uses for procurements from its non-Federal funds when it procures property and services under a Public Assistance grant award.²⁶⁰ It should also be reemphasized that local and Indian tribal governments *must use their own procurement procedures that reflect applicable State and local law and regulations*, provided that the procurements conform to applicable Federal law and standards identified at 44 C.F.R. § 13.36(b)-(i).²⁶¹ The requirement of State, local, and Indian tribal governments to follow their

their citizens. However, the contracts in question were awarded for debris removal from the [subgrantee’s] rights-of-way. FEMA has determined that such activity is not a public exigency or emergency that relieves the applicant of competitive bidding (FEMA Policy 9580.4, Fact Sheet: *Debris Operations – Clarification: Emergency Contracting vs. Emergency Work*, January 2001).”).

²⁵⁷ See, e.g. DHS Office of Inspector General, Report No. DS-11-12, *FEMA Public Assistance Grant Awarded to City of Paso Robles, California*, p. 3 (Sep. 13, 2011) (“However, exigency was not a factor for this work; the work was permanent in nature and not emergency-oriented [emphasis added].”); DHS Office of Inspector General, Report No. DA-13-13, *FEMA Should Recover \$3.2 Million of Public Assistance Grant Funds Awarded to the Moss Point School District Hurricane Katrina*, p. 5 (Mar. 15, 2013) (“Although Federal regulation 44 CFR 13.36 (d)(4)(i)(B) allows procurements by noncompetitive proposals when the public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation, the contract work in question was for permanent work and not emergency work [emphasis added].”). But see DHS Office of Inspector General, Report No. DD-13-11, *FEMA Should Recover \$46.2 Million of Improper Contracting Costs from Federal Funds Awarded to the Administrators of the Tulane Educational Fund* (Aug. 15, 2013) (in this audit, the Inspector General found exigent circumstances warranting a noncompetitive contract for permanent work).

²⁵⁸ 44 C.F.R. § 13.36(d)(4)(i)(C).

²⁵⁹ Note, however, that competition must still be infeasible per 44 C.F.R. § 13.36(d)(4)(i) and otherwise comply with applicable state and local laws and regulations per 44 C.F.R. § 13.36(b).

²⁶⁰ 44 C.F.R. § 13.36(a).

²⁶¹ 44 C.F.R. § 13.36(b)(1); see also DHS Office of Inspector General, Report No. 14-46-D, *FEMA’s Dissemination of Procurement Advice Early in Disaster Response Periods*, p. 3 (Feb. 28, 2014) (“Federal Regulation 44 CFR

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own laws, regulations, policies, and procedures is not obviated by 44 C.F.R. § 13.36(d)(4)(i)(C), such that any noncompetitive action authorized under this section must still conform to the laws, regulations, policies, and procedures governing the procurements of the State, local, and Indian tribal grantee and subgrantee.

iv. Competition Is Deemed Inadequate After the Solicitation of a Number of Sources (44 C.F.R. § 13.36(d)(4)(i)(D))

A subgrantee may use the procurement through the noncompetitive proposal method when, after the solicitation of a number of sources, the subgrantee determines competition to be inadequate.²⁶² This situation could arise when, among other things, the subgrantee has advertised the invitation for bids or request for proposals and solicited a number of sources, but has received only a single bid or proposal; received only a single responsive bid or proposal; or received no responsive bids or proposals.

FEMA considers competition to be “inadequate” in the context of 44 C.F.R. § 13.36(d)(4)—and the procurement by noncompetitive proposal method thus legally available to a subgrantee—when a subgrantee has complied with all of the procurement standards and the receipt of a single offer or bid, single responsive offer or bid, or no responsive bids or proposals is caused by conditions outside the subgrantee’s control. FEMA will not, on other hand, consider competition inadequate where a subgrantee did not sufficiently publicize the requirement, solicited only a few sources that chose not to submit a proposal, set unduly restrictive specifications, and/or took arbitrary actions or failed to take other actions that resulted in the inadequate competition. In those cases, adequate competition may very well be possible, it is just that the subgrantee failed to take the proper steps and actions to ensure such competition.

It is important, therefore, for a subgrantee to document its justification for why there is inadequate competition and why it moved forward with a noncompetitive award without cancelling the solicitation and resoliciting offers or bids. In making this justification, it may be necessary for the subgrantee to evaluate whether or not it sufficiently publicized the invitation for bids or requests for proposals and/or solicited an adequate number of firms. It may also be necessary to speak to those firms solicited to find out why they did not submit offers or bids. If the reason is an overly restrictive specification or delivery requirement, then the subgrantee would need to evaluate whether it should cancel the solicitation, change that specification to allow for more bids or offers, and re-solicit bids or offers. If the subgrantee chooses to move forward with the award in light of the restrictive specification, then the subgrantee should document in the procurement file why the restrictive specification or delivery requirement was necessary and could not be modified so as to enable additional competition.

13.36(a) allows States, as grantees, to use their own procurement procedures. *Other grantees and subgrantees may also use their own procurement procedures, but those procedures must conform to Federal law and standards stated in 44 CFR 13.36(b) through (i)* [emphasis added].”)

²⁶² 44 C.F.R. § 13.36(d)(4)(i)(D).

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D. CONTRACTING WITH SMALL AND MINORITY FIRMS, WOMEN’S BUSINESS ENTERPRISES, AND LABOR AREA SURPLUS FIRMS (44 C.F.R. § 13.36(e))

The regulation at 44 C.F.R. § 13.36(e)(1) requires that a subgrantee take all necessary affirmative steps to assure that minority firms, women’s business enterprises, and labor area surplus firms are used when possible.²⁶³ Notably, this is not an authority to provide set-asides, but rather a requirement aimed at ensuring maximum participation of these types of firms.

1. Required Affirmative Steps to Assure Certain Firms Are Used (44 C.F.R. § 13.36(e)(2))

A subgrantee must, at a minimum, take the following six “affirmative steps” to assure that minority firms, women’s business enterprises, and labor area surplus firms are used when possible:

- ***Solicitation Listing.*** The subgrantee must place qualified small and minority businesses and women’s business enterprises on solicitation lists.²⁶⁴
- ***Soliciting.*** The subgrantee must assure that small and minority businesses, and women’s business enterprises are solicited whenever they are potential sources.²⁶⁵
- ***Breaking Up Requirements.*** The subgrantee must divide total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority business, and women’s business enterprises.²⁶⁶ In applying this requirement, it is important to recognize that dividing up a large requirement into smaller parts so as to fall beneath the small acquisition threshold is prohibited, as would the opposite technique of bundling requirements so that it precludes small businesses, minority firms, and women’s business enterprises from being a prime contractor.²⁶⁷ Notwithstanding, dividing a bona fide large requirement into smaller components to facilitate participation by small businesses would be acceptable.
- ***Accommodating Delivery Schedules.*** The subgrantee must establish delivery schedules, where the requirement permits, which encourage participation by small and minority

²⁶³ 44 C.F.R. § 13.36(e).

²⁶⁴ 44 C.F.R. § 13.36(e)(1)(i).

²⁶⁵ 44 C.F.R. § 13.36(e)(1)(ii).

²⁶⁶ 44 C.F.R. § 13.36(e)(1)(iii).

²⁶⁷ See DHS Office of Inspector General, Report No. DD-11-22, *FEMA Public Assistance Grant Awarded to Henderson County, Illinois*, p. 3-4 (Sep. 27, 2011) (“The Federal Acquisition Regulation prohibits breaking down a proposed large purchase into multiple small purchases merely to permit use of simplified acquisition procedures. Further, although 44 CFR § 13.36 does not include a specific prohibition against such circumvention, we believe that any action specifically designed to circumvent a Federal regulation is not allowable [emphasis added].”).

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business, and women’s business enterprises.²⁶⁸

- **Using Federal Agencies.** Using the services and assistance of the Small Business Administration, and the Minority Business Development Agency of the Department of Commerce.²⁶⁹
- **Affirmative Steps for Contractors.** The subgrantee must require the prime contractor, if subcontracts are to be let, to take the five affirmative steps described above.²⁷⁰

2. Meaning of Small Business, Minority Business, Labor Area Surplus Firm, and Women’s Business Enterprise

The regulation at 44 C.F.R. § 13.36(e) does not, however, define the terms women’s businesses enterprise, small business, minority business, or labor surplus area firm. In the absence of such definitions, FEMA applies the following meanings of those terms when evaluating compliance with the requirements of 44 C.F.R. § 13.36.

i. Labor Surplus Area Concern

A labor surplus area concern (*i.e.*, business)²⁷¹ is one that, together with its first tier subcontractors, will perform substantially in labor surplus areas.²⁷² “Performing substantially” means that the costs incurred on account of manufacturing, production, or appropriate services in labor surplus areas exceed 50% of contract price,²⁷³ and a labor surplus area is a civil jurisdiction that has a civilian average annual unemployment rate during the previous two calendar years of 20 percent or more above the average annual civilian unemployment rates for all States during the same 24-month reference period.²⁷⁴

²⁶⁸ 44 C.F.R. § 13.36(e)(1)(iv).

²⁶⁹ 44 C.F.R. § 13.36(e)(1)(v).

²⁷⁰ 44 C.F.R. § 13.36(e)(1)(vi).

²⁷¹ A “concern” means any business entity organized for profit (even if its ownership is in the hands of a nonprofit entity) with a place of business located in the United States and which makes a significant contribution to the U.S. economy through payment of taxes and/or use of American products, material and/or labor, etc. “Concern” includes but is not limited to an individual, partnership, corporation, joint venture, association, or cooperative. 48 C.F.R. § 19.001.

²⁷² 48 C.F.R. § 2.101 (which defines the term “labor area surplus concern” for the purposes of the Federal Acquisition Regulations); *see also* Executive Order 12073, *Federal Procurement in Labor Surplus Areas* (Aug. 16, 1978) (which requires executive agencies to emphasize procurement set-asides in labor surplus areas).

²⁷³ 48 C.F.R. § 2.101.

²⁷⁴ 20 C.F.R. § 654.5; 48 C.F.R. § 2.101. The Secretary of Labor is responsible under Executive Order 12073 for classifying and designating labor surplus areas.

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ii. Small Business

FEMA will accept the meaning of a small business established under the applicable state, local, and Indian tribal laws and regulations. Where state, local, and Indian tribal laws and regulations do not provide a definition of small business, FEMA considers a business that is independently owned and operated, not dominant in the field of operation in which it is bidding on contracts, and qualified as a small business under the Small Business Administration criteria and size standards at 13 C.F.R. pt. 121.²⁷⁵

iii. Women's Business Enterprise

FEMA will accept the meaning of women's business enterprise established under the applicable state, local, and Indian tribal laws and regulations. Where state, local, and Indian tribal laws and regulations do not provide a definition of small business, FEMA considers a women's business enterprise as an enterprise that is: (a) at least 51 percent owned by one or more women or, in the case of a publicly owned business, at least 51 percent of the stock is owned by one or more women; and (b) whose management and daily operations are controlled by one or more women.

iv. Minority Business

FEMA will accept the meaning of a minority business established under the applicable state, local, and Indian tribal laws and regulations. Where state, local, and Indian tribal laws and regulations do not provide a definition of small business, FEMA considers a minority business as a business that is (a) at least 51 percent owned by one or more minority group members or, in the case of a publicly owned business, at least 51 percent of the stock is owned by one or more minority group members; and (b) whose management and daily operations are controlled by one or more minority group members.

3. Set Asides for Small Businesses, Minority Firms, and Women's Business Enterprises

A recurring issue within the context of subgrantee procurement is whether the subgrantee may set-aside a certain percentage of its contracting under a Public Assistance project award for small businesses, minority firms, and women's business enterprises. The regulation at 44 C.F.R. § 13.36(c) requires that a subgrantee conduct all procurements in a manner providing full and open competition, and makes no provision for specific exceptions to this requirement in the case of small businesses, minority firms, and women's business enterprises. Notably, the regulation at 44 C.F.R. § 13.36(e) does not provide an express authority to provide set-asides or quotas for these types of firms, but rather only for a subgrantee to take certain steps to ensure maximum participation of these types of firms. As such, FEMA views set-asides and other quotas as

²⁷⁵ 13 C.F.R. pt. 121 (Small Business Size Regulations).

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impermissible, unless specifically authorized by federal law.²⁷⁶

E. COST OR PRICE ANALYSIS (44 C.F.R. § 13.36(f))

1. General Requirement (44 C.F.R. § 13.36(f)(1))

The regulation at 44 C.F.R. § 13.36(f)(1) states that a subgrantee must perform a cost or price analysis in connection with every federally assisted procurement action, including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation but, as a starting point, grantees must make and subgrantees should make independent cost estimates before receiving bids or proposals.²⁷⁷

i. Cost Analysis

The regulation requires a subgrantee to perform a cost analysis when the offeror is required to submit the elements of its estimated cost under professional, consulting, and architectural engineering services contracts.²⁷⁸ A subgrantee is also required to perform a cost analysis for sole source procurements when adequate price competition is lacking, including contract modifications or change orders. However, a subgrantee need not complete a cost analysis if it can establish price reasonableness on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public or based on prices set by law or regulation.²⁷⁹

ii. Price Analysis

When a cost analysis is not necessary, the subgrantee must perform a price analysis in all other instances to determine the reasonableness of the proposed contract price.²⁸⁰ Price analysis is where the offeror's prices are compared to each other and/or established market or catalogue

²⁷⁶ See, e.g. Indian Self-Determination and Education Assistance Act, *supra* note 181.

²⁷⁷ 44 C.F.R. § 13.36(f)(1). This regulation provides, in relevant part, that “The method and degree of analysis is dependent on the facts surrounding the particular procurement situation but, as a starting point, *grantees* must make independent cost estimates before receiving bids or proposals.” (emphasis added). By referencing only the “grantee” and not the “subgrantee,” this means that the independent cost estimate is not a mandatory requirement for subgrantees. Although it may technically not be a mandatory requirement, FEMA recommends that subgrantees conduct an independent cost estimate. There are numerous benefits to such an estimate, to include ensuring a clear basis for the subgrantee’s determination that the benefits of the procurement warrant the cost, provides a basis for cost and price analysis, ensuring that the subgrantee select the appropriate method of procurement (*e.g.*, does not choose small purchase procedures when the estimate exceeds \$150,000), and ensures proper bonding requirements (which are different when exceeding the \$150,000 threshold).

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

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prices. Using this technique, a subgrantee compares the actual prices offered by various offerors to determine the reasonableness of the proposed price.

iii. Amplifying Guidance Concerning Cost and Price Analysis – Federal Acquisition Regulations

The regulation at 44 C.F.R. § 13.36(f) does not provide any additional detail about how to complete a price or cost analysis. Due to the lack of guiding information in the regulations, Public Assistance subgrantees may inquire as to what techniques or steps they must perform in order to meet the regulatory requirements to conduct a price or cost analysis outside the scope of what is provided in the regulations.

The first response to any inquiry about cost or price analysis techniques is that the subgrantee should use its own procurement procedures, which reflect applicable State, local, and Indian tribal laws and regulations, including the cost and price analysis requirements of those laws and regulations.²⁸¹

The second response to any inquiry is that FEMA has provided some guidance on “cost analysis” for debris removal contracts in FEMA Fact Sheet No. 9580.201. But, it is important to recognize that FEMA has not provided guidance on “price analysis” for debris removal contracts and not provided guidance for a cost or price analysis for any other type of contract.

The third response to any inquiry is that—in light of the lack of guidance for price and cost analysis in the regulations and in FEMA policy—FEMA will generally utilize guiding principles in the Federal Acquisition Regulations as a guide to analyze the cost or price analysis conducted by the Public Assistance subgrantee. The following sections provide an overview of the Federal Acquisition Regulation’s general pricing concepts and approach towards price and cost analysis.

iv. General Federal Acquisition Regulation Pricing Concepts

There are several general pricing concepts that one can extrapolate from the Federal Acquisition Regulations. The first concept is that the Federal Government’s policy is to purchase supplies and services at fair and reasonable prices.

The second concept is the Federal Government must obtain necessary information in the least burdensome manner possible, given the circumstances of each procurement. A Federal contracting officer must generally use the following order of precedence (to the extent certified cost or pricing data is not required by law) when requesting information to determine price reasonableness:

- Request no additional information if the agreed upon price is based upon adequate

²⁸¹ Similarly, nonprofit organizations should follow their own procedures for cost and price analysis in compliance with any applicable (if any) State, local, and/or Indian tribal government laws and regulations.

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price competition.

- If adequate price competition among competing offerors is not present, request additional price information from sources other than the offeror(s) to the maximum extent practicable.
- Request other than certified cost or pricing data if needed to determine fair and reasonable price.²⁸²

The third concept is that Federal contracting officers use a “proposal analysis” to determine if a proposed contract is fair and reasonable.²⁸³ In performing proposal analyses, Federal contracting officers use a variety of techniques, with some techniques being required under certain circumstances. The analytical techniques described in the FAR may be used, singly or in combination with others, to ensure that the final price is fair and reasonable, and the complexity and circumstances of each acquisition determines the level of details of the analysis required.²⁸⁴ Two of the four techniques are price analysis and cost analysis, which are further discussed below.²⁸⁵

a. Price Analysis under the Federal Acquisition Regulations

The Federal Acquisition Regulations describe price analysis as the process of examining and evaluating a proposed price²⁸⁶ without evaluating its separate cost elements and proposed profit.²⁸⁷ This is the minimum analysis a Federal contracting officer must use whenever acquiring commercial items,²⁸⁸ and is the analysis normally used in sealed bidding.²⁸⁹

The techniques for conducting a price analysis include, but are not limited to, the following:

- (1) Comparison of proposed prices received in response to the solicitation. *Normally,*

²⁸² 48 C.F.R. § 15.402(a)(2).

²⁸³ 48 C.F.R. § 15.404-1(a).

²⁸⁴ 48 C.F.R. § 15.404-1(a)(1).

²⁸⁵ The other two techniques not discussed here are the “cost-realism analysis” and “technical analysis...”.

²⁸⁶ “Price” means cost plus any fee or profit applicable to the contract type. 48 C.F.R. § 15.401. This definition is anachronistic because it treats the sum of the cost and fee on a cost-reimbursable contract as a “price” when the term is usually associated with a fixed-price contract, which calls for the payment of a negotiated amount, established at the outset or by redetermination, for satisfactorily completed work.

²⁸⁷ 48 C.F.R. § 15.404-1(b). “Profit” is the amount realized by a contractor after the costs of performance (both direct and indirect) are deducted from the amount to be paid under the terms of the contract. In procurement by negotiation where there is a cost-analysis, the government negotiates a projected amount of profit in accordance with 48 C.F.R. § 15.404-4.

²⁸⁸ 48 C.F.R. § 14.403-3(c).

²⁸⁹ 48 C.F.R. § 14-408.

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adequate price competition establishes a fair and reasonable price.

- (2) Comparison of the proposed prices to historical prices paid, whether by the government or other than the government, for the same or similar items.

Notably, the Federal Acquisition Regulation states that techniques (1) and (2) are the preferred techniques—but, if the Federal contracting officer determines that information on competitive proposed prices or previous contract prices is not available or is insufficient to determine that the price is fair and reasonable, the contracting officer may use the following techniques (3)-(7) as appropriate to the circumstances applicable to the acquisition.²⁹⁰

- (3) Use of parametric estimating methods/application of rough yardsticks (such as dollars per horsepower or other units) to highlight significant inconsistencies that warrant additional pricing inquiry.
- (4) Comparison with competitive published price lists, published market prices or commodities, similar indices, and discount or rebate arrangements.
- (5) Comparison of proposed prices with independent government cost estimates.
- (6) Comparison of proposed prices with prices obtained through market research for the same or similar items.
- (7) Analysis of data other than certified cost or pricing data²⁹¹ provided by the offeror.

b. Cost Analysis under the Federal Acquisition Regulations

The Federal Acquisition Regulation describes cost analysis as the review and evaluation of the separate cost elements and proposed profit or fee contained in an offeror's or contractor's proposal in order to determine a fair and reasonable price and the application of judgment to determine how well the proposed costs represent what the cost of the contract should be, assuming reasonable economy and efficiency.²⁹² Cost analysis is used to establish the basis for negotiating contract prices when price competition is inadequate or lacking altogether and when price analysis, by itself, does not ensure price reasonableness.²⁹³ Cost analysis is also required

²⁹⁰ 48 C.F.R. § 15.404-1(b)(3).

²⁹¹ "Certified cost and pricing data" are cost or pricing data that are required to be submitted in accordance with 48 C.F.R. § 15.403-4 and 15.403-5 and have been required to be certified in accordance with § 15.406-2. This certification states that, to the best of the person's knowledge and belief, the cost and pricing data are accurate, complete, and current as of a date certain before contract award. Cost or pricing data are required to be certified in certain procurements, such as negotiated procurements expected to exceed \$700,000 (subject to exceptions).

²⁹² 48 C.F.R. § 15.404-1(c).

²⁹³ 48 C.F.R. § 16.104(c). One generally sees cost analysis in contracting by negotiation (which is equivalent to procurement through competitive proposals in the grant context).

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when the offeror is required to submit certified cost and pricing data.

The Federal contracting officer may use various cost analysis techniques and procedures to ensure a fair and reasonable price, given the circumstances of the acquisition. Such techniques and procedures include the following:

- (1) Verification of cost data or pricing data and evaluation of cost elements.
- (2) Evaluation of the effect of current practices on future costs.
- (3) Comparison of costs proposed for individual cost elements with previously incurred actual costs, previous cost estimates, independent government estimates, and forecasts.
- (4) Verification that the offeror's cost submissions are in compliance with FAR cost principles and cost accounting standards.
- (5) Identification of any cost or pricing data needed to make the proposal accurate, complete, and current.

2. Profit as a Separate Element of Price (44 C.F.R. § 13.36(f)(2))

An allowable cost under a Public Assistance project award includes reasonable fees or profit of the subgrantee's contractor, but not fee or profit of the subgrantee.²⁹⁴ The subgrantee is required to negotiate profit as a separate element of cost for each contract in which there has been no price competition, and in all acquisitions in which the subgrantee performs a cost analysis.

To establish a fair and reasonable profit, the subgrantee should consider the complexity of the work to be performed, the risk undertaken by the contractor, the contractor's investment, the amount of subcontracting, the quality of the contractor's record of past performance, and industry profit rates in the surrounding geographical area for similar work.²⁹⁵

3. Costs or Prices Based on Estimated Costs (44 C.F.R. § 13.36(f)(3))

Costs or prices based on estimated costs for contracts under grants will be allowable only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with Federal cost principles.²⁹⁶

²⁹⁴ 44 C.F.R. § 13.36(f)(2); cf. 48 C.F.R. § 16.103 (Negotiating Contract Type) (“(a) The objective is to negotiate a contract type and price (or estimated cost and fee) that will result in reasonable contractor risk and provide the contractor with the greatest incentive for efficient and economical performance.”).

²⁹⁵ The geographic area served is the State, county, congressional district, and/or metropolitan statistical area where the vendor provides or delivers products and/or services.

²⁹⁶ 44 C.F.R. § 13.36(f)(3)).

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4. Cost Plus a Percentage of Cost and Percentage of Construction Costs Contracts (44 C.F.R. § 13.36(f)(4))

The regulation at 44 C.F.R. § 13.36(c)(4) prohibits subgrantees from using a cost plus percentage of cost or percentage of construction costs contract.²⁹⁷ The purpose for this prohibition is to prohibit contracts that incentivize a contractor to increase its profits by increasing costs of performance.²⁹⁸

A cost plus percentage of cost contract is a cost reimbursement contract containing some element that obligates the subgrantee to pay the contractor an amount (in the form of either profit or cost), undetermined at the time the contract was made and to be incurred in the future, based on a percentage of future costs.²⁹⁹ The following four-part test can be utilized to determine if a certain contract is a prohibited cost-plus-percentage-of-cost contract:

- Payment is on a pre-determined percentage rate;
- The pre-determined percentage rate is applied to actual performance costs;
- The contractor's entitlement is uncertain at the time of contracting; and
- The contractor's entitlement increased commensurately with increased performance costs.³⁰⁰

The prohibition applies to either a cost-reimbursement contract or a fixed-price contract if either contains any element that is paid as a percentage of other costs, thus permitting payment to increase if the contractor incurs greater costs.³⁰¹ The subgrantee must also apply the prohibition

²⁹⁷ A cost-plus-percentage-of-cost system of contracting is prohibited under Federal acquisition by 10 U.S.C. § 2306(a) and 41 U.S.C. § 3905(a). See 48 C.F.R. § 16.102(c).

²⁹⁸ Cf. *Decision of the Comptroller General*, B-119292, 1954 U.S. Comp. Gen. LEXIS 649 (Oct. 8, 1954) (“Section 4(B) of the Armed Services Procurement Act of 1947 prohibits the use of the cost-plus-a-percentage-of-cost system of contracting. The intent of Congress in opposing this system is clearly discernible in the legislative history of this and other acts regulating government procurement. Conditions which it sought to prevent are those which provide an incentive and an opportunity for a contractor or subcontractor to increase his profit by increasing his costs at the expense of the government.”).

²⁹⁹ See *Muschany v. United States*, 324 U.S. 49, 61-62 (1944).

³⁰⁰ *Federal Aviation Administration—Request for Advance Decision*, B-195173, 58 Comp. Gen. 654 (1979); *Marketing Consultants International Limited*, B-183705, 55 Comp. Gen. 554 (1975).

³⁰¹ Letter from Deborah Ingram, Assistant Administrator, FEMA Recovery Directorate, to Mark Ghilarducci, Secretary, California Emergency Management Agency re: *Second Appeal—Spanish Flat Water District, PA ID 055-UP3ZT-00, Sewer Treatment Plant Effluent Pond, FEMA -1646 -DR -CA, Project Worksheet (PW) 173*, Enclosed Analysis (Mar 22, 2012) (“It is clear from the above-quoted references in the March 1, 2007 contract to “contractor’s fee of 15 percent” and “plus an allowance of 15 percent” that this is a CPPC contract.”); see also Letter from Carlos Castillo, Assistant Administrator, FEMA Disaster Assistance Directorate, to Colonel Thomas Kirkpatrick (Ret), State Coordinating Officer, Louisiana Office of Homeland Security and Emergency Preparedness, re: *Second Appeal—City of New Orleans, PAID # 071-55000-00, Cleaning Storm Drains, FEMA-1603-DR-LA*,

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to subcontracts in the case where the prime contract is a cost-reimbursement contract type or subject to price redetermination.³⁰² Lastly, the inclusion of a ceiling price does not make these forms of contracts acceptable.³⁰³

Example – Prohibited Cost-Plus-Percentage-of-Cost Contracts

DHS Office of Inspector General Report No. DD-13-11

FEMA Should Recover \$46.2 Million of Improper Contracting Costs from Federal Funds Awarded to the Administrators of the Rule Educational Fund (Aug. 2013)

Background. Hurricane Katrina caused significant damage to Tulane University in August 2005 and, as a result, Tulane suspended most of its New Orleans-based activities and programs for the 2005 fall semester. Tulane placed great emphasis on reopening its main campus for the 2006 spring semester because it was concerned that its future would be imperiled if it could not quickly restore operations.

Tulane awarded a \$205.4 million contract to a contractor (primary contractor) using a noncompetitive, cost-plus-percentage-of-cost contract that included \$35.0 million in mark-up costs. As shown in the table below, the contractor added an average of 19.3 percent markups to hourly T&M billings for its own employees. These hourly rates were already fully burdened, which means they included profit and overhead. The primary contractor also added a 21 percent markup on pass-through costs for subcontractors and vendors that already included markups.

Description	Amounts Billed Before Markups	Markup Amounts	Mark up %	Amounts Billed After Markups	% of Total Billings
Time & Materials Billings	\$ 45,124,626	\$ 8,703,232	19.3%	\$ 53,827,858	26.2%
Subcontractors & Vendors	125,239,350	26,300,261	21.0%	151,539,611	73.8%
Totals	\$170,363,976	\$35,003,493	20.5%	\$205,367,469	100.0%

Project Worksheet (PW) 3715 (Feb. 5, 2008) (“The Applicant’s contract with MWH stated that the Applicant would pay MWH thirteen (13) percent of cost incurred on the project as profit. This meets the definition of the cost plus contract.”).

³⁰² Cf. *Comptroller General Warren to the Secretary of War*, B-23293, 21 Comp. Gen. 858 (Mar. 13, 1942).

³⁰³ *Id.*; see also *Secretary of the Air Force*, B-120546, 38 Comp. Gen. 38 (Jul. 21, 1958).

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Summary of OIG Findings. The OIG “did not fault” Tulane for awarding this contract without competition because exigent circumstances existed at the time. Generally, the OIG stated, it considers circumstances to be exigent when lives or property are at stake or, in this case, when a city or community needs to reopen its schools. Notwithstanding, the OIG did find that the 19% markups on the primary contractor’s T&M rates were not only prohibited, they also represented excessive profit because the T&M rates already included sufficient overhead and profit. The OIG also found that the 21% markup that the primary contractor added to the subcontractor costs represented duplicate costs and excessive profit because the primary contractor had already charged Tulane for managing subcontractors through its hourly rates. Based on these findings, the OIG recommended a disallowance of \$35.0 million as excessive and prohibited markups.

F. AWARDING AGENCY PREAWARD REVIEW OF SUBGRANTEE PROCUREMENTS (44 C.F.R. § 13.36(g))

1. Review of Technical Specifications on Proposed Procurements (44 C.F.R. § 13.36(g)(1))

A subgrantee must make available, upon request of the awarding agency, technical specifications on proposed procurements when the awarding agency believes such review is needed to ensure that the item and/or service specified is the one being proposed for purchase.³⁰⁴ An “awarding agency” means, with respect to a subgrant, the party that awarded the subgrant (which is the State or Indian tribal government in the case of the Public Assistance grant program).³⁰⁵ In any case, FEMA reserves the right to review a subgrantee’s technical specifications.³⁰⁶

This review will generally take place before the time when the specification is incorporated into a solicitation document.³⁰⁷ However, if the subgrantee desires to perform the review after a solicitation has been developed, the awarding agency may still review the specifications, with its review usually limited to the technical aspects of the proposed purchase.³⁰⁸

2. Review of Other Procurement Documents (44 C.F.R. § 13.36(g)(2))

Subgrantees must, on request, make available for awarding agency pre-award review

³⁰⁴ 44 C.F.R. § 13.36(g)(1).

³⁰⁵ 44 C.F.R. § 13.3.

³⁰⁶ See 44 C.F.R. § 13.42(e) (“(e) *Access to records*—(1) *Records of grantees and subgrantees.* The awarding agency...shall have right of access to any pertinent books, documents, papers, or other records of grantees and subgrantees which are pertinent to the grant, in order to make audits, examinations, excerpts, and transcripts.”).

³⁰⁷ 44 C.F.R. § 13.36(g)(1).

³⁰⁸ Id.

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procurement documents, such as requests for proposals or invitations for bids, independent cost estimates, etc. when:

- A subgrantee’s procurement procedures or operation fails to comply with the procurement standards in 44 C.F.R. § 13.36;
- The procurement is expected to exceed the simplified acquisition threshold (\$150,000) and is to be awarded without competition or only one bid or offer is received in response to a solicitation;
- The procurement, which is expected to exceed the simplified acquisition threshold, specifies a “brand name” product;
- The proposed award is more than the simplified acquisition threshold and is to be awarded to other than the apparent low bidder under a sealed bid procurement; or
- A proposed contract modification changes the scope of a contract or increases the contract amount by more than the simplified acquisition threshold.³⁰⁹

A subgrantee may be exempt from the pre-award review above if the awarding agency determines that the subgrantee’s procurement systems comply with the standards of 44 C.F.R. § 13.36.³¹⁰

- A subgrantee may request that the awarding agency review its procurement system to determine whether the system meets the standards of 44 C.F.R. § 13.36 for its system to be certified. Generally, these reviews shall occur where there is a continuous high-dollar funding, and the subgrantee awards third-party contracts on a regular basis.³¹¹
- A subgrantee may self-certify its procurement system. Such self-certification shall not limit the awarding agency’s right to survey the system. Under a self-certification procedure, awarding agencies may wish to rely on written assurances from the subgrantee that it is complying with these standards. A subgrantee will cite specific procedures, regulations, standards, etc., as being in compliance with these requirements and have its system available for review.³¹²

G. CONTRACTOR BONDING REQUIREMENTS (44 C.F.R. § 13.36(h))

The regulation at 44 C.F.R. § 13.36(h) sets forth various bonding requirements for a subgrantee’s contractor for construction or facility improvement contracts or subcontracts exceeding the

³⁰⁹ 44 C.F.R. § 13.36(g)(2).

³¹⁰ 44 C.F.R. § 13.36(g)(3).

³¹¹ 44 C.F.R. § 13.36(g)(3)(i).

³¹² 44 C.F.R. § 13.36(g)(3)(ii).

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simplified acquisition threshold (\$150,000). As a preliminary matter, the awarding agency³¹³ may accept the bonding policy and requirements of a subgrantee provided the awarding agency has made a determination that the awarding agency's interest is adequately protected. If the awarding agency has not made such a determination, then the subgrantee shall follow the following minimum requirements for a bid guarantee, performance bond, and payment bond.

1. Bid Guarantee (44 C.F.R. § 13.36(h)(1))

Each bidder must provide a bid guarantee equivalent of 5 percent of the bid price. The "bid guarantee" shall consist of a firm commitment, such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.³¹⁴ The existence of a bid guarantee provides a subgrantee with assurance that the bidder has the financial means to accept the job for the price quoted in the bid and that the bidder, should it be successful in its bid, will enter into the required contract and execute the required performance and payment bonds.

In the case where the contractor is awarded the contract but fails to enter into the contract, as agreed, then the purpose of the guarantee is to provide financial protection to the subgrantee by paying the difference between the contractor's offer and the next closest offer. Notably, requiring a bid guarantee helps keep contractors from submitting frivolous bids, because they will be obligated to either perform the job or pay (either itself or through a surety) compensation to the subgrantee.

2. Performance and Payment Bonds (44 C.F.R. § 13.36(h)(2) and (3))

The contractor must provide both a performance bond and a payment bond, each for 100 percent of the contract price.³¹⁵ A bond means a written instrument executed by a contractor (the "principal"), and a second party ("the surety" or "sureties") to assure fulfillment of the principal's obligations to a third party (the "obligee" which, in this case, is the subgrantee), identified in the bond. If the principal's obligations are not met, the bond assures payment, to the extent stipulated, of any loss sustained by the obligation.³¹⁶

³¹³ The "awarding agency" for a local government is a State. The same is true for an Indian tribal government when the state is serving as the grantee—however, when the Indian tribal government is serving as grantee, then it is the awarding agency for all subgrantees and FEMA is the awarding agency for the Indian tribal government.

³¹⁴ 44 C.F.R. § 13.36(h)(1); cf. 48 C.F.R. § 28.001 ("Bid guarantee means a form of security assuring that the bidder (1) will not withdraw a bid within the period specified for acceptance and (2) will execute a written contract and furnish required bonds, including any necessary coinsurance or reinsurance agreements, within the time specified in the bid, unless a longer time is allowed, after receipt of the specified forms.").

³¹⁵ 44 C.F.R. § 13.36(h)(2) and (3).

³¹⁶ See 48 C.F.R. § 28.001. The term "bond" is not defined in 44 C.F.R. pt. 13.

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A “performance bond” is one executed in connection with a contract to secure fulfillment of all the contractor’s obligations under such contract.³¹⁷ A “payment bond” is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

H. CONTRACT PROVISIONS (44 C.F.R. § 13.36(i))

A subgrantee’s contracts must contain the provisions set forth in 44 C.F.R. § 13.36(i).³¹⁸ Some of the provisions are based on sound contracting principles and others are required by Federal law, executive order, or regulation. FEMA is permitted to require changes, remedies, changed conditions, access and records retention, suspension of work, and other clauses approved by the Office of Federal Procurement Policy (“OFPP”), but has yet to ever submit such proposed modification to OFPP.³¹⁹

1. Provisions for Contractual Remedies (44 C.F.R. § 13.36(i)(1))

The subgrantee’s contract must contain provisions concerning administrative, contractual, or legal “remedies” in instances where contractors violate or breach contract terms, and provide for sanctions and penalties as may be appropriate.³²⁰ This requirement only applies in the case where a contract exceeds the simplified acquisition threshold of \$150,000.³²¹

By way of background, a “remedy” is the right of a contracting party when the other party does not fulfill its contractual obligations.³²² Parties may seek various judicial remedies for breach of contract, including damages, specific performance, and rescission or restitution.³²³ In Federal Government contracting, however, most of the remedies available to the parties are spelled out in contract clauses. For example, the Federal Government has remedies for nonperformance under the termination for default clause and for defective performance under the inspection clause of the contract, and the contractor’s remedies are generally for equitable adjustment or price adjustment under a variety of clauses.

³¹⁷ Id.

³¹⁸ In addition to these mandatory contract provisions, subgrantees would also be prudent to include additional contract provisions with respect to other legal requirements under federal laws, regulations, and executive orders that pass-through to their contractors. A list of many of the various federal laws with which subgrantees must comply can be found in the DHS Standard Terms and Conditions (see supra note 40) and also in the assurances under Standard Forms 424B and 424D.

³¹⁹ 44 C.F.R. § 13.36(i).

³²⁰ 44 C.F.R. § 13.36(i)(1).

³²¹ Id.

³²² Restatement (Second) of Contracts, ch. 16 (Remedies) (1981).

³²³ Id.

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In this case, the regulation at 44 C.F.R. § 13.36(i)(1) simply requires the subgrantee to spell out the remedies for breach of contract.

2. Provisions for Termination for Cause and Convenience (44 C.F.R. § 13.36(i)(2))

The subgrantee's contract must contain provisions concerning termination for cause and for convenience, including the manner by which it will be effected and the basis for settlement.³²⁴ This requirement only applies in the case of contracts in excess of \$10,000.³²⁵

"Termination for convenience" is the exercise of a subgrantee's right to completely or partially terminate the contractor's performance of work under a contract when it is in the subgrantee's interest.³²⁶ On the other hand, "termination for cause" (or "default") is the exercise of a party's right to completely or partially terminate a contract because of the other party's actual or anticipated failure to perform its contractual obligations.³²⁷

3. Compliance with Executive Order 11,246 (44 C.F.R. § 13.36(i)(3))

Except as otherwise provided under 41 C.F.R. pt. 60, the subgrantee's contract must include the equal opportunity clause at 41 C.F.R. § 60-1.4(b), in accordance with Executive Order 11,246, *Equal Employment Opportunity* (Sep. 24, 1965) (as amended) and Department of Labor implementing regulations at 41 C.F.R. ch. 60 (Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor).³²⁸ This requirement only applies in the case of construction³²⁹ contracts in excess of \$10,000.³³⁰

³²⁴ 44 C.F.R. § 13.36(i)(2).

³²⁵ *Id.*

³²⁶ The regulation does not define the phrase "termination for convenience," but *cf.* 48 C.F.R. § 2.101 ("Termination for convenience means the exercise of the Government's right to completely or partially terminate performance of work under a contract when it is in the Government's interest."). The Federal Government's process for termination for convenience is set forth at 48 C.F.R. subparts 49.1, 49.2, and 49.3. Notably, only the Federal Government—not the contractor—may terminate for convenience.

³²⁷ The regulation does not define the phrase "termination for cause;" *see* 48 C.F.R. § 2.101 ("Termination for default means the exercise of the Government's right to completely or partially terminate a contract because of the contractor's actual or anticipated failure to perform its contractual obligations."). In Federal Government procurement, a contractor cannot terminate a contract for an alleged breach by the Federal Government, but rather has to continue performing and has to keep performing at the direction of the Federal contracting officer while the dispute is resolved. The Federal Government's process for termination for cause is set forth at 48 C.F.R. subpart 49.4.

³²⁸ 44 C.F.R. § 13.36(i)(3).

³²⁹ 41 C.F.R. § 60-1.3 ("Construction work means 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.").

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The regulation at 41 C.F.R. § 60-1.4(b) requires the insertion of the following contract clause:

“During the performance of this contract, the contractor agrees as follows:

- (1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided setting forth the provisions of this nondiscrimination clause.
- (2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive considerations for employment without regard to race, color, religion, sex, or national origin.
- (3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice to be provided advising the said labor union or workers' representatives of the contractor's commitments under this section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.
- (4) The contractor will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.
- (5) The contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the administering agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.
- (6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of the said rules, regulations, or orders, this contract may be canceled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts or federally assisted construction contracts in accordance with procedures authorized in Executive Order 11246 of

³³⁰ 44 C.F.R. § 13.36(i)(3).

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September 24, 1965, and such other sanctions as may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

- (7) The contractor will include the portion of the sentence immediately preceding paragraph (1) and the provisions of paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the administering agency may direct as a means of enforcing such provisions, including sanctions for noncompliance: Provided, however, That in the event a contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the administering agency the contractor may request the United States to enter into such litigation to protect the interests of the United States.”

4. Compliance with Copeland Anti-Kickback Act (44 C.F.R. § 13.36(i)(4))

A subgrantee’s contract must include a provision for compliance with the Copeland “Anti-Kickback” Act (18 U.S.C. § 874³³¹ and 40 U.S.C. § 3145³³²), as supplemented by Department of Labor regulations at 29 C.F.R. pt. 3 (Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States).³³³ This requirement applies to all contracts for construction or repair.

By way of background, the Copeland Act provides that each contractor must be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he or she is otherwise entitled. The

³³¹ 18 U.S.C. § 874 (Kickbacks from Public Works Employees) (“Whoever, by force, intimidation, or threat of procuring dismissal from employment, or by any other manner whatsoever induces any person employed in the construction, prosecution, completion or repair of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, to give up any part of the compensation to which he is entitled under his contract of employment, shall be fined under this title or imprisoned not more than five years, or both.”).

³³² 40 U.S.C. § 3145 (Regulations Governing Contractors and Subcontractors):

- (a) In General.—The Secretary of Labor shall prescribe reasonable regulations for contractors and subcontractors engaged in constructing, carrying out, completing, or repairing public buildings, public works, or buildings or works that at least partly are financed by a loan or grant from the Federal Government. The regulations shall include a provision that each contractor and subcontractor each week must furnish a statement on the wages paid each employee during the prior week.
- (b) Application.—Section 1001 of title 18 applies to the statements.

³³³ 44 C.F.R. § 13.36(i)(4).

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Department of Labor implementing regulations for the Copeland Act are at 29 C.F.R. pt. 3, and the regulation at 29 C.F.R § 3.11 provides that:

“All contracts made with respect to the construction, prosecution, completion, or repair of any...work financed in whole or in part by loans or grants from the United States covered by the regulations in this part shall expressly bind the contractor or subcontractor to comply with such of the regulations in this part as may be applicable. In this regard, see § 5.5(a) of this title.”

The regulation at 29 C.F.R. § 5.5(a) does provide the required contract clause that applies to compliance with both the Davis-Bacon and Copeland Acts. However, as discussed in the next subsection, the Davis-Bacon Act does not apply to Public Assistance grantees and subgrantees. As such, FEMA requires the following contract clause:

“Compliance with the Copeland “Anti-Kickback” Act

- (1) Contractor. The contractor shall comply with 18 U.S.C. § 874, 40 U.S.C. § 3145, and the requirements of 29 C.F.R. pt. 3 as may be applicable, which are incorporated by reference into this contract.
- (2) Subcontracts. The contractor or subcontractor shall insert in any subcontracts the clause above and such other clauses as the FEMA may by appropriate instructions require, and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for the compliance by any subcontractor or lower tier subcontractor with all of these contract clauses.
- (3) Breach. A breach of the contract clauses above may be grounds for termination of the contract, and for debarment as a contractor and subcontractor as provided in 29 C.F.R. § 5.12.”

5. Compliance with the Davis-Bacon Act (44 C.F.R. § 13.36(i)(5))

The regulation at 44 C.F.R. § 13.36(i)(5) requires that a subgrantee include a contract clause providing for the compliance with the Davis Bacon Act (40 U.S.C. §§ 276a to 276a-7) as supplemented by Department of Labor regulations at 29 C.F.R. pt. 5. This requirement, however, only applies to construction contracts awarded by subgrantees in excess of \$2000 *when required by Federal grant program legislation.*³³⁴ In this case, the sections of the Stafford Act authorizing the Public Assistance grant program do not require compliance with the Davis-Bacon Act. As such, there is no requirement for a subgrantee to place any clauses into its contracts for compliance with the Davis-Bacon Act.

³³⁴ 44 C.F.R. § 13.36(i)(5).

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6. Compliance with the Contract Work Hours and Safety Standards Act (44 C.F.R. § 13.36(i)(6))

Subgrantees must include a provision into their contracts that requires compliance with Sections 103 and 107 of the Contract Work Hours and Safety Standards Act³³⁵ as supplemented by Department of Labor regulations at 29 C.F.R. pt 5.³³⁶ The Contract Work Hours and Safety Standards Act applies to subgrantee contracts and subcontracts “financed at least in part by loans or grants from...the [Federal] Government.”³³⁷ Although the original law required its application in any construction contract over \$2,000 or non-construction contract to which the Act applied over \$2,500 (and language to that effect is still found in 44 C.F.R. 13.36(i)(6)), the Contract Work Hours and Safety Standards Act no longer applies to any “contract in an amount that is not greater than \$100,000.”³³⁸

The regulation at 29 C.F.R. § 5.5(b) provides the required contract clause concerning compliance with the Contract Work Hours and Safety Standards Act:

“Compliance with the Contract Work Hours and Safety Standards Act

- (1) Overtime requirements. No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any such laborer or mechanic in any workweek in which he or she is employed on such work to work in excess of forty hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of forty hours in such workweek.
- (2) Violation; liability for unpaid wages; liquidated damages. In the event of any violation of the clause set forth in paragraph (1) of this section the contractor and any subcontractor responsible therefor shall be liable for the unpaid wages. In addition, such contractor and subcontractor shall be liable to the United States (in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory), for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic, including watchmen and guards, employed in violation of the clause set forth in paragraph (1) of this section, in the sum of \$10 for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of forty hours without payment of the overtime wages required by the clause set forth in paragraph (1) of this section.

³³⁵ Contract Work Hours and Safety Standards Act, Pub. L. No. 87-581, 76 Stat. 357, §§ 103 and 107 (1962) (codified as amended at 40 U.S.C. §§ 3701-3708).

³³⁶ 44 C.F.R. § 13.36(i)(6).

³³⁷ 40 U.S.C. § 3701(b)(1)(B)(iii) and (b)(2); 29 C.F.R. § 5.2(h).

³³⁸ 40 U.S.C. § 3701(b)(3)(A)(iii).

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- (3) Withholding for unpaid wages and liquidated damages. The (write in the name of the Federal agency or the loan or grant recipient) shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld, from any moneys payable on account of work performed by the contractor or subcontractor under any such contract or any other Federal contract with the same prime contractor, or any other federally-assisted contract subject to the Contract Work Hours and Safety Standards Act, which is held by the same prime contractor, such sums as may be determined to be necessary to satisfy any liabilities of such contractor or subcontractor for unpaid wages and liquidated damages as provided in the clause set forth in paragraph (2) of this section.
- (4) Subcontracts. The contractor or subcontractor shall insert in any subcontracts the clauses set forth in paragraph (1) through (4) of this section and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for compliance by any subcontractor or lower tier subcontractor with the clauses set forth in paragraphs (1) through (4) of this section.”

7. Notice of Awarding Agency Requirements and Regulations Pertaining to Reporting (44 C.F.R. § 13.36(i)(7))

A subgrantee’s contract must include notice of the awarding agency’s³³⁹ requirement and regulations pertaining to reporting.³⁴⁰ In the case of subgrantees that are local governments and Indian tribal governments, this means that the subgrantee must include notice of the state’s requirements and regulations for reporting. As such, the subgrantee should work with the state to identify the required contract clauses. FEMA recommends to states that their reporting requirements for subgrantees enable the state to meet FEMA’s reporting requirements, and FEMA also recommends that the State require subgrantees to include the “notice of FEMA reporting requirements and regulations” clause below. This clause is required for states to include in their contracts, whether acting as grantee or a subgrantee.

In the case of Indian tribal governments serving as grantees, the Indian tribal government must include notice of FEMA’s reporting requirements and regulations in its contracts and must require all of its subgrantees to include notice in the subgrantee’s contracts of the Indian tribal government’s reporting requirements and regulations. The following provides the clause required by FEMA for grantees as it relates to reporting:

“Notice of Federal Emergency Management Agency (FEMA) Reporting Requirements and Regulations

³³⁹ 44 C.F.R. § 13.3 (“Awarding agency means (1) with respect to a grant, the Federal agency, and (2) with respect to a subgrant, the party that awarded the subgrant.”).

³⁴⁰ 44 C.F.R. § 13.36(i)(7).

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- (1) General. The (name of state agency or the local or Indian tribal government entity) is using Public Assistance grant funding awarded by FEMA to the (insert name of grantee) to pay, in whole or in part, for the costs incurred under this contract. As a condition of Public Assistance funding under (major disaster or emergency) declaration FEMA-XXXX-XX, FEMA requires the (insert name of grantee) to provide various financial and performance reporting.
- a. It is important that the contractor is aware of these reporting requirements, as the (name of state agency or the local or Indian tribal government entity) may require the contractor to provide certain information, documentation, and other reporting in order to satisfy reporting requirements to (insert name of grantee) which, in turn, will enable (insert name of grantee) to satisfy reporting requirements to FEMA.
 - b. Failure of (insert name of grantee) to satisfy reporting requirements to FEMA is a material breach of the FEMA-State Agreement, and could result in loss of Federal financial assistance awarded to fund this contract.
- (2) Applicable Regulations and Policy. The applicable regulations, FEMA policy, and other sources setting forth these reporting requirements are as follows:
- a. 44 C.F.R. § 13.40 (Monitoring and Reporting Program Performance)
 - b. 44 C.F.R. § 13.41 (Financial Reporting)
 - c. 44 C.F.R. § 13.50(b) (Reports)
 - d. 44 C.F.R. § 206.204(f) (Progress Reports)
 - e. FEMA Standard Operating Procedure No. 9570.14, *Public Assistance Program Management and Grant Closeout Standard Operating Procedure* (Dec. 2013)
 - f. FEMA-State (or Tribal) Agreement
- (3) Financial Reporting. The (insert name of grantee) is required to submit to the following financial reports to FEMA:
- a. Initial Report. An initial Federal Financial Report (SF 425) no later than 30 days after FEMA has approved the first Public Assistance project under FEMA-XXXX-XX.
 - b. Quarterly Reports. Following submission of the initial report, quarterly Federal Financial Reports until submission of the final report described in the following subparagraph. Reports are due on January 30, April 30, July 30, and October 30.

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- c. Final Report. A final Federal Financial Report within 90 days of the end of the period of performance for the Public Assistance grant.
- (4) Performance Reporting. The (insert name of grantee) is required to submit to the following financial reports to FEMA:
- a. Initial Report. An initial performance report no later than 30 days after FEMA has approved the first Public Assistance project under FEMA-XXXX-XX.
 - b. Quarterly Reports. Following submission of the initial report, quarterly performance reports until submission of the final report described in the following subparagraph. Reports are due on January 30, April 30, July 30, and October 30.
 - c. Final Report. A final performance report within 90 days of the end of the period of performance for the Public Assistance grant.”

8. Notice of Awarding Agency Requirements and Regulations Pertaining to Patent Rights, Copyrights, and Rights in Data (44 C.F.R. § 13.36(i)(8) and (9))

The regulations require a subgrantee’s contract to include notice of the awarding agency’s³⁴¹ requirements and regulations pertaining to patent rights with respect to a discovery or invention which arises or is developed in the course of or under such contract.³⁴² Similarly, the regulations also require inclusion of the awarding agency’s requirements and regulations pertaining to copyrights and rights in data.³⁴³

Patents, copyrights, and rights in data requirements arise within the context of federally assisted projects, the purpose of which is to finance the development of a product or information. These requirements apply in the case of contracts involving experimental, development, or research work, and do not apply to capital projects or operating projects.³⁴⁴

The Public Assistance grant program does not authorize any work associated with experimental, developmental, or research work, such that patent rights, copyrights, and rights in data would be implicated. There are, therefore, no required contract clauses.

³⁴¹ 44 C.F.R. § 13.3 (“Awarding agency means (1) with respect to a grant, the Federal agency, and (2) with respect to a subgrant, the party that awarded the subgrant.”).

³⁴² 44 C.F.R. § 13.36(i)(8).

³⁴³ 44 C.F.R. § 13.36(i)(9).

³⁴⁴ Cf. 48 C.F.R. subparts 27.3 (Patent Rights under Government Contracts) and 27.4 (Rights in Data and Copyrights).

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9. Access to Records (44 C.F.R. § 13.36(i)(10))

The regulations require a subgrantee to include a contract clause that provides for access by the grantee, subgrantee, FEMA, the Comptroller General of the United States, or any of their duly authorized representatives to any books, documents, papers, and records of the contractor which are directly pertinent to that specific contract for the purpose of making audits, examinations, excerpts, and transcriptions.

The following provides the clause that a local government or Indian tribal government (acting as either subgrantee or grantee) must include in all contracts:

“Access to Records. The following access to records requirements apply to this contract:

- (1) The contractor agrees to provide (insert name of state agency or local or Indian tribal government), (insert name of grantee), the FEMA Administrator, the Comptroller General of the United States, or any of their authorized representatives access to any books, documents, papers, and records of the Contractor which are directly pertinent to this contract for the purposes of making audits, examinations, excerpts, and transcriptions.
- (2) The Contractor agrees to permit any of the foregoing parties to reproduce by any means whatsoever or to copy excerpts and transcriptions as reasonably needed.
- (3) The contractor agrees to provide the FEMA Administrator or his authorized representatives access to construction or other work sites pertaining to the work being completed under the contract.”

10. Retention of Records (44 C.F.R. § 13.36(i)(11))

The regulation at 44 C.F.R. § 13.36(i)(11) requires a subgrantee to include a contract clause pertaining to the retention of records for three years after the subgrantee makes final payment and all other pending matters are closed.³⁴⁵

The following provides the clause that a local government or Indian tribal government (acting as either subgrantee or grantee) must include in all contracts:

“Retention of Records. The contractor agrees to maintain all books, records, accounts and reports required under this contract for a period of not less than three years after the date of termination or expiration of this contract, except in the event of litigation or settlement of claims arising from the performance of this contract, in which case contractor agrees to maintain same until the (name of the state agency or local or Indian tribal government), (name of grantee), the

³⁴⁵ 44 C.F.R. § 13.36(i)(11).

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FEMA Administrator, the Comptroller General of the United States, or any of their duly authorized representatives, have disposed of all such litigation, appeals, claims or exceptions related to the litigation or settlement of claims.”

11. Compliance with the Clean Air Act and Clean Water Act (44 C.F.R. § 13.36(i)(12))

The regulation at 44 C.F.R. § 13.36(i)(12) requires a subgrantee to include a clause in its contracts providing for compliance with all applicable standards, orders, or requirements issued pursuant to the Clean Air Act (42 U.S.C. §§ 7401-7671q) and the Federal Water Pollution Control Act as amended (33 U.S.C. §§ 1251-1387). This requirement applies to all contracts in excess of \$100,000.

The following provides clauses that a local government or Indian tribal government (acting as either subgrantee or grantee) must include in all contracts exceeding \$100,000:

“Clean Air Act

- (1) The contractor agrees to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act, as amended, 42 U.S.C. § 7401 *et seq.*
- (2) The contractor agrees to report each violation to the (name of the state agency or local or Indian tribal government) and understands and agrees that the (name of the state agency or local or Indian tribal government) will, in turn, report each violation as required to assure notification to the (name of grantee), Federal Emergency Management Agency, and the appropriate Environmental Protection Agency Regional Office.
- (3) The contractor agrees to include these requirements in each subcontract exceeding \$100,000 financed in whole or in part with Federal assistance provided by FEMA.

Federal Water Pollution Control Act

- (1) The contractor agrees to comply with all applicable standards, orders or regulations issued pursuant to the Federal Water Pollution Control Act, as amended, 33 U.S.C. 1251 *et seq.*
- (2) The contractor agrees to report each violation to the (name of the state agency or local or Indian tribal government) and understands and agrees that the (name of the state agency or local or Indian tribal government) will, in turn, report each violation as required to assure notification to the (name of grantee), Federal Emergency Management Agency, and the appropriate Environmental Protection Agency Regional Office
- (3) The contractor agrees to include these requirements in each subcontract exceeding \$100,000 financed in whole or in part with Federal assistance provided by FEMA.”

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12. Energy Efficiency (44 C.F.R. § 13.36(i)(13))

The regulation at 44 C.F.R. § 13.36(i)(13) requires the subgrantee to include a clause in its contracts concerning mandatory standards and policies related to energy efficiency that are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act.

The local government or Indian tribal government (acting as either subgrantee or grantee) must include the following clause in all contracts:

“Energy Conservation. The contractor agrees to comply with mandatory standards and policies relating to energy efficiency which are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act.”

13. Suspension and Debarment

The policy of the Federal Government is to do business with, or award assistance to, persons that are “presently responsible.”³⁴⁶ To further this policy, the Federal Government may exclude, disqualify, or declare ineligible non-Federal persons (which include organizations and specific individuals) from Federal assistance agreements and procurement contracts. Exclusion can be based on a person’s poor integrity, poor financial capability, violations of law and regulations, or poor performance.

The President has issued two executive orders addressing debarment and suspension, which are Executive Order 12,549, *Debarment and Suspension* (Feb. 18, 1986) and Executive Order 12,689, *Debarment and Suspension* (Aug. 16, 1989). The Office of Management and Budget has provided guidance for Federal agencies on the governmentwide debarment and suspension system for nonprocurement programs and activities at 2 C.F.R. pt. 180. This is often referred to as the “nonprocurement common rule.” The Department of Homeland Security has, in turn, issued regulations at 2 C.F.R. pt. 3000 that adopt the nonprocurement common rule and provide supplemental policies and procedures.³⁴⁷ The Department has also issued a directive and associated instruction on suspension and debarment.³⁴⁸

³⁴⁶ See 2 C.F.R. § 180.800(a)(4), (d).

³⁴⁷ See 2 C.F.R. § 3000.10 (“This part adopts the Office of Management and Budget (OMB) guidance in Subparts A through I of 2 CFR part 180, as supplemented by this part, as the Department of Homeland Security policies and procedures for nonprocurement debarment and suspension. It thereby gives regulatory effect for the Department of Homeland Security to the OMB guidance as supplemented by this part. This part satisfies the requirements in section 3 of Executive Order 12549, “Debarment and Suspension” (3 CFR 1986 Comp., p. 189), Executive Order 12689, “Debarment and Suspension” (3 CFR 1989 Comp., p. 235) and 31 U.S.C. 6101 note (Section 2455, Pub. L. 103-355, 108 Stat. 3327).”).

³⁴⁸ DHS Directive No. 146-01, *Suspension and Debarment Program* (May 31, 2012); DHS Instruction No. 146-01-001, *Suspension and Debarment Instruction* (May 31, 2012). One of the key items in the instruction is the DHS

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In general, an “excluded” party cannot receive a Federal grant award or a contract within the meaning of a “covered transaction,” to include subawards and subcontracts. This includes parties that receive Federal funding indirectly, such as contractors to grantees and subgrantees. The key to the exclusion is whether there is a “covered transaction,” which is any nonprocurement transaction (unless excepted³⁴⁹) at either a “primary” or “secondary” tier. Although “covered transactions” do not include contracts awarded by the Federal Government for purposes of the nonprocurement common rule and DHS’s implementing regulations, it does include some contracts awarded by grantees and subgrantees.³⁵⁰

Specifically, a covered transaction includes the following contracts for goods or services:

- (1) The contract is awarded by a grantee or subgrantee in the amount of at least \$25,000.
- (2) The contract requires the approval of FEMA, regardless of amount.
- (3) The contract is for federally-required audit services.
- (4) A subcontract is also a covered transaction if it is awarded by the contractor of a grantee or subgrantee and requires either the approval of FEMA or is in excess of \$25,000.³⁵¹

The two forms of exclusion are “suspension” and “debarment.” Suspensions and debarments can be extended to include subsidiaries, parent companies, and other individuals.³⁵²

Suspension is an action taken by a suspending official that excludes a person from participating in a covered transaction for a temporary period, pending completion of an investigation or legal, debarment, or other proceedings.³⁵³ Suspension, for a set period of time determined on a case-by-case basis, may be based on indictments, information, or adequate evidence involving environmental crimes, contract fraud, embezzlement, theft, forgery, bribery, poor performance, nonperformance, or false statements.³⁵⁴ They are temporary actions that may last up to 18

Chief Financial Officer, and the Components, may approve limited exceptions to let an excluded person participate in covered non-procurement transactions, including grants. *Id.* V(G).

³⁴⁹ 2 C.F.R. § 3000.137 (“Within the Department of Homeland Security, the Secretary of Homeland Security has delegated the authority to grant an exception to let an excluded person participate in a covered transaction to the Head of the Contracting Activity for each DHS component as provided in the OMB guidance at 2 CFR 180.135.”).

³⁵⁰ See 2 C.F.R. § 180.220 .

³⁵¹ 2 C.F.R. § 180.220; 2 C.F.R. § 3000.220.

³⁵² 2 C.F.R. § 180.625

³⁵³ 2 C.F.R. § 180.1015.

³⁵⁴ 2 C.F.R. §§ 180.700 and 180.800.

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months and are effective immediately.³⁵⁵

Debarment, on the other hand, is an action taken by a debarring official to exclude a person from participating in a covered transaction for a specified period.³⁵⁶ Debarment may be based on convictions, civil judgments, or fact-based cases involving crimes, contract fraud, embezzlement, theft, forgery, bribery, poor performance, nonperformance, or false statements, as well as other causes.³⁵⁷ Statutory debarments occur by operation of law following criminal convictions under certain laws, i.e., the Clean Water Act and Clean Air Act.³⁵⁸ These last until the debarring official certifies that the condition giving rise to the conviction has been corrected.

DHS regulations require a grantee, subgrantee, and contractor to include a term or condition in any lower-tier covered transaction into which it enters that requires the participant of that transaction to (a) comply with subpart C of the OMB guidance in 2 C.F.R. pt. 180 and (b) include a similar term or condition in any covered transaction into which it enters at the next lowest tier.³⁵⁹

The following provides a recommended clause that a local government or Indian tribal government (acting as either subgrantee or grantee) should include in all contracts that are “covered transactions.” It incorporates an optional method of verifying that contractors are not excluded or disqualified.

“Suspension and Debarment

- (1) This contract is a covered transaction for purposes of 2 C.F.R. pt. 180 and 2 C.F.R. pt. 3000. As such the contractor is required to verify that none of the contractor, its principals (defined at 2 C.F.R. § 180.995), or its affiliates (defined at 2 C.F.R. § 180.905) are excluded (defined at 2 C.F.R. § 180.940) or disqualified (defined at 2 C.F.R. § 180.935).
- (2) The contractor must comply with 2 C.F.R. pt. 180, subpart C and 2 C.F.R. pt. 3000, subpart C and must include a requirement to comply with these regulations in any lower tier covered transaction it enters into.
- (3) This certification is a material representation of fact relied upon by (insert name of subgrantee). If it is later determined that the contractor did not comply with 2 C.F.R. pt. 180, subpart C and 2 C.F.R. pt. 3000, subpart C, in addition to remedies available to

³⁵⁵ 2 C.F.R. § 180.760.

³⁵⁶ 2 C.F.R. § 180.925.

³⁵⁷ 2 C.F.R. § 180.800.

³⁵⁸ See 2 C.F.R. pt. 1532.

³⁵⁹ 2 C.F.R. §§ 3000.332 and 437.

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(name of state agency serving as grantee and name of subgrantee), the Federal Government may pursue available remedies, including but not limited to suspension and/or debarment.

- (4) The bidder or proposer agrees to comply with the requirements of 2 C.F.R. pt. 180, subpart C and 2 C.F.R. pt. 3000, subpart C while this offer is valid and throughout the period of any contract that may arise from this offer. The bidder or proposer further agrees to include a provision requiring such compliance in its lower tier covered transactions.”

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V. PROCUREMENT BY INSTITUTIONS OF HIGHER EDUCATION, HOSPITALS, AND OTHER NONPROFIT ORGANIZATIONS

The procurement standards for institutions of higher education, hospitals, and other nonprofit organizations (collectively referred to as “subgrantees” in this section) are set forth at 2 C.F.R. §§ 215.41 through 215.48.³⁶⁰ These standards are intended to ensure that subgrantees “procure supplies and services in an effective manner, and in compliance with the provisions of applicable Federal statutes and executive orders.”³⁶¹ The procurement standards for institutions of higher education,³⁶² hospitals, and other nonprofit organizations are similar to, but not the same as, the standards for local and Indian tribal governments under 44 C.F.R. § 13.36.

The standards under 2 C.F.R. pt. 215 are generally not as prescriptive as the standards under 44 C.F.R. § 13.36. For example, 44 C.F.R. § 13.36 sets forth the various methods of competitive procurement (small purchase procedures, sealed bidding, and procurement through competitive proposals), and 2 C.F.R. pt. 215 does not describe any such methods. Similarly, 44 C.F.R. § 13.36(d) describes the necessary conditions precedent for a local or Indian tribal government to noncompetitively procure goods and services, whereas 2 C.F.R. pt. 215 does not have any such conditions precedent (only that a subgrantee shall conduct procurement transactions to provide, “to the maximum extent practical,” open and free competition).

A. SETTLEMENT AND SATISFACTION OF ALL CONTRACTUAL AND ADMINISTRATIVE ISSUES (2 C.F.R. § 215.41)

The subgrantee is the responsible authority, without recourse to FEMA, regarding the settlement and satisfaction of all contractual and administrative issues arising out of its procurements entered into in support of an award or other agreement.³⁶³ This includes disputes, claims, protests of awards, source evaluation, or other matters of a contractual nature.³⁶⁴ If a subgrantee’s contractor violates a law in the course of carrying out the contract, then the subgrantee must report that violation to such Federal, State, or local authority as may have proper jurisdiction.³⁶⁵

³⁶⁰ OMB Circular A-110, *Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Nonprofit Organizations* is codified at 2 C.F.R. pt. 215.

³⁶¹ 2 C.F.R. § 215.40.

³⁶² This includes all institutions of higher education, even if part of a State or local government. *See, e.g.* DHS Office of Inspector General, Report No. DA-13-03, *FEMA Should Recover \$5.3 Million of Public Assistance Grant Funds Awarded to University of Southern Mississippi-Hurricane Katrina* (Nov. 6, 2012).

³⁶³ 2 C.F.R. § 215.41.

³⁶⁴ *See* section IV(A)(8) of this Field Manual for a discussion of the meaning of “disputes,” “protests,” and “claims.”

³⁶⁵ 2 C.F.R. § 215.41.

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B. WRITTEN STANDARDS OF CONDUCT (2 C.F.R. § 215.42)

The subgrantee must maintain written standards of conduct governing the performance of its employees engaged in the award and administration of contracts.³⁶⁶ FEMA expects an applicant, when contracting with Public Assistance grant funding, to ensure that procurement transactions are conducted in a manner beyond reproach, at arm's length, with impartiality, and without preferential treatment. FEMA's regulations require the subgrantee's written standards to provide for, at a minimum, the following items.

1. No Personal Conflicts of Interest

None of the subgrantee's employees, officers, or agents shall participate in the selection, award, or administration of a contract supported by FEMA funding if a real or apparent conflict of interest would be involved.³⁶⁷ Such a conflict would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization that employs, or is about to employ, any of those parties has a financial or other interest in the contractor that is selected.³⁶⁸

Although the term "financial interest" is not defined or otherwise described in the regulation, the following provides a non-exhaustive list of the types of financial interest that may give rise to a personal conflict of interest:

- Compensation, including wages, salaries, commissions, professional fees, or fees for business referrals;
- Consulting relationships (such as commercial and professional consulting and service arrangements);
- Investment in the form of stock or bond ownership or partnership interest;
- Real estate investments; and
- Business ownership

2. Prohibitions Against Gratuities

A subgrantee's officers, employees, and agents may not solicit or accept gratuities, favors, or anything of monetary value from contractors or parties to subagreements.³⁶⁹ This would include entertainment, hospitality, loan, and forbearance. It would also include services as well as gifts

³⁶⁶ 2 C.F.R. § 215.42 .

³⁶⁷ Id.

³⁶⁸ Id.

³⁶⁹ Id.

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of training, transportation, local travel, and lodgings and meals, whether provided in-kind, by purchase of a ticket, payment in advance, or reimbursement after the expense has been incurred.³⁷⁰

3. Permitted Conflicts of Interests and Gifts

As an exception to the general prohibition against gratuities and financial interests, subgrantees may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value.³⁷¹ The regulations do not provide any additional clarity as to what comprises “substantial” or “nominal intrinsic value,” such that the content of any such exception is left to the discretion of the subgrantee.

Notwithstanding, the Standards of Conduct for Employees of the Executive Branch provide a useful guide in analyzing a subgrantee’s exceptions. First, the regulations at 5 C.F.R. pt. 2640 set forth exemptions concerning prohibited conflicts of interest for certain financial interests that are too remote or too inconsequential to affect the integrity of the services of Federal officers or employees.³⁷² Second, 5 C.F.R. pt. 2640 provides guidance to Federal agencies on the factors to consider when issuing individual waivers from the conflict of interest prohibitions based on a conclusion that the financial interest is not so substantial as to be deemed likely to affect the integrity of the services of Federal officers and employees.³⁷³ Third, the regulations at 5 C.F.R. pt. 2635 provide certain exclusions and exceptions from the gifts from outside sources prohibitions.³⁷⁴

4. Requirement for Disciplinary Action

The subgrantee’s procurement standards of conduct must provide for disciplinary action when its employees, officers, or agents violate the standards.³⁷⁵

5. Arms-Length Transactions and Apparent Conflict of Interest

There may be circumstances where a subgrantee’s employee, officer, or agent acts in a way so as

³⁷⁰ Cf. 5 C.F.R. § 2635.203(b) (defining “gift” under the Standards of Conduct for Employees of the Executive Branch).

³⁷¹ 2 C.F.R. § 215.42.

³⁷² 5 C.F.R. pt. 2640, subpart B (exemptions to certain financial interests). These regulations were issued to implement 18 U.S.C. § 208(b)(2).

³⁷³ 5 C.F.R. pt. 2640, subpart and C (individual waivers). These regulations provide guidance to Federal agencies when considering individual waivers pursuant to 18 U.S.C. § 208(b)(1).

³⁷⁴ See 5 C.F.R. §§ 2635.203 (providing exclusions for the meaning of gift, such modest items of food and refreshments offered other than part of a meal); 2635.204 (providing exceptions to the gift prohibitions, such unsolicited non-cash gifts of a fair market value of \$20 per occasion with a limit of \$50 per year per source).

³⁷⁵ 2 C.F.R. § 215.42.

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to avoid an actual conflict of interest, but where the commercial transaction in question comprises an apparent conflict of interest or something less than an arms-length transaction.³⁷⁶ “Arms-length,” although not defined in the Circular, means “of or relating to dealings between two parties who are not related or not on close terms and who are presumed to have roughly equal bargaining power.”³⁷⁷ The “arms-length” requirement is part of sound business practice directed at avoiding conflicts of interest or the appearance of same.³⁷⁸

First, FEMA may conclude that a subgrantee’s officer, employee, or agent’s participation or other involvement in the award and administration of a contract—although not an actual conflict of interest—may still be an apparent conflict of interest.

Second, a subgrantee may conduct a procurement and award a contract inconsistent with an arms-length transaction, and OMB Circular A-122 offers guidance in this regard.³⁷⁹ Paragraph A.2.a of OMB Circular A-122 (applicable to nonprofit organizations) provides that, in order to be allowable under an award, a cost must “[b]e reasonable for the performance of the award and be allocable thereto under these principles. Paragraph A.3 defines “reasonable costs,” and, subparagraph A.3.b provides that:

“in determining the reasonableness of a given cost, consideration shall be given to...[t]he restraints or requirements imposed by such factors as generally accepted sound business practices, *arms-length bargaining*, Federal and State law and regulations, and terms and conditions of the award.”³⁸⁰

³⁷⁶ See, e.g. DHS Office of Inspector General, Report No. DD-13-11, *FEMA Should Recover \$46.2 Million of Improper Contracting Costs from Federal Funds Awarded to the Administrators of the Tulane Educational Fund, New Orleans, Louisiana*, pp. 16-18 (Aug. 15, 2013):

“Additionally, Tulane and the primary contractor awarded three contracts or subcontracts to vendors who had previously or later made contributions to Tulane, one of the most significant of which was a \$2.0 million donation from the primary contractor. Also, Tulane awarded several other disaster contracts to entities with relationships with Tulane, including previously used contractors, alumni, and members of various Tulane boards. Tulane representatives said that it made these awards in a manner consistent with its internal policies, and were not aware of the open and free competition requirements. ***Certain of these awards could potentially represent real or apparent organizational conflicts of interest*** under 2 C.F.R. § 215.43.” (emphasis added)

³⁷⁷ *Black’s Law Dictionary* 123 (9th Ed. 2009).

³⁷⁸ Cf. Department of Health and Human Services Departmental Appeals Board, Appellate Division, Decision No. 2079, *Kansas Advocacy & Protective Services*, pp. 15-16 (Apr. 30, 2007) and Decision No. 976, *All Indian Pueblo Council, Inc.* (Aug. 10, 1988).

³⁷⁹ OMB Circular A-122, *Cost Principles for Non-Profit Organizations* (codified at 2 C.F.R. pt. 230).

³⁸⁰ 2 C.F.R. pt. 230, Appendix A, ¶ A.2.a.

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Example – Apparent Conflict of Interest and Arms-Length Transaction

A private nonprofit (PNP) organization owns and operates numerous facilities that are damaged by a major disaster, and seeks financial assistance under the Public Assistance Program for debris removal, emergency protective measures, and permanent restorative work for these facilities. The PNP desires a contractor to perform a number of project management tasks, including Project Worksheet development, meeting with FEMA, and myriad other tasks that FEMA considers eligible as direct administrative costs under a Public Assistance project.

The PNP's Vice President participated in the development and approval of the request for proposals issued by the PNP. The Vice President happens to be experienced in the services to be performed as detailed in the solicitation, and submits a response to the solicitation. The Vice President, along with other PNP officials, reviews each of the submissions to the solicitation, although the Vice President recuses herself in the evaluation of her own submission and in the final award decision.

The PNP informs the Vice President that it has decided to award the contract to her. Because the PNP's written standards of conduct prohibit any PNP officer from entering into a contract or consultant agreement with the PNP, the Vice President resigns her position. The PNP, on the day after the resignation, awards the contract to the former Vice President.

From the manner in which the PNP procured the services of the Vice President, FEMA would likely conclude that—at the very least—there was an apparent conflict of interest in violation of 2 C.F.R. § 215.42 resulting from the Vice President's involvement in the procurement, even though she was not involved in the final award decision or reviewing her own solicitation.

C. COMPETITION (2 C.F.R. § 215.43)

The subgrantee must, pursuant to 2 C.F.R. § 215.43, conduct all procurement transactions “in a manner to provide, *to the maximum extent practical*, open and free competition.”³⁸¹ Although not defined in the regulation, “open and free competition”³⁸² generally means that a complete requirement is publicly solicited and all responsible sources are permitted to compete.³⁸³ There

³⁸¹ 2 C.F.R. § 215.43 (emphasis added).

³⁸² Cf. 48 C.F.R. § 2.101 (“Full and open competition, when used with respect to a contract action, means that all responsible sources are permitted to compete.”). We note that the procurement standards applicable to local and Indian tribal governments use the phrase “full and open” as opposed to “free and open.” 44 C.F.R. § 13.36(c). FEMA does not consider the words “free” or “full” as distinguishable.

³⁸³ Department of Homeland Security, Office of Inspector General, OIG-14-12-D, *FEMA Should Recover \$10.9 Million of Improper Contracting Costs from Grant Funds Awarded to Columbus Regional Hospital, Columbus, Indiana*, p. 4 (Dec. 4, 2013) (“Generally, open and free competition means that all responsible sources are allowed to compete for contracts.”)

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are numerous benefits to free and open competition, such as an increased probability of reasonable pricing from the most qualified contractor.³⁸⁴ Such competition also works to prevent fraud, favoritism, collusion, waste, and abuse.³⁸⁵ Open and free competition also increases the probability of achieving reasonable pricing from the most qualified contractors and allows greater opportunity for small businesses, minority firms, and women's enterprises to compete for federally funded work.³⁸⁶

The free and open competition requirement has proven to be one of the most common problems with subgrantee procurements in recent years and comprises a majority of audit findings by OIG. One noncompetitive practice often encountered during audits of subgrantees has been the solicitation of a requirement from only a limited number or pool of contractors.³⁸⁷ Another

³⁸⁴ Department of Homeland Security, Office of Inspector General, OIG-14-46-D, *FEMA's Dissemination of Procurement Advice Early in Disaster Response Periods*, pp. 5-6 (Feb. 28, 2014); DHS Office of Inspector General, Report No. DA-13-03, *FEMA Should Recover \$5.3 Million of Public Assistance Grant Funds Awarded to the University of Southern Mississippi – Hurricane Katrina* (Nov. 6, 2012).

³⁸⁵ Id.

³⁸⁶ Department of Homeland Security, Office of Inspector General, OIG-14-12-D, *FEMA Should Recover \$10.9 Million of Improper Contracting Costs from Grant Funds Awarded to Columbus Regional Hospital, Columbus, Indiana*, p. 6 (Dec. 04, 2013)

³⁸⁷ See, e.g. the following audit reports:

- (1) DHS Office of Inspector General Audit No. 14-12-D, *FEMA Should Recover \$10.9 Million of Improper Contracting Costs from Grant Funds Awarded to Columbus Regional Hospital*, pp. 6-7 (Dec. 13, 2014) (“The Hospital awarded two contracts totaling \$8,699,025 for nonexigent work without open and free competition. In addition, at least one of the contracts included unreasonable prices. Generally, open and free competition means that all responsible sources are allowed to compete for contracts. However, the Hospital did not publicly advertise the two contracts, but rather invited a limited number of preselected contractors to bid.”);
- (2) DHS Office of Inspector General Report No. DD-13-11, *FEMA Should Recover \$46.2 Million of Improper Contracting Costs from Federal Funds Awarded to the Administrators of the Rule Educational Fund* (Aug. 15, 2013) (“Tulane awarded four noncompetitive contracts totaling \$5,677,034 after exigent circumstances no longer existed. We consider the exigency to have ended in June 2006 just before Tulane opened its Medical School campus to students. Federal regulations at 2 CFR Part 215.43 require all procurement transactions be conducted in a manner to provide, to the maximum extent practical, open and free competition, which means that all responsible sources are allowed to compete for contracts. However, rather than publicly advertising these four contracts, Tulane invited only preselected contractors to bid on them.”); and
- (3) DHS Office of Inspector General Report No. 14-95-D, *FEMA Should Recover \$8.0 Million of \$26.6 Million in Public Assistance Grant Funds Awarded to St. Stanislaus College Preparatory in Mississippi – Hurricane Katrina* (May 22, 2014) (“Under Project 9689, St. Stanislaus did not promote an open and free procurement process when it hired a contractor to demolish its damaged dining hall. Instead of soliciting bids from all sources for the work totaling \$156,350, St. Stanislaus contacted several specific contractors to obtain quotes and selected a firm that had previously performed debris cleanup work for the school. However, this process restricted competition because it did not provide an opportunity for all interested contractors to bid for the contract work.”).

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impermissible practice is the sole-source procurement of services from a single vendor who has existing business relationships with the subgrantee³⁸⁸ or familiarity with the work in question.

**Noncompetitive Procurement by Nonprofit Organization – Solicitation of Requirement
from a Limited Number of Vendors**

DHS Office of the Inspector General Report No. DA-13-20 (Jun. 2013)
*FEMA Should Recover \$3.8 Million of Public Assistance Grant Funds Awarded to Kenergy
Corporation, Henderson, Kentucky*

Background. A severe winter storm impacted Kentucky in January 2009, and damaged the electrical distribution system of Kenergy, a private nonprofit electric utility cooperative. Kenergy awarded two noncompetitive T&M contracts for the permanent repairs performed after February 18, 2009, which was after emergency electrical power had been restored to all of Kenergy’s customers. For two contracts valued at \$1,989,277, Kenergy did not openly compete the work, but instead requested information from several contractors that Kenergy officials believed were capable of doing the work. They prequalified several contractors and sent requests for quotations to those contractors, awarding the contract work to the lowest bidders.

General Summary of OIG Finding. The OIG concluded that the need to restore electrical power constituted exigent circumstances that warranted the use of noncompetitive contracts through February 18, 2009, because lives and property were at risk. However, Kenergy should have openly competed the permanent repair work after that date because exigent circumstances no longer existed to justify the use of noncompetitive contracts.

³⁸⁸ See, e.g. the following audit reports:

- (1) DHS Office of Inspector General, Report No. DA-12-18, FEMA Public Assistance Funds Awarded to Henderson Point Water and Sewer District, Pass Christian, Mississippi (May 11, 2012) (“The District used a contractor with which it had an existing business relationship to complete the work authorized under the FEMA projects. District officials said that they made that decision because they were operating under a state of emergency at the time the replacement and repair work began on the sewer system. However, both projects were for permanent repair work (Category F) and should have been openly competed.”); and
- (2) DHS Office of Inspector General, Report No. DA-11-23, *FEMA Public Assistance Grant Funds Awarded to Gulf Coast Community Action Agency, Gulfport, Mississippi* (Aug. 26, 2011) (“The Agency did not openly compete \$273,137 of contracted architectural and engineering (A&E) services under Project 11134 for permanent construction work (A.E. Perkins facility) that began approximately 1 year after the disaster. **Instead, the Agency used a firm with which it had an existing relationship under a pre-Katrina contract to perform the services.** Federal regulation 2 CFR 215.43 requires all procurement transactions to be conducted in a manner to provide, to the maximum extent practical, open and free competition. The Agency’s board meeting notes from September 2006 indicated that there were no other architectural firms that were operational or that could handle the size of the rebuilding project. However, the procurement files contained no documentation to indicate how the Agency reached such a decision.”) (emphasis added).

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1. Noncompetitive Procurements

Noncompetitive procurements not providing for free and open competition will be scrutinized by FEMA and/or likely be challenged by the OIG during an audit, even if they result in the same or lower price than if the procurement was conducted through free and open competition. Notably, there is no specific guidance in 2 C.F.R. pt. 215 as to when a noncompetitive procurement is appropriate, which is a key distinction from the procurement standards at 44 C.F.R. § 13.36 for local and Indian tribal governments.

As discussed in section IV(C)(4) of this Field Manual, 44 C.F.R. § 13.36(d) sets forth the two conditions precedent that must be met in order for local and Indian tribal governments to conduct a noncompetitive procurement. The first condition precedent is that the award of a contract must be “*infeasible*” under small purchase procedures, sealed bids, or competitive proposals.³⁸⁹ The second condition precedent is that one of four circumstances applies, and the most frequently relied upon circumstance is where the public *exigency* or *emergency* for the requirement will not permit delay resulting from competitive solicitation.

The regulations at 2 C.F.R. pt. 215, however, contain no such conditions precedent, and FEMA will evaluate the appropriateness of a noncompetitive procurement by using the “maximum extent practical” standard. The term “practical,” while not defined by the regulation generally means “capable of being put to use or account,” “of, relating to, or manifested in practice or action: not theoretical or ideal.”³⁹⁰

When evaluating whether a noncompetitive procurement was permissible, the OIG has focused on whether or not there were “exigent” circumstances that would warrant something less than free and open competition. Its view of what is “exigent” in many cases focuses on a life, health,

³⁸⁹ 44 C.F.R. § 13.36(d)(4)(i).

³⁹⁰ “Practical.” Merriam-Webster.com. Accessed June 18, 2014. <http://www.merriam-webster.com/dictionary/practical>:

- (1) a: of, relating to, or manifested in practice or action : not theoretical or ideal <a practical question> <for all practical purposes>
b: being such in practice or effect : virtual <a practical failure>
- (2) actively engaged in some course of action or occupation <a practical farmer>
- (3) capable of being put to use or account : useful <he had a practical knowledge of French>
- (4) a: disposed to action as opposed to speculation or abstraction
b: (1): qualified by practice or practical training <a good practical mechanic> (2): designed to supplement theoretical training by experience
- (5) concerned with voluntary action and ethical decisions <practical reason>

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and safety standard.³⁹¹ For example, in the case of private nonprofit electric cooperatives awarding a noncompetitive contract, the OIG stated the following:

“The contracts were awarded for work after February 18, 2009, when emergency electrical power had been restored to all of Kenergy’s customers. We concluded that the need to restore electric power constituted exigent circumstances that warranted the use of noncompetitive contracts through February 18, 2009, because lives and property were at risk. However, Kenergy should have openly competed permanent repair work after such date because exigent circumstances no longer existed to justify the use of noncompetitive contracts.”³⁹²

Despite the focus on lives and safety in the case of determining “exigent” circumstances for institutions of higher education, hospitals, and other private nonprofit organizations, the OIG has also recognized other types of “exigent” circumstances where an applicant needed to perform restorative activities critical to reopening a hospital to its full operating capability,³⁹³ reopening an institution of higher education,³⁹⁴ and reopening a private nonprofit educational facility.³⁹⁵

³⁹¹ See also the discussion of exigency and emergency in the OIG decisions cited in section IV(C)(4) of this Field Manual. Notably, the OIG does not appear to draw and distinctions in its evaluation of an exigency or emergency when evaluating the procurement under 44 C.F.R. § 13.36 (for local and Indian tribal governments) and 2 C.F.R. pt. 215 (for institutions of higher education, hospitals, and other private nonprofit organizations).

³⁹² See DHS Office of Inspector General Report No. DA-13-20, *FEMA Should Recover \$3.8 Million of Public Assistance Grant Funds Awarded to Kenergy Corporation, Henderson, Kentucky*, p. 3 (Jun. 18, 2013); compare DHS Office of Inspector General Report No. 14-11, *FEMA Should Recover \$6.1 Million of Public Assistance Grant Funds to Orlando Utilities Commission under Hurricane Frances* (Dec. 2013), where the Office of Inspector General asserted the same meaning of “exigency” under 44 C.F.R. § 13.36(d) with respect to a *public* utilities commission (“The Utility restored electrical power to almost all of its customers by September 9, 2004, which we consider the end of the emergency period. We did not question about \$2.6 million in contract costs the Utility claimed under Project 3927 for emergency restoration of power during this period. The \$6.1 million we question is for debris removal and electrical repair work that the Utility completed after it restored emergency power to its customers. After such time, exigent circumstances no longer existed to warrant the use of noncompetitive contracts.”).

³⁹³ See DHS Office of Inspector General Audit No. 14-12-D, *FEMA Should Recover \$10.9 Million of Improper Contracting Costs from Grant Funds Awarded to Columbus Regional Hospital*, pp. 6-7 (Dec. 13, 2014) (“...we did not question all of the costs for the two contracts because contractors performed the majority of the work under exigent circumstances to restore the Hospital to its full operating capability.”).

³⁹⁴ See DHS Office of Inspector General Report No. DD-13-11, *FEMA Should Recover \$46.2 Million of Improper Contracting Costs from Federal Funds Awarded to the Administrators of the Rule Educational Fund* (Aug. 15, 2013) (“We did not fault Tulane for awarding this contract without competition because exigent circumstances existed at the time. Generally, we consider circumstances to be exigent when lives or property are at stake, or in this case, when a city or community needs to reopen its schools.”).

³⁹⁵ See DHS Office of Inspector General Report No. 14-95-D, *FEMA Should Recover \$8.0 Million of \$26.6 Million in Public Assistance Grant Funds Awarded to St. Stanislaus College Preparatory in Mississippi – Hurricane Katrina*, p.5 (May 2014) (“Our review of Projects 10695 and 10291 revealed that St. Stanislaus did not comply with Federal contracting requirements for contract work procured under the projects. However, we did not question any

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2. Organizational Conflicts of Interest, Award Decisions, and Solicitations

The regulation at 2 C.F.R. § 215.43 provides additional guidance as it relates to organizational conflict of interest, award decisions, and solicitations, which are addressed below.

i. Organizational Conflicts of Interest

A subgrantee is required to be alert to organizational conflicts of interest.³⁹⁶ In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, invitations for bid, and/or requests for proposals shall be excluded from competing for such procurements.³⁹⁷ The regulation, however, does not define nor provide additional guidance as to the scope and meaning of “organizational conflict of interest.” It is, therefore, helpful to understand the meaning and scope of organizational conflicts of interest with respect to Federal contracting, and section IV(B)(5) of this Field Manual contains a detailed description of the applicable rules and prohibitions.

ii. Noncompetitive Practices

A subgrantee is also required to be alert to noncompetitive practices among contractors that may restrict or eliminate competition or otherwise restrain trade.³⁹⁸ Noncompetitive practices are different than organizational conflicts of interest, in that there is often some form of misconduct. The regulation, however, does not define noncompetitive practices nor provide any additional explanation of what would comprise such a practice. The most common form of noncompetitive practice is “bid rigging,” which is discussed in detailed at section IV(B)(1)(iii) of this Field Manual.

iii. Clear Specifications and Requirements

The subgrantee’s solicitations must clearly set forth all requirements that the bidder or offeror shall fulfill in order for the bid or offer to be evaluated by the subgrantee.³⁹⁹ The purpose of this requirement is to enable bidders or offerors to understand the requirements and prepare sound

costs under those projects because (1) the contract work was for activities critical to reopening the school, and (2) FEMA had taken corrective action on the noncompliance issues by disallowing unreasonable and ineligible contract costs before our audit.”).

³⁹⁶ 2 C.F.R. § 215.43.

³⁹⁷ *Id.*; see DHS Office of Inspector General, Report No. DD-11-15, *FEMA Public Assistance Grant Awarded to Saint Mary’s Academy (SMA), New Orleans, Louisiana*, p. 3 (Aug. 5, 2011) (The subgrantee gave an unfair competitive advantage to a subcontractor on an \$8.7 million contract by allowing the subcontractor to prepare drawings and specifications for the scope of work.).

³⁹⁸ *Id.*

³⁹⁹ *Id.*

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proposals to satisfy those requirements. In addition, the subgrantee's written procurement procedures must provide for a solicitation for goods and services to have certain elements, discussed in section V(D) below.

iv. Basis for Contract Award

A subgrantee must make an award to the bidder or offeror whose bid or offer is responsive to the solicitation and is most advantageous to the subgrantee, price, quality, and other factors considered.⁴⁰⁰

Qualifications-Based Procurement of Architectural/Engineering Services

The regulation at 2 C.F.R. § 215.43 states that a subgrantee must make an award to the bidder or offeror whose bid or offer is responsive to the solicitation and is "most advantageous to the subgrantee, price, quality, and other factors considered." There is, however, no specific method of procurement identified in 2 C.F.R. pt. 215 that must be followed by a nonprofit organization to ensure free and open competition and to ensure an award is made to the bidder or offeror whose bid or offer was most responsive. There is also no specific mention of any unique processes applicable to architectural and engineering services where price is not considered as one of the evaluation factors.

These are important distinctions from 44 C.F.R. § 13.36, which sets forth the procurement requirements for local and Indian tribal governments under grants. Notably, this regulation provides that a local or Indian tribal government may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services where competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services.⁴⁰¹

Similar to 44 C.F.R. § 13.36, the Federal Acquisition Regulation authorizes the Federal Government to acquire architect-engineering services through competitive proposals, where contractors responding to a solicitation are evaluated and ranked by an evaluation board according to non-price selection criteria.⁴⁰² The final selection authority selects a contractor and, once the selection is made, the contracting officer negotiates a final contract, inclusive of a fair and reasonable price for the services.⁴⁰³ There is a requirement for the Federal

⁴⁰⁰ Id.

⁴⁰¹ 44 C.F.R. § 13.36(d)(3)(5).

⁴⁰² 41 C.F.R. pt. 36 (Construction Contracts), subpart 36.6 (Architect-Engineering Services).

⁴⁰³ 41 C.F.R. § 36.606 (Negotiation). Negotiations must be conducted in accordance with 41 C.F.R. pt. 15 (Contracting by Negotiation).

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government to prepare an independent cost estimate before commencing negotiations.⁴⁰⁴

FEMA has, accordingly, taken the position that a subgrantee subject to 2 C.F.R. pt. 215 may conduct a qualifications-based procurement for A/E professional services in the same manner as detailed in 44 C.F.R. pt. 13. There is, notably, still a requirement to perform a cost or price analysis.

v. Rejection of Bids and Offers

A subgrantee may reject any and all bids when it is in the interest of the subgrantee to do so.⁴⁰⁵ Notwithstanding, the subgrantee should contemporaneously memorialize the rationale for the rejection of a bid or offer, specifically in the case where the rejected bid or offer was the lowest price and otherwise responsive to the solicitation.

D. PROCUREMENT PROCEDURES (2 C.F.R. § 215.44(a))

A subgrantee must establish written procedures that provide for, at a minimum, the three items set forth at 2 C.F.R. § 215.44(a)(1)-(3).⁴⁰⁶ These are the minimum requirements, and the subgrantee is free to adopt any other procedures so long as they do not conflict with the Federal procurements standards at 2 C.F.R. pt. 215.

1. Purchasing Only Necessary Items and Services (2 C.F.R. § 215.44(a)(1))

The subgrantee's written procedures must provide for procedures to avoid the purchase of unnecessary items.⁴⁰⁷ The purpose of this requirement is to limit purchases with Federal assistance to only the items and services necessary to carry out the award.

2. Lease vs. Purchase (2 C.F.R. § 215.44(a)(2))

A subgrantee's written procedures must provide for, where appropriate, an analysis of lease vs. purchase alternatives to determine which would be the most economical and practical procurement for the Federal Government.⁴⁰⁸ Within the context of the Public Assistance Program, there will be numerous occasions when a subgrantee would perform this analysis, such as the acquisition of equipment necessary to respond or recover to a major disaster or temporary facilities (which is detailed at Section IV(A)(3) of this Field Manual).

⁴⁰⁴ 41 C.F.R. § 36.605 (Government Cost Estimate for Architect-Engineering Work).

⁴⁰⁵ 2 C.F.R. § 215.43.

⁴⁰⁶ See DHS Office of Inspector General, Report No. DD-13-08, *FEMA Should Disallow \$4.1 Million of the \$48.5 Million Public Assistance Grant Awarded to ARK Valley Electric Cooperative, Kansas* (Apr. 16, 2013).

⁴⁰⁷ 44 C.F.R. § 215.44(a)(1).

⁴⁰⁸ 44 C.F.R. § 215.44(a)(2).

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3. Solicitations for Goods and Services (2 C.F.R. § 215.44(a)(3))

The regulation at 2 C.F.R. § 215.44(a)(3) sets forth various requirements that a subgrantee's solicitation for goods and services must provide for.

i. Description of Technical Requirements

The solicitation must provide for a clear and accurate description of the technical requirements for the material, product, or service to be procured.⁴⁰⁹ In competitive procurements, such a description must not contain features which unduly restrict competition.⁴¹⁰ The description of the technical requirements must be stated, whenever practicable, in terms of functions to be performed or performance required, including the range of acceptable characteristics or minimum acceptable standards.⁴¹¹ In addition, the solicitation must provide specific features of “brand name or equal” descriptions that bidders are required to meet when such items are included in the solicitation.⁴¹²

This regulation notably expresses a preference for performance or functional specifications, but does not prohibit the use of detailed technical specifications when appropriate. A performance specification describes an end result, an objective, or standard to be achieved, and leaves the determination of how to reach the result to the contractor.⁴¹³ Using such a model, the subgrantee should describe what the product should be able to do or the services to accomplish without imposing unnecessarily detailed requirements on how to accomplish the tasks.

ii. Evaluation Factors

The solicitation must state the requirements which the bidder/offeror must fulfill and all other factors to be used in evaluating bids or proposals.⁴¹⁴

⁴⁰⁹ 44 C.F.R. § 215.44(a)(3)(i); see DHS Office of Inspector General, Report No. 14-12-D, *FEMA Should Recover \$10.9 Million of Improper Contracting Costs from Grant Funds Awarded to Columbus Regional Hospital*, p. 5 (Dec. 4, 2013) (subgrantee did not develop a scope of work for certain contracts before award).

⁴¹⁰ 44 C.F.R. § 215.44(a)(3)(i).

⁴¹¹ 44 C.F.R. § 215.44(a)(3)(iii).

⁴¹² 44 C.F.R. § 215.44(a)(3)(iv); see DHS Office of Inspector General, Report No. DD-11-15, *FEMA Public Assistance Grant Awarded to Saint Mary's Academy (SMA), New Orleans, Louisiana*, p. 3 (Aug. 5, 2011) (subgrantee gave a particular contractor an additional advantage on the same contract because it identified “[contractor name] or equal” in its request for bid documents but did not describe the specific technical requirements that would equal that contractor's product).

⁴¹³ See *Stuyvesant Dredging Co. v. United States*, 834 F.2d 1576 (Fed. Cir. 1987). Design specifications, on other hand, set forth in detail the materials to be employed and the manner in which the work is to be performed, and the contractor is required to follow them as one would a road map and without deviation. See *L.L. Simmons Co. v. United States*, 412 F.2d 1360 (Ct. Cl. 1969).

⁴¹⁴ 44 C.F.R. § 215.44(a)(3)(ii).

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iii. Conservation and Protection

The solicitation must include a preference, to the extent practicable and economically feasible, for products and services that conserve natural resources and protect the environment and are energy efficient.⁴¹⁵

iv. Metric System

The solicitation must provide for the acceptance, to the extent practicable and economically feasible, of products and services dimensioned in the metric system of measurement.⁴¹⁶ FEMA, as a matter of practice, generally treats this requirement as nonmaterial during its evaluation of subgrantee procurements.

E. CONTRACTING WITH SMALL BUSINESSES, MINORITY-OWNED FIRMS, AND WOMEN'S BUSINESS ENTERPRISES

1. Steps to Further Goal of Using Small Businesses, Minority-Owned Firms, and Women's Business Enterprises (2 C.F.R. § 215.44(b))

The regulation at 2 C.F.R. § 215.44(b) requires a subgrantee to make “positive efforts... to utilize small businesses, minority-owned firms, and women’s business enterprises, whenever possible.”⁴¹⁷ In order to further this goal, the regulations require a subgrantee to take five specific steps described below. The regulation does not preclude a subgrantee from taking additional steps, but rather sets a baseline level of effort.

- ***Use of Such Firms to the Fullest Extent Practicable.*** A subgrantee must ensure that small businesses, minority-owned firms, and women’s business enterprises are used “to the fullest extent practicable.”⁴¹⁸
- ***Advertise and Schedule.*** A subgrantee must make information on forthcoming opportunities available and arrange time frames for purchases and contracts to encourage and facilitate participation by small businesses, minority-owned firms, and women’s business enterprises.⁴¹⁹
- ***Subcontracting.*** A subgrantee must consider in the contract process whether firms competing for larger contracts intend to subcontract with small businesses, minority-

⁴¹⁵ 2 C.F.R. § 215.44(a)(3)(vi).

⁴¹⁶ 2 C.F.R. § 215.44(a)(3)(v).

⁴¹⁷ 2 C.F.R. § 215.44(b).

⁴¹⁸ 2 C.F.R. § 215.44(b)(1).

⁴¹⁹ 2 C.F.R. § 215.44(b)(2).

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owned firms, and women’s business enterprises.⁴²⁰

- **Consortiums.** A subgrantee must encourage contracting with consortiums of small businesses, minority-owned firms, and women’s business enterprises when a contract is too large for one of these firms to handle individually.⁴²¹
- **Use of Certain Federal Services.** A subgrantee must use the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Department of Commerce’s Minority Business Development Agency in the solicitation and utilization of small businesses, minority-owned firms, and women’s business enterprises.⁴²²

The failure to take the steps above is one of the most common findings in OIG audits.⁴²³ Furthermore, the following example demonstrates that failure to take the required steps can result in the potential disallowance of costs, even if the subgrantee otherwise conducts a procurement in a manner consistent with free and open competition.

Example – Taking Affirmative Steps to Assure the Use of Small and Minority Firms, Women’s Business Enterprises, and Labor Surplus Area Firms

DHS Office of Inspector General Report No. DS-13-14 (Sep. 2013)
FEMA Should Recover \$7.5 Million of the \$43.2 Million Public Assistance Grant Awarded to Craighead Electric Cooperative Corporation, Arkansas

Background. A nonprofit rural electric cooperative (“Cooperative”) serves eight counties in northeast Arkansas and provides electricity to more than 27,000 customers. A severe winter storm impacts the State of Arkansas damages or destroys roughly 8000 utility poles throughout the Cooperative’s service area, and these damaged or destroyed poles caused power outages to approximately 25,000 of the Cooperative’s customers. The Cooperative used free and open competition in awarding \$5.6 million in contracts for permanent work.

⁴²⁰ 2 C.F.R. § 215.44(b)(3).

⁴²¹ 2 C.F.R. § 215.44(b)(4).

⁴²² 2 C.F.R. § 215.44(b)(5).

⁴²³ DHS Office of Inspector General, Report No. 14-12-D, *FEMA Should Recover \$10.9 Million of Improper Contracting Costs from Grant Funds Awarded to Columbus Regional Hospital*, p. 5 (Dec. 4, 2013); DHS Office of Inspector General, Report No. DD-13-14, *FEMA Should Recover \$7.5 Million of the \$43.2 Million Public Assistance Grant Awarded to Craighead Electric Cooperative Corporation, Arkansas* (Sep. 2013); DHS Office of Inspector General, Report No. DD-13-11, *FEMA Should Recover \$46.2 Million of Improper Contracting Costs from Federal Funds Awarded to the Administrators of the Tulane Educational Fund, New Orleans, Louisiana*, pp. 16-18 (Aug. 15, 2013); DHS Office of Inspector General, Report No. DD-12-15, *FEMA Public Assistance Grant Funds Awarded to Ochsner Clinic Foundation, New Orleans, Louisiana* (Jun. 20, 2012); DHS Office of Inspector General, Report No. DD-11-21, *FEMA Public Assistance Grant Awarded to Jesuit High School, New Orleans, Louisiana* (Sep. 26, 2011).

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However, the Cooperative did not take the required steps to assure that it used small businesses, minority-owned firms, and women’s business enterprises when possible. Cooperative officials said that they were not aware of this requirement and that all businesses had an equal opportunity to bid because they advertised the projects in the newspaper. Cooperative officials also said that they were concerned about cost and contractor experience, rather than a contractor’s business affiliation. The Cooperative also did not include the required provisions in its contracts

Summary of Relevant Finding. The OIG found that the Cooperative did not comply with the requirement to take affirmative steps to use small businesses, minority-owned firms, and women’s business enterprises, and recommended disallowance of the \$5.6 million in contract costs. FEMA did not concur with this recommendation to disallow all costs. FEMA evaluated the costs for reasonableness, found them reasonable, and elected not to take any enforcement remedy.

2. Meaning of Small Business, Minority-Owned Firm, and Women’s Business Enterprise

The regulation at 2 C.F.R. § 215.45 does not, unfortunately, define the terms women’s businesses enterprise, small business, or minority-owned firm. In the absence of such definitions, FEMA applies the meaning of those terms described in section IV(D) of this Field Manual.

3. Set Asides for Small Businesses, Minority-Owned Firms, and Women’s Business Enterprises

See section IV(D) for a discussion of this issue.

F. TYPES OF CONTRACTS (2 C.F.R. § 215.44(c))

Subgrantees have the discretion of determining the type of contract to be used (such as fixed price, cost-reimbursement, and incentive⁴²⁴ contracts), but the type of contract must be “appropriate for the particular procurement and for promoting the best interest of the program or project involved.”⁴²⁵

⁴²⁴ An “incentive contract” is one where a contractor stands to make more money if its performance is superior or ahead of schedule. The guidance on the use of such contracts by the Federal Government in its procurement is forth in the Federal Acquisition Regulations, 48 C.F.R. subpart 16.4.

⁴²⁵ 2 C.F.R. § 215.44(c). The Federal Acquisition Regulations set forth its guidance concerning the Federal Government’s selection of a contract type in its procurements at 48 C.F.R. subpart 16.1.

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1. Cost-Plus-Percentage-of-Cost Contract

The regulation at 2 C.F.R. § 215.44(c) specifically prohibits the cost-plus-percentage-of-cost or percentage-of-construction cost” methods of contracting. The reason for this prohibition is that such contracts provide a disincentive for contractors to control costs—the more contractors charge, the more profit they make. Section IV(E)(4) of this Field Manual contains a detailed discussion of these types of prohibited contracts.

Prohibited Use of Cost-Plus-Percentage of Cost Contract

DHS Office of Inspector General Audit No. 14-12-D (Dec. 13, 2014)
FEMA Should Recover \$10.9 Million of Improper Contracting Costs from Grant Funds
Awarded to Columbus Regional Hospital

Background. Severe storms and flooding impacted the State of Indiana from May 30 to June 27, 2008, and damaged the Columbus Regional Hospital (“Hospital”), which is a county nonprofit regional health care facility that provides healthcare services to residents of multiple counties. Floodwaters from the incident inundated the entire basement and first floor of the Hospital, and Hospital officials closed the facility as a result of the flood and partially reopened it in October 2008. The OIG determined that exigent circumstances existed until April 2009, when the hospital returned to full capacity.

The Hospital awarded two contracts totaling \$44,725,020 using prohibited cost-plus-percentage-of-cost-contracts. First, the Hospital awarded a cost-plus-percentage-of-cost contract for the phase 1 rebuilding of the hospital, and the contractor added a 4.5 percent mark-up to all subcontractor/vendor costs. Second, the Hospital also used the same type of cost-plus contract for emergency clean-up after the flooding, which included a 15 percent mark-up on all costs.

General Summary of Relevant OIG Finding. The OIG determined that both contracts were entirely ineligible, but did not question all of the costs for the two contracts because contractors performed the majority of the work under exigent circumstances to restore the hospital to its full operating capacity. However, because the Hospital “should have known better than to use cost-plus-percentage-of-costs contract and because such contracts are so egregious,” the OIG believed that “FEMA should at least disallow the mark-ups on costs.”⁴²⁶

2. Time and Materials Contracts

One notable distinction between 44 C.F.R. § 13.36(b)-(i) and 2 C.F.R. § 215.44(c) concerns T&M contracts. For local and Indian tribal governments, 44 C.F.R. § 13.36(b)(10) provides that

⁴²⁶ There were many other contracts at issue under this audit and many other audit findings not discussed here.

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a local or Indian tribal government subgrantee may use a T&M contract 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.⁴²⁷ The regulation at 2 C.F.R. § 215.44(c) contains no such equivalent conditions precedent. In other words, the regulation does not require the subgrantee to make a determination that no other contract type is suitable and include a ceiling price.

Notwithstanding, FEMA will review a hospital's, institution of higher education's, or other nonprofit organization's selection of a T&M contract to analyze whether the contract was "appropriate for the particular procurement" and "promotes the best interest" of the Public Assistance project. FEMA has also promulgated (as discussed in Section IV(A)(6) of this Field Manual) various policies concerning the use of T&M contracts that are applicable to all Public Assistance applicants, including hospitals, institutions of higher education, or other nonprofit organizations.

We note that the OIG has made findings during audits of private nonprofit organizations that—in the case where the organization used a T&M contract—the organization did not include a cost ceiling or a not-to-exceed clause, referencing the Public Assistance Guide as the source of this requirement. For example, in the audit of Kenergy Corporation discussed in section V(C)(1) above, the subgrantee awarded two noncompetitive T&M contracts for permanent repairs to its electrical distribution system. In addition to issues over the noncompetitive nature of the contracts beyond the exigent period, the OIG stated that "Kenergy awarded the contracts without a cost ceiling or not-to-exceed clause..." and cited to the language in the Public Assistance Guide that states "Applicants must carefully monitor and document contractor expenses [under T&M contracts], and a cost ceiling or not to exceed provision must be included in the contract."⁴²⁸

In addition to the statements in the Public Assistance Guide concerning the need to include cost ceilings, the OIG has also focused on the following statement about the use of T&M contracts for only a limited period during audits of institutions of higher education, hospitals, and other private nonprofit organizations:

"Applicants should avoid using time and materials contracts. FEMA may provide assistance for work completed under such contracts for a limited period (generally not more than 70 hours) for work that is necessary immediately after the disaster has

⁴²⁷ See *supra* section IV(A)(6) of this Field Manual.

⁴²⁸ DHS Office of Inspector General, Report No. DA-13-20, *FEMA Should Recover \$3.8 Million of Public Assistance Grant Funds Awarded to Kenergy Corporation, Henderson, Kentucky* (Jun. 18, 2013) ("In addition, FEMA Public Assistance Guide (FEMA 322, October 2007, pp. 39-40[*sic*]) specifies that—...Time-and-materials contracts must be carefully monitored and a cost ceiling or "not to exceed" provision must be included in the contract.").

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occurred when a clear scope of work cannot be developed.”⁴²⁹

Relying upon the Public Assistance Guide and FEMA disaster assistance policies, the OIG may recommend total disallowance of costs based on the inappropriate use of a T&M contract beyond a limited period and where a scope of work can be developed.

Inappropriate Use of Time and Materials Contract by an Institution of Higher Education

DHS Office of Inspector General Report No. DA-13-03 (Nov. 2012)
FEMA Should Recover \$5.3 Million of Public Assistance Grant Funds Awarded to the
University of Southern Mississippi – Hurricane Katrina

Background. Hurricane Katrina impacted the State of Mississippi in 2005, and damaged the buildings, equipment, utilities, and recreational facilities at the University of Southern Mississippi (“University”). The University awarded, among other things, a T&M contract for permanent repairs conducted under six projects (repairs included such things as electrical, replacement of heating, ventilation, and air-conditioning units, temporary roof replacement, drywall replacement, etc.). The contract work was completed in July 2006, 11 months after Hurricane Katrina.

Summary of Relevant OIG Finding. The OIG found that the project files did not contain adequate justification for the use of the T&M contract. First, project documentation showed that a clear scope of work had been developed at the time the contract was awarded. Second, the contract was completed 11 months after the major disaster and FEMA’s Public Assistance Guide “states that time-and-materials contracts should be avoided but may be used for a limited period (generally not more than 70 hours) for work that is necessary immediately after the disaster. Therefore, the OIG stated that the University should have used a more appropriate type of contracting method to accomplish the work and questioned all contract costs.”⁴³⁰

G. RESPONSIBLE CONTRACTORS AND DEBARMENT (2 C.F.R. § 215.44(d))

A subgrantee must make contracts with “responsible contractors” who possess the ability to perform successfully under the terms and conditions of the proposed procurement.⁴³¹ In making such a determination, the subgrantee must consider contractor integrity, record of past performance, and financial and technical resources or accessibility to other necessary

⁴²⁹ Public Assistance Guide, *supra* note 90, p. 53.

⁴³⁰ DHS Office of Inspector General Report No. DA-13-03, *FEMA Should Recover \$5.3 Million of Public Assistance Grant Funds Awarded to the University of Southern Mississippi – Hurricane Katrina*, p. 5 (Nov. 6, 2012).

⁴³¹ 2 C.F.R. § 215.44(d).

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resources.⁴³²

As a preliminary matter, a subgrantee may not enter into a contract with a contractor that is debarred or suspended.⁴³³ But it is important to recognize that a contractor, even if not debarred or suspended, may still not be a “responsible” contractor for the purposes of 2 C.F.R. § 215.44(d). For example, a contractor may not have the necessary “technical and financial resources” to properly perform a contract, such as the necessary equipment and technical skills (or the ability to obtain them) to perform a particular scope of work. The Federal Acquisition Regulations set forth general standards for determining contractor responsibility that provide a useful reference in determining contractor responsibility, which are detailed at section IV(A)(4) of this Field Manual.

H. FEMA PREAWARD REVIEW OF SUBGRANTEE CONTRACTING (2 C.F.R. § 215.44(e))

FEMA can review a subgrantee’s preaward procurement documents, such as a request for proposal, invitation for bids, or independent cost estimates when any of the following five circumstances apply.⁴³⁴

- ***Noncompliance.*** A subgrantee’s procurement procedures or operation fails to comply with the procurement standards at 2 C.F.R. pt. 215.
- ***Noncompetitive Award.*** The procurement is expected to exceed the small purchase threshold (currently \$150,000) and is to be awarded without competition or only one bid or offer is received in response to a solicitation.
- ***Brand-Name.*** The procurement is expected to exceed the small purchase threshold (currently \$150,000) and specifies a “brand name” product.⁴³⁵
- ***Award to Other than Lowest Bidder.*** The proposed award over the small purchase threshold is to be awarded to other than the apparent low bidder under a sealed bid procurement.
- ***Contract Modifications.*** A proposed contract modification changes the scope of a contract or increased the contract amount by more than the amount of the small purchase threshold (currently set at \$150,000).

⁴³² *Id.*

⁴³³ See *supra* section IV(H)(13) of this Field Manual for a detailed description of the rules concerning debarment and suspension.

⁴³⁴ 2 C.F.R. § 214.44(e).

⁴³⁵ See, e.g. DHS Office of Inspector General, DD-11-15, *FEMA Public Assistance Grant Awarded to Saint Mary’s Academy (SMA), New Orleans, Louisiana*, pp. 3-4 (Aug. 05, 2011) (Subgrantee gave a contractor, “Southwest,” an unfair competitive advantage by soliciting “Southwest or equal” in its request for bid documents but did not describe the specific technical requirements that would equal Southwest’s product.

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I. COST AND PRICE ANALYSIS (2 C.F.R. § 215.45)

The subgrantee must perform and document some form of price or cost analysis in connection with every procurement action pursuant to 2 C.F.R. § 215.45.⁴³⁶ A cost or price analysis decreases the likelihood of unreasonably high or low prices, contractor misrepresentations, and errors in pricing relative to the scope of work.⁴³⁷ A cost or price analysis is required in the case where a subgrantee performs a noncompetitive procurement.⁴³⁸

- **Price Analysis.** The regulation provides that a “price analysis” may be accomplished in various ways, including the comparison of price quotations submitted, market prices and similar indicia, together with discounts.⁴³⁹ For example, in the case of sealed bidding, the comparison of apparent winner’s bid prices to the other bids satisfies price analysis.
- **Cost Analysis.** The regulation then states that a “cost analysis” is the review and evaluation of each element of cost to determine reasonableness, allocability, and allowability.⁴⁴⁰

It is important to recognize the distinctions between the cost and price analysis requirements set forth at 44 C.F.R. § 13.36(f) for local and Indian tribal governments and the requirements at 2 C.F.R. § 215.45 for an institution of higher education, hospital, or other nonprofit organization. The requirements at 44 C.F.R. § 13.36(f) are much more prescriptive, and require a cost analysis in certain circumstances (such as noncompetitive procurements). The requirements at 2 C.F.R. § 215.45 are much more permissive, and do not mandate any particular form of analysis (only that the subgrantee perform one).

J. PROCUREMENT RECORDS (2 C.F.R. § 215.46)

A subgrantee must create procurement records and files for contracts in excess of the small

⁴³⁶ 2 C.F.R. § 214.45.

⁴³⁷ See DHS Office of Inspector General, Report No. DA-13-03, *FEMA Should Recover \$5.3 Million of Public Assistance Grant Funds Awarded to the University of Southern Mississippi – Hurricane Katrina*, p. 6 (Nov. 2012).

⁴³⁸ See DHS Office of Inspector General, Report No. 14-12-D, *FEMA Should Recover \$10.9 Million of Improper Contracting Costs from Grant Funds Awarded to Columbus Regional Hospital*, p. 8 (Dec. 4, 2013) (“Regarding the lease on the modular kitchens, Hospital officials said that it was their only alternative. Hospital officials said they contacted three companies, and only one was responsive to their needs. **Regardless, even when only one source is available all procurements require a cost or price analysis.**”) (emphasis added); see also DHS Office of Inspector General, Report No. DA-12-18, *FEMA Public Assistance Funds Awarded to Henderson Point Water and Sewer District, Pass Christian, Mississippi* (May 11, 2012) (subgrantee did not openly compete certain contracts and “accepted the contractor’s proposed prices without performing an independent analysis of the prices to ensure reasonableness.”).

⁴³⁹ 2 C.F.R. § 214.45.

⁴⁴⁰ *Id.*

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purchase threshold (currently \$150,000).⁴⁴¹ These records and files must include, at minimum, the following:

- Basis for contractor selection;
- Justification for lack of competition when competitive bids or offers are not obtained; and
- Basis for award cost or price.

Subject to certain exceptions, the subgrantee must retain the procurement records for three years after the event that commences the record retention time frame.⁴⁴²

K. CONTRACT ADMINISTRATION (2 C.F.R. § 215.47)

The subgrantee must maintain a system for contract administration to ensure contractor conformance with the terms, conditions, and specifications in the contract and to ensure adequate and timely follow up of all purchases.⁴⁴³ As part of this system, the subgrantee must evaluate contractor performance and document, as appropriate, whether contractors have met the terms, conditions, and specifications of the contract.⁴⁴⁴

L. BONDING REQUIREMENTS (2 C.F.R. § 215.48(c))

The subgrantee must follow certain bonding rules for contracts and subcontracts for Public Assistance projects requiring construction or facility improvements.⁴⁴⁵ If the contract does not involve construction or facility improvements, then the bonding requirements below do not apply.

1. Contracts Less than \$100,000

Except as otherwise provided by Federal law, the subgrantee must follow its *own* requirements related to bid guarantees, performance bonds, and payment bonds for contracts and subcontracts less than \$100,000.

2. Contracts Over \$100,000

For contracts or subcontracts exceeding \$100,000, FEMA may accept the bonding policy and requirements of the subgrantee, provided that FEMA has made a determination that the Federal

⁴⁴¹ 2 C.F.R. § 214.46.

⁴⁴² 2 C.F.R. § 214.53(b).

⁴⁴³ 2 C.F.R. § 215.47.

⁴⁴⁴ Id.

⁴⁴⁵ 2 C.F.R. § 215.48(c).

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Government's interest is adequately protected. If FEMA has not made such a determination, then the subgrantee must meet the following requirements:

- ***Bid Guarantee.*** The subgrantee must require a bid guarantee from each bidder equivalent to five percent of the bid price.⁴⁴⁶ The "bid guarantee" must consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder shall, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.⁴⁴⁷
- ***Performance Bond.*** The subgrantee must require a performance bond on the part of the contractor for 100 percent of the contract price.⁴⁴⁸ A "performance bond" is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.⁴⁴⁹
- ***Payment Bond.*** The subgrantee must require a payment bond on the part of the contractor for 100 percent of the contract price.⁴⁵⁰ A "payment bond" is one executed in connection with a contract to assure payment as required by statute of all persons supplying labor and material in the execution of the work provided for in the contract.⁴⁵¹

Where bonds are required in the situations above, the bonds shall be obtained from companies holding certificates of authority as acceptable sureties pursuant to 31 C.F.R. pt. 223 (Surety Companies Doing Business with the United States).⁴⁵²

M. REQUIRED CONTRACT PROVISIONS (2 C.F.R. § 215.48 and Appendix A)

A subgrantee's contracts must include, in addition to provisions to define a sound and complete agreement, the provisions set forth at 2 C.F.R. § 215.48 and 2 C.F.R. pt. 215, Appendix A. Some of the provisions are based on sound contracting principles and others are required by Federal law, executive order, or regulation. The failure to include the required contract provisions is one of the most common findings under OIG audits of institutions of higher education, hospitals, and other private nonprofit organizations.⁴⁵³

⁴⁴⁶ 2 C.F.R. § 215.48(c)(1).

⁴⁴⁷ Id.

⁴⁴⁸ 2 C.F.R. § 215.48(c)(2).

⁴⁴⁹ Id.

⁴⁵⁰ 2 C.F.R. § 215.48(c)(3).

⁴⁵¹ Id.

⁴⁵² 2 C.F.R. § 215.48(c)(4).

⁴⁵³ See, e.g. DHS Office of Inspector General, Report No. DD-13-14, *FEMA Should Recover \$7.5 Million of the \$43.2 Million Public Assistance Grant Awarded to Craighead Electric Cooperative Corporation, Arkansas* (Sep. 20, 2013); DHS Office of Inspector General, Report No. DD-13-08, *FEMA Should Disallow \$4.1 Million of the \$48.5*

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1. Provisions for Contractual Remedies (2 C.F.R. § 215.48(a))

The subgrantee’s contract must include contractual provisions or conditions that allow for administrative, contractual, or legal remedies in instances where a contractor violates or breaches the contract terms, and provide for such remedial actions as may be appropriate.⁴⁵⁴ This requirement only applies in the case where a contract exceeds the simplified acquisition threshold of \$150,000.⁴⁵⁵

2. Provisions for Termination for Cause and Convenience (2 C.F.R. § 215.48(b))

The subgrantee’s contract must include suitable provisions for termination for cause and convenience by the subgrantee for contracts exceeding the simplified acquisition threshold of \$150,000.⁴⁵⁶

“Termination for convenience” is the exercise of a subgrantee’s right to completely or partially, and the relevant contract provisions must include the manner by which termination shall be effected and the basis for settlement.⁴⁵⁷ “Termination for cause” (or “default”) is the exercise of a party’s right to completely or partially terminate a contract because of the other party’s actual or anticipated failure to perform its contractual obligations, the relevant contract provisions must describe conditions under which the contract may be terminated for default.⁴⁵⁸ Lastly, the contract must describe the conditions where the contract may be terminated because of circumstances beyond the control of the contractor, which is known as a “force majeure” clause.⁴⁵⁹ These types of clauses also serve as the basis for excusing contractor performance until the “force” has abated.

3. Contract Clause Regarding Government Access to Records (2 C.F.R. § 215.48(d))

A subgrantee must include—in all “negotiated contracts” greater than the simplified acquisition threshold of \$150,000—a provision to the effect that the subgrantee, FEMA, the grantee, Comptroller General of the United States, or any of their duly authorized representatives shall have access to any books, documents, papers, and records of the contractor which are directly

Million Public Assistance Grant Awarded to ARK Valley Electric Cooperative, Kansas (Apr. 16, 2013); DHS Office of Inspector General, Report No. DD-12-15, *FEMA Public Assistance Grant Funds Awarded to Ochsner Clinic Foundation, New Orleans, Louisiana* (Jun. 20, 2012).

⁴⁵⁴ 2 C.F.R. § 215.48(a).

⁴⁵⁵ Id.

⁴⁵⁶ 2 C.F.R. § 215.48(b).

⁴⁵⁷ Id.

⁴⁵⁸ Id.

⁴⁵⁹ Id.

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pertinent to a specific program for the purpose of making audits, examinations, excerpts, and transcriptions.⁴⁶⁰ A “negotiated contract” is any contract awarded by a form of procurement other than sealed bidding, which are procurement through competitive proposals, small purchase procedures, and noncompetitive procurements.

4. Compliance with Executive Order 11,246 (2 C.F.R. pt. 215, Appendix A, ¶ 1)

All subgrantee federally assisted construction contracts⁴⁶¹ must contain a provision requiring compliance with Executive Order 11,246, *Equal Employment Opportunity* (Sep. 24, 1965) (as amended) as supplemented by Department of Labor implementing regulations at 41 C.F.R. ch. 60 (Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor).⁴⁶² The specific language of the required contract clause is set forth at section IV(H)(3) of this Field Manual.⁴⁶³

5. Compliance with the Copeland Anti-Kickback Act (2 C.F.R. pt. 215, Appendix A, ¶ 2)

A subgrantee’s contract must include a provision for compliance with the Copeland “Anti-Kickback” Act (18 U.S.C. § 874 and 40 U.S.C. § 3145), as supplemented by Department of Labor regulations at 29 C.F.R. pt. 3 (Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States).⁴⁶⁴ This requirement applies to all contracts for construction or repair in excess of \$2000. The specific language of the required contract clause is set forth at section IV(H)(4) of this Field Manual.

6. Compliance with the Davis-Bacon Act (2 C.F.R. pt. 215, Appendix A, ¶ 3)

A subgrantee’ contract must include a clause providing for the compliance with the Davis Bacon

⁴⁶⁰ 2 C.F.R. § 215.48(d).

⁴⁶¹ A “federally assisted construction contract” means any “agreement or modification thereof between any applicant and a person for *construction work* which is paid for in whole or in part with funds obtained from the Government...pursuant to any Federal program involving a *grant*, contract, loan, insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, or any application or modification thereof approved by the Government for a grant, contract, loan, insurance, or guarantee under which the applicant itself participates in the construction work.” 41 C.F.R. § 60-1.3 (emphasis added). “Construction work” means 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.” *Id.*

⁴⁶² 2 C.F.R. pt. 215, Appendix A, ¶ 1.

⁴⁶³ The regulation at 44 C.F.R. § 13.36(i)(3) only requires local and Indian tribal governments to insert the contract clause in federally assistance construction contracts over \$10,000, where the regulation at 2 C.F.R. pt. 215, Appendix A, ¶ 1 has no such minimum threshold.

⁴⁶⁴ 44 C.F.R. § 13.36(i)(4).

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Act (40 U.S.C. §§ 276a to 276a-7) as supplemented by Department of Labor regulations at 29 C.F.R. pt. 5.⁴⁶⁵ This requirement, however, only applies to construction contracts awarded by subgrantees in excess of \$2000 *when required by Federal grant program legislation*. In this case, the sections of the Stafford Act authorizing the Public Assistance grant program do not require compliance with the Davis-Bacon Act. As such, there is no requirement for a subgrantee to place any clauses into its contracts for compliance with the Davis-Bacon Act.

7. Compliance with the Contract Work Hours and Safety Standards Act (2 C.F.R. pt. 215, Appendix A, ¶ 4)

A subgrantee's contract must, where applicable, include a provision for compliance with Sections 103 and 107 of the Contract Work Hours and Safety Standards Act, as supplemented by Department of Labor regulations at 29 C.F.R. pt 5 for construction contracts in excess of \$2000 for other contracts involving laborers and mechanics in excess of \$2500.⁴⁶⁶ Although the original law required its application in any construction contract over \$2,000 or non-construction contract to which the Act applied over \$2,500 (and language to that effect is still found in the regulation), the Contract Work Hours and Safety Standards Act no longer applies to any "contract in an amount that is not greater than \$100,000."⁴⁶⁷ The specific language of the required contract clause is set forth at section IV(H)(6) of this Field Manual.

8. Rights to Inventions (2 C.F.R. pt. 215, Appendix A, ¶ 5)

A subgrantee's contracts or agreements for the performance of experimental, developmental, or research work shall provide for the right of the Federal Government in any resulting invention in accordance with 37 C.F.R. pt. 401 (Rights to Inventions Made by Nonprofit Organizations and Small Business Firms under Government Grants, Contracts, and Cooperative Agreements) and any implementing regulations promulgated by FEMA.⁴⁶⁸ This is a requirement that flows from the Bayh-Dole Act,⁴⁶⁹ which sets the parameters for patent rights in inventions made with Federal assistance. The implementing regulation for the Bayh-Dole Act at 37 C.F.R. § 401.14

⁴⁶⁵ 2 C.F.R. pt. 215, Appendix A, ¶ 3.

⁴⁶⁶ 2 C.F.R. pt. 215, Appendix A, ¶ 4.

⁴⁶⁷ 40 U.S.C. § 3701(b)(3)(A)(iii).

⁴⁶⁸ 2 C.F.R. pt. 215, Appendix A, ¶ 5.

⁴⁶⁹ Bayh-Dole Act, Pub. L. No. 96-517, 94 Stat. 1019 (1980) (codified as amended at 35 U.S.C. chap. 18). The Bayh-Dole Act provides the primary statutory basis for Federal technology transfers, including the patenting and licensing of inventions made under Federal funding agreements such as a grant. This statute authorizes recipients of Federal funding to elect to take title of any invention that they produce or discover under a Federal grant award. If the recipient elects to take title, then it must take certain procedural steps, such as filing patent applications, seek commercialization activities, and report back to the funding agency on its activities to utilize the invention. What the Federal Government gets is a nonexclusive, nontransferable, irrevocable, paid-up-license to make or practice the invention.

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sets forth the text of the required contract clause for inclusion in subgrantee contracts.⁴⁷⁰

The Public Assistance Grant Program does not provide financial assistance associated with experimental, developmental, or research work that would result in an invention,⁴⁷¹ rendering this contract clause requirement inapplicable. There is, therefore, no required contract clause in this regard.

An issue related to “inventions” is that concerning the production of works by a subgrantee which are copyrightable under Federal law.⁴⁷² The Public Assistance grantee and subgrantee hold the copyright to works they produce or purchase under a Public Assistance award. FEMA and the Federal Government hold a royalty-free, nonexclusive, and irrevocable license to produce, publish, or to otherwise authorize others to use, for Federal Government purposes, copyrighted material that was developed under a Federal award or purchased under a Federal award.⁴⁷³ There is no required contract clause in this regard, but a subgrantee may wish to include such a clause so as to provide notice to its contractors and subcontractors.

9. Clean Air Act and Clean Water Act (2 C.F.R. pt. 215, Appendix A, ¶ 6)

A subgrantee must include a clause in its contracts providing for compliance with all applicable standards, orders, or requirements issued pursuant to the Clean Air Act (42 U.S.C. §§ 7401-7671q) and the Federal Water Pollution Control Act as amended (33 U.S.C. §§ 1251-1387). This requirement applies to all contracts in excess of \$100,000. The specific language of the required contract clause is set forth at section IV(H)(11) of this Field Manual.

10. Byrd Anti-Lobbying Amendment (2 C.F.R. pt. 215, Appendix A, ¶ 7)

The Byrd Anti-Lobbying Amendment prohibits any appropriated funds to be expended by the recipient of a Federal contract, grant, loan, or cooperative agreement to pay any person for influencing or attempting to influence an officer or employee of any Federal agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in

⁴⁷⁰ 37 C.F.R. §§ 401.3, 401.14; see also 35 U.S.C. chapter 18 (Patent Rights in Inventions Made with Federal Assistance).

⁴⁷¹ See 35 U.S.C. § 201(c); 37 C.F.R. § 401.2(c) (“The term invention means any invention or discovery which is or may be patentable or otherwise protectable under Title 35 of the United States Code, or any novel variety of plant which is or may be protectable under the Plant Variety Protection Act (7 U.S.C. 2321 et seq.).”).

⁴⁷² Copyright protects original works of authorship that have been tangibly expressed and fixed in some medium, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of machine or device. 17 U.S.C. § 102. Works of authorship included, among other things, architectural works. Id. § 102(a)(8). Based on the nature of work completed under the Public Assistance and Hazard Mitigation Grant Programs, the issue of copyright will likely not arise, although it could arise in the case of architectural works (the design of a building) completed as part of a project.

⁴⁷³ 2 C.F.R. § 215.36.

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connection with certain Federal actions.⁴⁷⁴ The grantee signs a certification as to lobbying as part of the FEMA-State or FEMA-Tribal Agreement, and this certification requires the grantee to include the language of the certification into the award documents for all subawards at all tiers (including subgrants and contracts under grants) and that all subrecipients shall certify and disclose accordingly

The following provides the clause that a subgrantee must include in all contracts:

“Byrd Anti-Lobbying Amendment, 31 U.S.C. § 1352 (as amended)”

Contractors who apply or bid for an award of \$100,000 or more shall file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant, or any other award covered by 31 U.S.C. § 1352. Each tier shall also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the recipient.”

APPENDIX A, 44 C.F.R. PART 18 – CERTIFICATION REGARDING LOBBYING

Certification for Contracts, Grants, Loans, and Cooperative Agreements

(To be submitted with each bid or offer exceeding \$100,000)

The undersigned [Contractor] certifies, to the best of his or her knowledge, that:

1. No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.
2. If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the

⁴⁷⁴ 31 U.S.C. § 1352. The prohibition applies to the following “Federal actions”: (1) the awarding of any Federal contract; (2) the making of any Federal grant; (3) the making of any Federal loan; (4) the entering into of any cooperative agreement; and (5) the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement. Id. § 1352(a)(2).

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undersigned shall complete and submit Standard Form-LLL, “Disclosure Form to Report Lobbying,” in accordance with its instructions.

3. The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by 31, U.S.C. § 1352 (as amended by the Lobbying Disclosure Act of 1995). Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

The Contractor, _____, certifies or affirms the truthfulness and accuracy of each statement of its certification and disclosure, if any. In addition, the Contractor understands and agrees that the provisions of 31 U.S.C. § 3801 *et seq.*, apply to this certification and disclosure, if any.

Signature of Contractor’s Authorized Official

Name and Title of Contractor’s Authorized Official

Date”

11. Debarment and Suspension (2 C.F.R. pt. 215, Appendix A, ¶ 8)

Paragraph 8 of Appendix A to 2 C.F.R. pt. 215 states the prohibition that subgrantees must not make certain contract awards with parties listed on the government-wide Excluded Parties List System, in accordance with guidelines at 2 C.F.R. pt. 180.⁴⁷⁵ Section IV(H)(13) of this Field Manual contains a detailed discussion of suspension and debarment, which is equally applicable to institutions of higher education, hospitals, and other private nonprofit organizations.

Appendix A does not provide any required contract clause; notwithstanding, the following provides a recommended clause that a subgrantee should include in all contracts that are “covered transactions.” It incorporates an optional method of verifying that contractors are not excluded or disqualified.

⁴⁷⁵ 2 C.F.R. pt. 215, Appendix A, ¶ 8.

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“Suspension and Debarment

- (1) This contract is a covered transaction for purposes of 2 C.F.R. pt. 180 and 2 C.F.R. pt. 3000. As such the contractor is required to verify that none of the contractor, its principals (defined at 2 C.F.R. § 180.995), or its affiliates (defined at 2 C.F.R. § 180.905) are excluded (defined at 2 C.F.R. § 180.940) or disqualified (defined at 2 C.F.R. § 180.935).
- (2) The contractor must comply with 2 C.F.R. pt. 180, subpart C and 2 C.F.R. pt. 3000, subpart C and must include a requirement to comply with these regulations in any lower tier covered transaction it enters into.
- (3) This certification is a material representation of fact relied upon by (insert name of subgrantee). If it is later determined that the contractor did not comply with 2 C.F.R. pt. 180, subpart C and 2 C.F.R. pt. 3000, subpart C, in addition to remedies available to (name of State agency serving as grantee and name of subgrantee), the Federal Government may pursue available remedies, including but not limited to suspension and/or debarment.
- (4) The bidder or proposer agrees to comply with the requirements of 2 C.F.R. pt. 180, subpart C and 2 C.F.R. pt. 3000, subpart C while this offer is valid and throughout the period of any contract that may arise from this offer. The bidder or proposer further agrees to include a provision requiring such compliance in its lower tier covered transactions.”

APPENDIX A

**SYNOPSIS OF DHS OFFICE OF INSPECTOR GENERAL AUDIT REPORTS
CONCERNING PROCUREMENT UNDER PUBLIC ASSISTANCE GRANTS**

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LIST OF AUDIT REPORTS

OIG AUDIT REPORT NUMBER	TITLE	DATE	PAGE
OIG-15-03-D	The State of North Dakota Needs to Assist Ramsey County in Completing \$24 Million of FEMA Public Assistance Projects for Three Federally Declared Disasters that Occurred in 2009–2011	Oct.14, 2014	A-9
OIG-14-148-D	FEMA Should Disallow \$9.6 Million of Disaster-Related Costs Incurred by the University of New Orleans Research and Technology Foundation, New Orleans, Louisiana	Sept. 19, 2014	A-10
OIG-14-136-D	The Village of Corrales, New Mexico, Needs Assistance to Ensure Compliance with FEMA Public Assistance Grant Requirements	Sept. 10, 2014	A-11
OIG-14-136-D	The City of Albuquerque, New Mexico, Needs Assistance to Ensure Compliance with FEMA Public Assistance Grant Requirements	Sept. 10, 2014	A-12
OIG-14-133-D	Louisiana Should Monitor \$39.8 Million of FEMA Funds Awarded to Pontchartrain Housing Corporation I to Ensure Compliance with Federal Regulations	Sept. 5, 2014	A-13
OIG-14-128-D	Santa Clara Pueblo, New Mexico, Needs Assistance to Ensure Compliance with FEMA Public Assistance Grant Requirements	Aug. 26, 2014	A-14
OIG-14-127-D	FEMA Should Recover \$4.9 Million of \$87.7 Million in Public Assistance Grant Funds Awarded to the Hancock County, Mississippi, Board of Supervisors for Hurricane Katrina Damages	Aug. 26, 2014	A-15
OIG-14-124-D	FEMA Should Recover \$985,887 of Ineligible and Unneeded Public Assistance Grant Funds Awarded to Cobb County, Georgia, as a Result of Severe Storms and Flooding	Aug. 7, 2014	A-16
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OIG-14-115-D	New York City’s Department of Design and Construction Needs Assistance To Ensure Compliance with Federal Regulations	July 21, 2013	A-18
OIG-14-114-D	FEMA Should Recover \$3.9 Million of Public Assistance Grant Funds Awarded to Jefferson County, Alabama, as a Result of Severe Storms in April 2011	July 21, 2013	A-19
OIG-14-109-D	FEMA Should Recover \$258,488 of Public Assistance Grant Funds Awarded to the Graton Community Services District, California	June 25, 2014	A-20
OIG-14-107-D	FEMA Should Recover \$1.3 Million of Public Assistance Grant Funds Awarded to Desire Street Ministries, New Orleans, Louisiana, for Hurricane Katrina	June 17, 2014	A-21
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**DHS OIG Audit Report: [OIG-15-03-D](#)
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Date: October 15, 2014

Subject: *The State of North Dakota Needs to Assist Ramsey County in Completing \$24 Million of FEMA Public Assistance Projects for Three Federally Declared Disasters that Occurred in 2009–2011*

Terms: local government, socioeconomic contracting, required provisions

Background: Ramsey County (subgrantee) in North Dakota received Public Assistance awards for three federally declared flooding events.

Procurement Related Findings:

- 1) Although the subgrantee competitively awarded the contracts, it did not comply with Federal requirements to take affirmative steps to ensure the use of small and minority firms, women’s business enterprises, and labor surplus area firms when possible. These affirmative steps should include using the services and assistance of the Small Business Administration and the Minority Business Development Agency of the Department of Commerce and requiring the prime contractor, if using subcontracts, to take the affirmative steps listed in Federal regulations 44 C.F.R. § 13.36(e)(2)(i) through (v). [OIG-15-03-D at 8-9](#), [44 C.F.R. § 13.36\(e\)](#).
- 2) Subgrantee did not include all required provisions in its contracts. [OIG-15-03-D at 8-9](#), [44 C.F.R. § 13.36\(i\)](#).

**DHS OIG Audit Report: [OIG-14-148-D](#)
Procurements Under Grants Synopsis**

Date: September 19, 2014

Subject: *FEMA Should Disallow \$9.6 Million of Disaster-Related Costs Incurred by the University of New Orleans Research and Technology Foundation, New Orleans, Louisiana*

Terms: private nonprofit, free and open competition, preselected firms, socioeconomic contracting, cost-plus-percentage-of-cost basis contract, required provisions

Background: The University of New Orleans Research and Technology Foundation (subgrantee) is a private nonprofit entity that supports the University of New Orleans and the Louisiana State University system with any appropriate programs, facilities, research, and educational opportunities. Subgrantee sustained damages resulting from Hurricane Katrina on August 29, 2005 and was awarded Public Assistance grant funds from the State of Louisiana.

Procurement Related Findings:

- 1) Subgrantee awarded contracts for nonexigent work without open and free competition. It did not publicly advertise the work. Instead, it notified contractors by word-of-mouth or by phoning known contractors about the required pre-bid conference. [OIG-14-148-D at 4-6](#), [2 C.F.R. § 215.43](#).
- 2) Subgrantee did not take the required steps on to ensure the use of small businesses, minority-firms, and women's business enterprises. [OIG-14-148-D at 4-7](#), [2 C.F.R. § 215.44\(b\)](#).
- 3) Subgrantee awarded a prohibited cost-plus-percentage-of-cost basis contract for exigent work where the contractor charged markups of 10 percent to 20 percent on top of its agreed-upon time-and-materials rates. [OIG-14-148-D at 4-7](#), [2 C.F.R. § 215.44\(c\)](#).
- 4) Subgrantee did not include required contract provisions. [OIG-14-148-D at 4-7](#), [2 C.F.R. § 215.48](#), [Appendix A pt. 215](#).

**DHS OIG Audit Report: [OIG-14-143-D](#)
Procurements Under Grants Synopsis**

Date: September 16, 2014

Subject: *The Village of Corrales, New Mexico, Needs Assistance to Ensure Compliance with FEMA Public Assistance Grant Requirements*

Terms: local government, cost and price analysis, T&M contracts, required provisions

Background: The Village of Corrales (subgrantee) received Public Assistance (PA) grant funds for damages resulting from rain and flooding. The OIG conducted an audit early in the PA process to identify areas where subgrantee may need additional technical assistance or monitoring to ensure compliance with federal regulations.

Procurement Related Findings

- 1) Subgrantee did not maintain evidence that it conducted cost or price analyses before receiving contract bids or proposals.⁴⁷⁶ Subgrantee issued task and purchase orders against two pre-existing, on-call, time-and-material contracts without performing a cost or price analysis. [OIG-14-143-D at 5-6](#), [44 C.F.R. § 13.36\(f\)\(1\)](#).
- 2) Subgrantee did not determine that no other type of contract is suitable when using time and material contracts and did not include a contract ceiling. [OIG-14-143-D at 5-6](#), [44 C.F.R. § 13.36\(c\)](#).
- 3) Subgrantee did not include all federally required provisions in its contracts. [OIG-14-143-D at 5-6](#), [44 C.F.R. § 13.36\(i\)](#).

⁴⁷⁶ [OIG Interpretive Guidance](#): The absence of a cost or price analysis increases the likelihood of unreasonable contract costs and misinterpretations or errors in pricing.

**DHS OIG Audit Report: [OIG-14-136-D](#)
Procurements Under Grants Synopsis**

Date: September 10, 2014

Subject: *The City of Albuquerque, New Mexico, Needs Assistance to Ensure Compliance with FEMA Public Assistance Grant Requirements*

Terms: local government, cost-plus-percentage-of-cost contracting, T&M contracts, required provisions

Background: The City of Albuquerque (subgrantee) received Public Assistance (PA) grant funds for damages resulting from severe storms and flooding. The OIG conducted an audit early in the PA process to identify areas where subgrantee may need additional technical assistance or monitoring to ensure compliance with federal regulations.

Procurement Related Findings:

- 1) Subgrantee included prohibited cost-plus-percentage-of-cost terms in four contracts. [OIG-14-136-D at 4-6, 44 C.F.R. § 13.36\(f\)\(4\)](#).
- 2) Subgrantee did not determine that no other contract was suitable before using a time-and-material contract and did not include a ceiling price in its time-and-material contract. [OIG-14-136-D at 4-6, 44 C.F.R. § 13.36\(c\)](#).
- 3) Subgrantee did not include all required contract provisions in its contracts. [OIG-14-136-D at 4-6, 44 C.F.R. § 13.36\(i\)](#).

**DHS OIG Audit Report: [OIG-14-133-D](#)
Procurements Under Grants Synopsis**

Date: September 5, 2014

Subject: *Louisiana Should Monitor \$39.8 Million of FEMA Funds Awarded to Pontchartrain Housing Corporation I to Ensure Compliance with Federal Regulations*

Terms: local government, socioeconomic contracting, required provisions

Background: Pontchartrain Housing Corporation I (subgrantee) is a private nonprofit entity that operated 12 low-income housing buildings. Hurricane Katrina destroyed all 12 buildings, and in December 2010, FEMA approved subgrantee's request for an alternate project to purchase and renovate an administrative building.

Procurement Related Findings:

- 1) Subgrantee did not include in its contracts all the applicable provisions. [OIG-14-133-D at 4](#), [2 C.F.R. § 215.48](#), [Appendix A pt. 215](#).
- 2) Subgrantee did not take required steps to ensure the use of small businesses, minority-owned firms, and women's business enterprises when possible. [OIG-14-133-D at 4](#), [2 C.F.R. § 215.44\(b\)](#).

**DHS OIG Audit Report: [OIG-14-128-D](#)
Procurements Under Grants Synopsis**

Date: August 26, 2014

Subject: *Santa Clara Pueblo, New Mexico, Needs Assistance to Ensure Compliance with FEMA Public Assistance Grant Requirements*

Terms: Indian tribal government, the Sandy Recovery Improvement Act, socioeconomic contracting

Background: For the first time, Santa Clara Pueblo (grantee), a tribal government, received Public Assistance grant funds directly as a grantee. The OIG conducted an audit early in the PA process to identify areas where grantee may need additional technical assistance or monitoring to ensure compliance with federal regulations.

Procurement Related Findings:

- 1) Early in the disaster, FEMA Regional officials incorrectly advised grantee that based on the Sandy Recovery Improvement Act (Act), it should follow the same policies and procedures it uses for procurements from its non-Federal funds—just as any state grantee would. The Act allows tribes to independently request disaster declarations just as states make requests, as grantees. However, the Act does not state that tribes should be able to use Federal procurement regulations applicable to states rather than those applicable to other grantees. Tribal grantees should follow 44 C.F.R. § 13.36(b) through (i), rather than 44 C.F.R. § 13.36(a). [OIG-14-128-D at 4-5](#).
- 2) In soliciting proposals for previous disaster work using subgrants, Santa Clara Pueblo had not taken all necessary affirmative steps to assure the use of small and minority firms, women’s business enterprises, and labor surplus area firms when possible. [OIG-14-128-D at 5-6](#), [44 C.F.R. § 13.36\(e\)](#).
- 3) Santa Clara Pueblo’s previous disaster contracts using subgrants did not include all the provisions that Federal regulations require. [OIG-14-128-D at 6](#), [44 C.F.R. § 13.36\(i\)](#).

**DHS OIG Audit Report: [OIG-14-127-D](#)
Procurements Under Grants Synopsis**

Date: August 26, 2014

Subject: *FEMA Should Recover \$4.9 Million of \$87.7 Million in Public Assistance Grant Funds Awarded to the Hancock County, Mississippi, Board of Supervisors for Hurricane Katrina Damages*

Terms: local government, A/E contract, full and open competition, competitive proposal procedures

Background: Hancock County (subgrantee) received a Public Assistance grant award for damages resulting from Hurricane Katrina, which occurred in August 2005.

Procurement Related Findings:

Subgrantee did not comply with Federal procurement requirements when awarding architectural and engineering (A/E) contracts totaling \$1,207,217 for nonemergency work. Instead of soliciting competitive proposals subgrantee used an A/E firm that it used before Hurricane Katrina. [OIG-14-127-D at 4-5](#), [44 C.F.R. § 13.36\(c\)](#), [44 C.F.R. § 13.36\(d\)\(3\)\(v\)](#).

**DHS OIG Audit Report: [OIG-14-124-D](#)
Procurements Under Grants Synopsis**

Date: August 7, 2014

Subject: *FEMA Should Recover \$985,887 of Ineligible and Unneeded Public Assistance Grant Funds Awarded to Cobb County, Georgia, as a Result of Severe Storms and Flooding*

Terms: local government, required provisions

Background: Cobb County (subgrantee) received a Public Assistance grant award for damages resulting from severe storms and flooding, which occurred in September 2009.

Procurement Related Findings:

- 1) Subgrantee did not take affirmative steps to solicit small, minority firms, and women-owned firms. [OIG-14-124-D at 5](#), [44 C.F.R. § 13.36\(e\)](#)
- 2) Subgrantee did not include all required contract provisions in its contracts. [OIG-14-124-D at 5](#), [44 C.F.R. § 13.36\(i\)](#).

**DHS OIG Audit Report: [OIG-14-120-D](#)
Procurements Under Grants Synopsis**

Date: July 31, 2014

Subject: *New York City's Department of Transportation Needs Assistance to Ensure Compliance with Federal Regulations*

Terms: local government, full and open competition, socioeconomic contracting

Background: New York City's Department of Transportation (subgrantee) received Public Assistance (PA) grant funds for damages resulting from Hurricane Sandy. The OIG conducted an audit early in the PA process to identify areas where subgrantee may need additional technical assistance or monitoring to ensure compliance with federal regulations.

Procurement Related Findings:

- 1) Subgrantee awarded contracts without full and open competition as it did not publicly advertise the solicitations for proposals so that all qualified contractors had an opportunity to bid. Instead, subgrantee invited five preselected contractors to bid. [OIG-14-120-D at 4-5](#), [44 C.F.R. § 13.36\(c\)](#).
- 2) Subgrantee did not take sufficient steps to provide opportunities to small businesses, minority-owned firms, women's business enterprises, and labor surplus area firms when it awarded two contracts totaling \$4.4 million. [OIG-14-120-D at 4-6](#), [44 C.F.R. § 13.36\(e\)](#).

**DHS OIG Audit Report: [OIG-14-115-D](#)
Procurements Under Grants Synopsis**

Date: July 21, 2014

Subject: *New York City's Department of Design and Construction Needs Assistance To Ensure Compliance with Federal Regulations*

Terms: local government, full and open competition, public exigency or emergency, procurement by noncompetitive proposals

Background: New York City's Department of Design and Construction (subgrantee) received Public Assistance (PA) grant funds for damages resulting from Hurricane Sandy. The OIG conducted an audit early in the PA process to identify areas where subgrantee may need additional technical assistance or monitoring to ensure compliance with federal regulations.

Procurement Related Findings:

Subgrantee awarded contracts without full and open competition, inviting only preselected contractors to submit bids and proposals. Subgrantee considered the circumstances to be exigent since the hurricane damage was unforeseeable, and therefore believed that Federal regulations allowed them to contract without full and open competition. FEMA agreed with the Department's position. According to OIG, while the hurricane scattered debris across the city and severely damaged sidewalks, debris and sidewalk damage do not normally present a threat to life or property. However, OIG agreed that some immediate debris removal and temporary repairs may have been necessary to make sidewalks since inaccessible sidewalks in a densely populated area could put pedestrians at risk. [OIG-14-115-D at 3-4](#), [44 C.F.R. § 13.36\(c\)](#), [44 C.F.R. § 13.36\(d\)\(4\)\(i\)\(B\)](#).

DHS OIG Audit Report: [OIG-14-114-D](#)
Procurements Under Grants Synopsis

Date: July 21, 2014

Subject: *FEMA Should Recover \$3.9 Million of Public Assistance Grant Funds Awarded to Jefferson County, Alabama, as a Result of Severe Storms in April 2011*

Terms: local government, full and open competition, breaking out procurements to obtain a more economical purchase, necessary and reasonable costs

Background: The County (subgrantee) received a Public Assistance subgrant award for damage resulting from tornados, straight-line winds, and flooding that occurred in April 2011.

Procurement Related Findings:

Subgrantee did not break out procurement to obtain a more economical purchase, and costs were not necessary and reasonable for efficient and reasonable performance and administration of the grant to be eligible under a Federal award. Subgrantee solicited and received unit price quotes from 13 debris removal contractors for both (1) vegetative debris removal work and (1) construction and demolition debris removal work. Subgrantee selected a contractor that had the lowest bid for both tasks combined, instead of breaking out the procurement into two activities and awarding two contracts (one for vegetative debris removal work and another for construction and demolition debris removal work) to contractors that had the lowest bid for each of the two tasks. This resulted in \$2,740,002 in excessive costs. [OIG-14-114-D at 3-5, 44. C.F.R. § 13.36\(b\)\(4\), 2 C.F.R. § 225, Cost Principles for State, Local, and Indian Tribal Governments, Appendix A, § C.1\(a\).](#)

**DHS OIG Audit Report: [OIG-14-109-D](#)
Procurements Under Grants Synopsis**

Date: June 25, 2014

Subject: *FEMA Should Recover \$258,488 of Public Assistance Grant Funds Awarded to the Graton Community Services District, California*

Terms: local government, A/E contract, full and open competition, noncompetitive proposal procedures, T&M contract, cost or price analysis, reasonable cost, monitoring

Background: Graton Community Services District (subgrantee) received a Public Assistance grant award for damages resulting from severe storms, flooding, mudslides, and landslides from December 17, 2005, through January 3, 2006.

Procurement Related Findings:

- 1) Subgrantee did not conduct procurements in a manner providing full and open competition in its A/E contract. It used noncompetitive proposals method of contracting without satisfying the requirement for its use. [OIG-14-109-D at 4-7](#), [44 C.F.R. § 13.36\(c\)](#), [44 C.F.R. § 13.36\(d\)\(4\)\(i\)](#).
- 2) Subgrantee did not determine that no other contract was suitable before using a time-and-material contract and did not include a ceiling price in its time-and-material contract. [OIG-14-109-D at 4-7](#), [44 C.F.R. § 13.36\(b\)\(10\)](#).
- 3) Subgrantee did not conduct a cost or price analysis before receiving contract proposals to determine reasonable costs for the work needed. [OIG-14-109-D at 4-7](#), [44 C.F.R. § 13.36\(f\)\(1\)](#).
- 3) Subgrantee did not properly monitor the contractor's performance to ensure cost reasonableness. [OIG-14-109-D at 4-7](#), [44 C.F.R. § 13.36\(b\)\(2\)](#).

DHS OIG Audit Report: [OIG-14-107-D](#)
Procurements Under Grants Synopsis

Date: June 17, 2014

Subject: *FEMA Should Recover \$1.3 Million of Public Assistance Grant Funds Awarded to Desire Street Ministries, New Orleans, Louisiana, for Hurricane Katrina*

Terms: private nonprofit, cost or price analysis, contracting, required provisions

Background: Desire Street Ministries, Inc. (subgrantee), a private nonprofit organization that operates a junior-senior level high school, received a Public Assistance grant award for damages resulting from Hurricane Katrina, which occurred on August 29, 2005.

Procurement Related Findings:

- 1) Subgrantee did not perform a cost or price analysis before awarding the A/E services contracts.⁴⁷⁷ [OIG-14-12-D at 4](#), [2 C.F.R. § 215.45](#).
- 2) Subgrantee did not include required contract provisions in all contracts and subcontracts as applicable. [OIG-14-12-D at 4](#), [2 C.F.R. § 215.48](#).

⁴⁷⁷ OIG Interpretive Guidance: By not performing a cost or price analysis, subgrantee increased the likelihood of unreasonably high or low prices, contractor misinterpretations, and errors in pricing relative to the scope of work.

DHS OIG Audit Report: [OIG-14-95-D](#)
Procurements Under Grants Synopsis

Date: May 22, 2014

Subject: *FEMA Should Recover \$8.0 Million of \$26.6 Million in Public Assistance Grant Funds Awarded to St. Stanislaus College Preparatory in Mississippi - Hurricane Katrina*

Terms: private nonprofit, free and open competition, preselected firms, socioeconomic contracting, grantee management

Background: St. Stanislaus (subgrantee) is a Catholic school that received a Public Assistance subgrant award to cover disaster-related damage as a private nonprofit facility.

Procurement Related Findings:

- 1) Subgrantee could not provide evidence that it made efforts to include small businesses, minority-firms, and women’s business enterprises. [OIG-14-95-D at 4](#), [2 C.F.R. § 215.44\(b\)](#).
- 2) Subgrantee did not competitively bid contracts for demolition work and professional A/E services.⁴⁷⁸ Instead of soliciting bids from all sources for the demolition work the subgrantee contacted several specific contractors to obtain quotes and selected a firm that had previously performed debris cleanup work for the school. However, this process restricted competition because it did not provide an opportunity for all interested contractors to bid for the contract work. The subgrantee did not seek competitive bids for the A/E contracts. [OIG-14-95-D at 5](#), [2 C.F.R. § 215.43](#).
- 3) State did not fulfill its grantee responsibility to ensure that the subgrantee followed Federal procurement regulations. The nature and extent of ineligible costs identified demonstrate that the State should have done a better job of reviewing the subgrantee’s contracting methods. [OIG-14-95-D at 6](#), [44 C.F.R. § 13.37\(a\)\(2\)](#), [44 C.F.R. § 13.40\(a\)](#).

⁴⁷⁸ OIG Interpretive Guidance: Open and free competition increases the probability of reasonable pricing from the most qualified contractors and helps discourage and prevent favoritism, collusion, fraud, waste, and abuse.

DHS OIG Audit Report: [OIG-14-63-D](#)
Procurements Under Grants Synopsis

Date: April 15, 2014

Subject: *FEMA Should Recover \$1.7 Million of Public Assistance Grant Funds Awarded to the City of Waveland, Mississippi-Hurricane Katrina*

Terms: local government, full and open competition, contract administration

Background: Hurricane Katrina severely damaged the City's (subgrantee) sewer collection system. The City determined that it could not make repairs to the existing system in a timely or cost effective manner. Therefore, the City elected to replace the damaged portion of the sewer collection system.

Procurement Related Findings:

1) The subgrantee failed to maintain an adequate contract administration system. [OIG-14-63-D at 4, 44 C.F.R. § 13.36\(b\)\(2\)](#)

2) Subgrantee did not solicit competitive bids⁴⁷⁹ for architectural and engineering (A/E) contract work.⁴⁸⁰ Instead of seeking competitive bids for the A/E work, the subgrantee hired an A/E firm it had used for projects before Hurricane Katrina to perform the disaster-related work. [OIG-14-63-D at 5, 44 C.F.R. § 13.36\(c\)](#)

⁴⁷⁹ **OIG Interpretive Guidance:** Although Federal regulation 44 C.F.R. § 13.36(d)(4)(i)(B) allows procurements by noncompetitive proposals when the public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation, the contract work in question was not for emergency work and did not occur during exigent circumstances. It was for permanent repair work that the City began in May 2007 (21 months after the disaster) and completed in December 2008.

⁴⁸⁰ **OIG Interpretive Guidance:** Full and open competition increases the probability of reasonable pricing from the most qualified contractors and helps discourage and prevent favoritism, collusion, fraud, waste, and abuse.

DHS OIG Audit Report: [OIG-14-49-D](#)
Procurements Under Grants Synopsis

Date: March 13, 2014

Subject: *FEMA Should Recover \$8.2 Million of the \$14.9 Million of Public Assistance Grant Funds Awarded to the Harrison County School District, Mississippi - Hurricane Katrina*

Terms: local government, full and open competition, socioeconomic contracting

Background: The District (subgrantee) received a Public Assistance subgrant award for damages resulting from Hurricane Katrina, which occurred in August 2005.

Procurement Related Findings:

- 1) Subgrantee could not provide evidence that it took affirmative steps to include minority firms, women’s enterprises, and labor surplus area firms for nonemergency permanent contract work. [OIG-14-49-D at 4](#), [44 C.F.R. § 13.36\(e\)](#).

- 2) Subgrantee did not solicit competitive bids when hiring a contractor for architectural and engineering (A/E) contract work.⁴⁸¹ Subgrantee sent bid invitations (based on qualifications) to nine sources, but did not advertise publicly to allow other qualified parties the opportunity to bid. [OIG-14-49-D at 4-5](#), [44 C.F.R. § 13.36\(c\)](#).

⁴⁸¹ [OIG Interpretive Guidance](#): Full and open competition increases the probability of reasonable pricing from the most qualified contractors and helps discourage and prevent favoritism, collusion, fraud, waste, and abuse.

DHS OIG Audit Report: [OIG-14-46-D](#)
Procurements Under Grants Synopsis

Date: February 28, 2014

Subject: *FEMA’s Dissemination of Procurement Advice Early in Disaster Response Periods*

Terms: FEMA personnel, inaccurate information

Background: From May 18 to 20, 2013, Oklahoma City, OK, (subgrantee) experienced severe storms and tornadoes, including an EF-5 tornado that struck the City of Moore on May 20, 2013.

Procurement Related Findings:

1) 44 C.F.R. § 13.36(a) allows States to use their own procurement procedures. Other grantees and subgrantees may also use their own procurement procedures, but must conform to federal law and standards stated in 44 C.F.R. § 13.36(b)-(i). If a subgrantee is an institution of higher education, hospital, or other non-profit organization, it must conform to 2 C.F.R. § 215.40-215.48. [OIG-14-46 at 3](#).

2) FEMA personnel provided applicants incomplete and inaccurate contracting information during applicant Kickoff Meetings by telling applicants they needed to follow State law or their own contracting procedures.⁴⁸² FEMA’s draft *Public Assistance Program Field Operations Pocket Guide, September 2012*, contributed to the problem because its appendix includes this same incomplete contracting guidance.⁴⁸³ [OIG-14-46 at 3](#).

⁴⁸²**OIG Interpretive Guidance:** “This is incomplete information because, for grant recipients other than States, this is true only if the contracting procedures happen to meet the specific Federal requirements. In our experience, local governments and private non-profit organizations typically do not use contracting procedures that mirror Federal requirements.”

⁴⁸³**OIG Interpretive Guidance:** At kickoff meetings the OIG emphasized compliance with federal procurement requirements. In particular, to (1) bid contracts competitively; (2) include specific provisions in contracts; (3) take affirmative steps to include small, minority, and women-owned businesses; and (4) maintain documentation to support costs, including those related to procurement process. Applicants were not aware of these requirements or that noncompliance with the requirements could put their grant funds at risk.

DHS OIG Audit Report: [OIG-14-44-D](#)
Procurements Under Grants Synopsis

Date: February 25, 2014

Subject: *FEMA Should Recover \$5.3 Million of the \$52.1 Million of Public Assistance Grant Funds Awarded to the Bay St. Louis Waveland School District in Mississippi-Hurricane Katrina*

Terms: local government, cost-plus-percentage-of-cost, full and open competition, socioeconomic contracting, cost or price analysis

Background: The District (subgrantee) received a Public Assistance subgrant award for damages resulting from Hurricane Katrina.

Procurement Related Findings:

- 1) Subgrantee used a cost-plus-percentage-of-cost contract (subgrantee paid markups on fully burdened time and material rates) and profit/overhead mark-ups were thus questioned.⁴⁸⁴ [OIG-14-44-D at 3-4, 44 C.F.R. § 13.36\(f\)\(4\)](#). Subgrantee argued that this was the only contract type that was reasonably available as the scope of work was impossible to determine – OIG responded that subgrantee could have used T&M contract with a cost ceiling
- 2) Subgrantee did not perform cost or price analyses in order to determine cost reasonableness.⁴⁸⁵ [OIG-14-44-D at 4, 44 C.F.R. § 13.36\(f\)\(1\)](#).
- 3) Subgrantee did not solicit competitive bids for architectural and engineering (A/E) services.⁴⁸⁶ Instead of seeking competitive bids for the A/E work, the subgrantee hired a firm it used before Hurricane Katrina. Subgrantee said they were familiar with the contractor's work and that other firms did not have the capacity to meet their requirements, however, the subgrantee did not provide any evidence to support their assertion that no other qualified A/E firms were available for the project work. [OIG-14-44-D at 4-5, 44 C.F.R. § 13.36\(c\)](#). The subgrantee argued exigent circumstances; however, the OIG responded that the services were acquired 17 months after disaster.
- 4) Subgrantee did not take affirmative steps to assure the use of small businesses, minority firms,

⁴⁸⁴ **OIG Interpretive Guidance:** "Federal regulations prohibit cost-plus-percentage-of-cost contracts because they provide no incentive for contractors to control costs—the more contractors charge, the more profit they make." [OIG-14-44-D at 4](#).

⁴⁸⁵ **OIG Interpretive Guidance:** "A cost or price analysis decreases the likelihood of unreasonably high or low prices, contractor misinterpretations, and errors in pricing relative to the scope of work." [OIG-14-44-D at 4](#).

⁴⁸⁶ **OIG Interpretive Guidance:** "Full and open competition increases the probability of reasonable pricing from the most qualified contractors and helps discourage and prevent favoritism, collusion, fraud, waste, and abuse." [OIG-14-44-D at 4](#).

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women's business enterprises, and labor surplus area firms when possible. [OIG-14-44-D at 4-5](#), [44 C.F.R. § 13.36\(e\)](#).

**DHS OIG Audit Report: [OIG-14-12-D](#)
Procurements Under Grants Synopsis**

Date: December 4, 2013

Subject: *FEMA Should Recover \$10.9 Million of Improper Contracting Costs from Grant Funds Awarded to Columbus Regional Hospital, Columbus, Indiana*

Terms: private nonprofit, free and open competition, preselected firms, scope of work, cost-plus-percentage-of-cost, socioeconomic contracting, cost or price analysis, scope of work, required provisions

Background: Columbus Regional Hospital (subgrantee) is a nonprofit healthcare facility. On June 7, 2008, flood waters inundated the entire basement of the Hospital.

Procurement Related Findings: 1) Subgrantee awarded contracts for nonexigent work without open and free competition, inviting only preselected firms to bid.⁴⁸⁷ [OIG-14-12-D at 4-5](#), [2 C.F.R. § 215.43](#)

2) Subgrantee did not have documentation defining the scope of work for two contracts. [OIG-14-12-D at 5](#), [2 C.F.R. 215.44\(a\)\(3\)\(i\)-\(ii\)](#).

3) Subgrantee awarded contracts using prohibited cost-plus-percentage-of-cost contracts. [OIG-14-12-D at 6](#), [2 C.F.R. § 215.44\(c\)](#).

4) Subgrantee did not include all required provisions in its contracts. [OIG-14-12-D at 7](#), [2 C.F.R. § 215.48](#), [Appendix A pt. 215](#).

5) Subgrantee did not make efforts to assure use of small businesses, minority owned firms, and women's business enterprises whenever possible. [OIG-14-12-D at 7](#), [2 C.F.R. § 215.44\(b\)](#).

6) Subgrantee awarded contracts without performing a cost or price analysis.⁴⁸⁸ [OIG-14-12-D at 7](#), [2 C.F.R. § 215.45](#).

⁴⁸⁷ [OIG Interpretive Guidance](#): "Generally, open and free competition means that all responsible sources are allowed to compete for contracts." [OIG-14-12-D at 4](#). "Open and free competition also increases the probability of achieving reasonable pricing from the most qualified contractors and allows greater opportunity for small businesses, minority firms, and women's enterprises to compete for federally funded work. Open and free competition also helps discourage and prevent favoritism, collusion, fraud, waste, and abuse." [Id. at 6](#). Further, "...without open and free competition there is no assurance that another contractor would not have been able to perform the...at lower rates." [Id. at 5](#). Finally, as to "project administration" services during the exigent period to assist in responding quickly to FEMA's requests for information to formulate disaster projects, "project administration is not exigent work to save lives or property." [Id.](#)

⁴⁸⁸ [OIG Interpretive Guidance](#): "The absence of a cost or price analysis increases the likelihood of unreasonable contract costs and misinterpretations or errors in pricing relative to scopes of work." [Id. at 8](#).

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7) Subgrantee did not develop a scope of work for certain contracts prior to award.⁴⁸⁹ [OIG-14-12-D at 8, 2 C.F.R § 215.44\(a\)\(3\)\(i\)-\(ii\)](#).

⁴⁸⁹ [OIG Interpretive Guidance](#) “Exigent circumstances do not negate the necessity to follow Federal regulations even when doing so is difficult...FEMA initially develops project worksheets to estimate disaster damages and obligate project funding; the project worksheet is not FEMA’s approval of procurement procedures [emphasis added].” [OIG-14-12-D at 9](#).

**DHS OIG Audit Report: [OIG-14-11-D](#)
Procurements Under Grants Synopsis**

Date: December 3, 2013

Subject: *FEMA Should Recover \$6.1 Million of Public Assistance Grant Funds Awarded to Orlando Utilities Commission under Hurricane Frances*

Terms: local government, full and open competition, socioeconomic contracting, maintain records, cost or price analysis

Background: The Utility (subgrantee) received a Public Assistance subgrant award for damages resulting from Hurricane Frances, which occurred in September 2004.

Procurement Related Findings:

- 1) Subgrantee did not openly solicit competitive bids and instead solicited bids only from companies with which it had previously contracted.⁴⁹⁰ [OIG-14-11-D at 3](#), [44 C.F.R. § 13.36\(c\)](#).
- 2) Subgrantee did not take affirmative steps to use minority firms, women’s business enterprises, and labor surplus area firms for nonemergency contract work. [OIG-14-11-D at 3](#), [44 C.F.R. § 13.36\(e\)](#).
- 3) Subgrantee did not have adequate documentation to show that it performed a cost or price analysis to determine cost reasonableness. [OIG-14-11-D at 3](#), [44 C.F.R. § 13.36\(f\)\(1\)](#).
- 4) Subgrantee did not maintain sufficient records to detail the significant history of the procurement, such as the rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price. [OIG-14-11-D at 3](#), [44 C.F.R. § 13.36\(b\)\(9\)](#).

⁴⁹⁰ **OIG Interpretive Guidance:** The exigent circumstances allowing for noncompetitive awards ended after the subgrantee “restored emergency power to its customers. After such time, exigent circumstances no longer existed to warrant the use of noncompetitive contracts. The Utility should have procured such work through open competition, because exigent circumstances no longer existed to justify the use of noncompetitive contracts. Full and open competition increases the probability of reasonable pricing from the most qualified contractors, and helps discourage and prevent favoritism, collusion, fraud, waste, and abuse. It also allows the opportunity for minority firms, women’s business enterprises, and labor surplus area firms to participate in federally-funded work.”

DHS OIG Audit Report: [OIG-14-08-D](#)
Procurements Under Grants Synopsis

Date: November 21, 2013

Subject: *FEMA Should Recover \$615,613 of Public Assistance Grant Funds Awarded to Orlando Utilities Commission under Hurricane Jeanne*

Terms: local government, full and open competition, socioeconomic contracting, cost or price analysis

Background: The Utility (subgrantee) received a Public Assistance subgrant award for damages resulting from Hurricane Jeanne, which occurred in September 2004.

Procurement Related Findings:

- 1) Subgrantee did not solicit competitive bids. Subgrantee solicited bids only from contractors that it had used before the storm or ones that it believed had the requisite knowledge, expertise, and work force to perform the required work.⁴⁹¹ [OIG-14-08-d at 3](#), [44 C.F.R. § 13.36\(c\)](#).
- 2) Subgrantee did not take affirmative steps to use minority firms, women’s business enterprises, and labor surplus area firms for nonemergency contract work valued. [OIG-14-08-d at 3](#), [OIG-14-08-d at 3](#), [44 C.F.R. § 13.36\(c\)](#), [44 C.F.R. § 13.36\(c\)](#), [44 C.F.R. § 13.36\(e\)](#).
- 2) Subgrantee did not have adequate documentation to show that it performed a cost or price analysis in connection with every procurement action.⁴⁹² [OIG-14-08-d at 3](#), [44 C.F.R. § 13.36\(f\)\(1\)](#).

⁴⁹¹ **OIG Interpretive Guidance:** The subgrantee restored electrical power to almost all of its customers by September 29, 2004, which the OIG considered the end of the emergency period. The five contracts in question were for electrical repair and debris removal work that the subgrantee performed after September 29, 2004, and that it continued for several months. The subgrantee should have procured such work through open competition because exigent circumstances no longer existed to justify the use of noncompetitive contracts. Full and open competition increases the probability of reasonable pricing from the most qualified contractors, and helps discourage and prevent favoritism, collusion, fraud, waste, and abuse. It also allows the opportunity for minority firms, women’s business enterprises, and labor surplus area firms to participate in federally-funded work.

⁴⁹² **OIG Interpretive Guidance:** A cost or price analysis decreases the likelihood of unreasonably high or low prices, contractor misinterpretations, and errors in pricing relative to the scope of work.

DHS OIG Audit Report: [DS-13-14](#)
Procurements Under Grants Synopsis

Date: September 24, 2013

Subject: *FEMA Should Recover \$4.2 Million of Public Assistance Grant Funds Awarded to the Department of Design and Construction, Honolulu, Hawaii*

Terms: local government, unsupported costs, contract scope, full and open competition, improper procurement, legal responsibility, improper accounting of large project costs, grant management

Background: The Department (subgrantee) received a Public Assistance subgrant award for costs resulting from severe storms, flooding, landslides, and mudslides.

Procurement Related Findings:

- 1) Subgrantee circumvented full and open competition and invited four *specific* contractors—with whom they were familiar—to bid on roadwork repairs. Subgrantee could not justify why full and open competition did not occur. Subgrantee provided that the City Procurement Manager approved the contract under emergency procurement procedures, which allowed them to streamline the procurement process. However, the OIG determined that emergency procurement for this project did not apply. Specifically, the subgrantee performed the work over 11 months after the disaster, and the work itself was permanent in nature and not emergency-oriented.⁴⁹³ [OIG DS-13-14 at 6](#), [44 C.F.R. § 13.36\(c\)](#).
- 2) Subgrantee did not take all necessary affirmative steps to assure that small businesses, minority firms, women’s business enterprises, and labor surplus area firms were used when possible. [OIG DS-13-14 at 6](#), [44 C.F.R. § 13.36\(e\)](#).
- 3) Grantee failed to provide adequate oversight to the subgrantee’s activities. Federal regulations require grantees to ensure that subgrantees are aware of Federal regulations, and manage the day-to-day operations of subgrant activity and monitor subgrant activity to ensure compliance. [OIG-13-14 at 10](#), [44 C.F.R. § 13.40\(a\)](#).

⁴⁹³ **OIG Interpretive Guidance:** “Full and open competition increases the opportunity for obtaining reasonable pricing from the most qualified contractors and allows the opportunity for minority firms, women’s business enterprises, and labor surplus area firms to participate in Federally funded work. In addition, full and open competition helps discourage and prevent favoritism, collusion, fraud, waste, and abuse. We do not believe that it is prudent to waive Federal procurement standards unless lives and property are at risk, because the goals of proper contracting relate to more than just reasonable costs. Once the roads are clear, power is restored, and the danger is over, cities, counties, and other entities should follow Federal regulations or risk losing Federal funding.”

**DHS OIG Audit Report: [DD-13-14](#)
Procurements Under Grants Synopsis**

Date: September 20, 2013

Subject: *FEMA Should Recover \$7.5 Million of the \$43.2 Million Public Assistance Grant Awarded to Craighead Electric Cooperative Corporation, Arkansas*

Terms: private nonprofit, A/E, verbal agreement, socioeconomic contracting, required contract provisions

Background: The Cooperative (subgrantee) received a Public Assistance subgrant award for damages resulting from a severe winter storm, which occurred January 26 through 30, 2009.

Procurement Related Findings:

- 1) Subgrantee did not take the required steps to assure that it used small businesses, minority-owned firms, and women’s business enterprises when possible.⁴⁹⁴ [DD-13-14 at 3-4](#), [2 C.F.R. § 215.44\(b\)](#).
- 2) Subgrantee did not include federally required provisions in its contracts. [DD-13-14 at 3-4](#), [2 C.F.R. § 215.48](#), [Appendix A pt. 215](#).

⁴⁹⁴ Subgrantee provided that they were not aware of this requirement, that all businesses had an equal opportunity to bid because they advertised the projects in the newspaper, and that they were concerned about cost and contractor experience, rather than a contractor’s business affiliation. None of these statements provided a basis sufficient to obviate the need to comply with the requirement to required steps to assure that it used small businesses, minority-owned firms, and women’s business enterprises when possible.

DHS OIG Audit Report: [DD-13-11](#)
Procurements Under Grants Synopsis

Date: August 15, 2013

Subject: *FEMA Should Recover \$46.2 Million of Improper Contracting Costs from Federal Funds Awarded to the Administrators of the Tulane Educational Fund, New Orleans, Louisiana*

Terms: private nonprofit, full and open competition, cost-plus percentage, cost/price analysis, contract requirements, socioeconomic contracting, exigent circumstances

Background: Tulane (subgrantee) received a Public Assistance subgrant award for costs resulting from Hurricane Katrina.

Procurement Related Findings:

- 1) Subgrantee awarded a noncompetitive, cost-plus-percentage-of-cost contract with excessive and prohibited markups⁴⁹⁵ [OIG DD-13-11 at 7](#), [2 C.F.R. § 215.43](#), [2 C.F.R. § 215.44\(c\)](#) and was awarded with a cost/price analysis. [OIG DD-13-11 at 16](#), [2 C.F.R. § 215.45](#). Markups on T&M were excessive profit. Subcontractor markups were duplicate costs and excessive profit.
- 2) Subgrantee awarded four noncompetitive contracts after exigent circumstances ended. [2 C.F.R. § 215.43](#), [2 C.F.R. § 215.44\(b\)](#).
- 3) Subgrantee did not include required provision in eight of its contracts. [OIG DD-13-11 at 17](#), [2 C.F.R. § 215.48](#), [Appendix A pt. 215](#).
- 4) Subgrantee did not take steps to assure use of small businesses, minority firms, and women's business enterprises for any of its awards. [OIG DD-13-11 at 17](#), [2 C.F.R. § 215.44\(b\)](#).
- 5) Subgrantee awarded contracts with potential organizational conflict of interest.⁴⁹⁶ [OIG-13-11](#)

⁴⁹⁵ [OIG Interpretive Guidance](#): FEMA approved this contract despite being aware of its provisions for markups. The OIG did not fault the subgrantee for awarding this contract without competition because of exigent circumstances. Generally, the OIG considers circumstances to be exigent when lives or property are at stake, or in this case, when a city or community needs to reopen its schools. Approximately 93 percent of the students returned for the 2006 spring semester on the main campus and the subgrantee reopened its medical-related campuses in July 2006. Therefore, we consider the exigent period to have ended in June 2006. [OIG-13-11 at 6-7](#).

⁴⁹⁶ The subgrantee and the primary contractor awarded three contracts or subcontracts to vendors who had previously or later made contributions to the subgrantee, one of the most significant of which was a \$2.0 million donation from the primary contractor. Also, the subgrantee awarded several other disaster contracts to entities with relationships with the subgrantee, including previously used contractors, alumni, and members of various boards. Subgrantee representatives said that it made these awards in a manner consistent with its internal policies, and were not aware of the open and free competition requirements. Certain of these awards could potentially represent real or apparent organizational conflicts of interest.

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[at 16-18.](#)

DHS OIG Audit Report: [DS-13-11](#)
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Date: July 18, 2013

Subject: *Los Angeles County, CA, Did Not Properly Account For and Expend \$3.9 Million in FEMA Public Assistance Grant Funds for Debris-Related Costs*

Terms: local government, improper procurement, full and open competition, T&M contract, ineligible costs, unsupported costs

Background: Los Angeles County (subgrantee) received a Public Assistance subgrant award for costs resulting from storms, flooding, debris flows, and mudslides.

Procurement Related Findings:

- 1) Subgrantee noncompetitively awarded debris-related contracts after the exigent period and when a scope of work could be formulated.⁴⁹⁷ [OIG DS-13-11 at 4](#), [44 C.F.R. 13.36\(c\)](#).
- 2) Subgrantee awarded time-and-material contracts with neither a determination that no other contract is suitable nor a contract provision providing ceiling price that the contractor exceeds at its own risk. [OIG DS-13-11 at 5](#), [44 C.F.R. § 13.36\(b\)\(10\)\(i\)-\(ii\)](#). Subgrantee also failed to closely monitor the contract. FEMA's PA Guide ([FEMA 322, October 1999, p. 40](#)), PA Applicant Handbook ([FEMA 323, Sep. 1999, pp. 28-29](#)).
- 3) Subgrantee claimed equipment costs without sufficient documentation and claimed costs for the use of equipment that could not be matched to the operators of that equipment. Consequently, OIG was unable to verify whether the equipment hours claimed were the actual number of hours the equipment was in operation. [OIG-13-11 at 13-14](#). Subgrantees must have fiscal controls and maintain records that adequately identify the source and application of funds provided for financially assisted activities. [44 C.F.R. § 13.20\(a\)\(2\) and \(b\)\(2\)](#). Cost Principles for State, Local, and Indian Tribal Governments require that costs be adequately documented to be allowable under a Federal award. [Office of Management and Budget Circular A-87, Attachment A, Section C.1.j](#) and FEMA's Public Assistance Guide ([FEMA 322, October 1999, pp. 113-114](#)) states the applicant should establish and maintain accurate records of events and expenditures related to disaster recovery work.

⁴⁹⁷ **OIG Interpretive Guidance:** Full and open competition helps provide assurance that contract costs are reasonable; increases the number of available contracting sources, and thereby increases the opportunity for obtaining reasonable pricing from the most qualified contractors; and helps discourage and prevent favoritism, collusion, fraud, waste, and abuse.

DHS OIG Audit Report: [DA-13-24](#)
Procurements Under Grants Synopsis

Date: July 10, 2013

Subject: *FEMA Should Recover \$951,221 of Public Assistance Grant Funds Awarded to Palm Beach County, Florida Hurricane Jeanne*

Terms: local government, full and open competition, cost and price analysis, exigent circumstances, cost-plus-percentage-of-cost contract, T&M contract reasonable costs, *FEMA Public Assistance Guide (1999)*

Background: The County (subgrantee) received a Public Assistance subgrant award for damages resulting from Hurricane Jeanne, which occurred in September 2004.

Procurement Related Findings

- 1) Subgrantee did not perform a cost or price analysis on two contracts awarded noncompetitively under exigent circumstances.⁴⁹⁸ [DA-13-24 at 5](#), [44 C.F.R. § 13.36\(f\)\(1\)](#).
- 2) Subgrantee awarded a prohibited cost-plus-percentage-of-cost contract. [DA 13-24 at 5](#), [44 C.F.R. § 13.36\(f\)\(4\)](#).

⁴⁹⁸ **OIG Interpretive Guidance:** While exigent circumstances warranted the use of noncompetitive proposals, the subgrantee did not perform a cost or price analysis on the contractors' proposed prices and awarded one contract as a time and materials contract and the other as a cost plus percentage of cost contract, a contracting method strictly prohibited by Federal regulations. Because of the subgrantee's improper procurement actions, FEMA has no assurance that the contract costs are reasonable.

**DHS OIG Audit Report: [DA-13-23](#)
Procurements Under Grants Synopsis**

Date: July 10, 2013

Subject: *FEMA Should Recover \$4.9 Million of Public Assistance Grant Funds Awarded to Palm Beach County, Florida Hurricane Wilma*

Terms: local government, cost and price analysis, exigent circumstances, cost-plus-percentage-of-cost contract, reasonable costs, *FEMA Public Assistance Guide (1999)*

Background: The County (subgrantee) received a Public Assistance subgrant grant award for damages resulting from Hurricane Wilma, which occurred in October 2005.

Procurement Related Findings

- 1) Subgrantee did not perform a cost or price analysis on contracts awarded noncompetitively under exigent circumstances using local emergency contracting procedures.⁴⁹⁹ [DA-13-23 at 4](#), [44 C.F.R. § 13.36\(f\)\(1\)](#).
- 2) Subgrantee awarded a prohibited cost-plus-percentage-of-cost contract. [DA 13-23 at 5](#), [44 C.F.R. § 13.36\(f\)\(4\)](#).

⁴⁹⁹ **OIG Interpretive Guidance:** Although exigent circumstances warranted the use of a noncompetitive proposal, the subgrantee did not perform a cost or price analysis on the contractor's proposed price and awarded the contract as a cost plus percentage of cost contract, which is strictly prohibited by Federal regulation. As a result of the subgrantee's actions, FEMA has no assurance that the costs are reasonable.

DHS OIG Audit Report: [DA-13-20](#)
Procurements Under Grants Synopsis

Date: June 18, 2013

Subject: *FEMA Should Recover \$3.8 Million of Public Assistance Grant Funds Awarded to Kenergy Corporation, Henderson, Kentucky*

Terms: private nonprofit, exigent circumstances, free and open competition, required provisions, cost and price analysis, socioeconomic contracting, small purchase threshold, maintain documents

Background: Kenergy (subgrantee) received a Public Assistance subgrant award for damages resulting from a severe winter storm, which occurred in January 2009.

Procurement Related Findings:

- 1) Subgrantee noncompetitively awarded contracts for permanent repair work in nonexigent circumstances.⁵⁰⁰ [DA-13-20 at 3](#), [2 C.F.R. § 215.43](#).
- 2) Subgrantee did not take sufficient steps to assure the use of small businesses, minority owned firms, women’s business enterprises, and labor surplus area firms. [DA-13-20 at 3](#), [2 C.F.R. § 215.44](#).
- 3) Subgrantee awarded two T&M contracts without including a cost ceiling. [DA-13-20 at 3](#), [FEMA Public Assistance Guide \(FEMA 322, October 2007, pp. 39–40\)](#).

⁵⁰⁰ **OIG Interpretive Guidance:** Two contracts were awarded for work after February 18, 2009, when emergency electrical power had been restored to all of subgrantee’s customers. OIG concluded that the need to restore electric power constituted exigent circumstances that warranted the use of noncompetitive contracts through February 18, 2009, because lives and property were at risk. Subgrantee should have openly competed permanent repair work after such date because exigent circumstances no longer existed to justify the use of noncompetitive contracts.

DHS OIG Audit Report: [DA-13-17](#)
Procurements Under Grants Synopsis

Date: June 7, 2013

Subject: *FEMA Should Recover \$3.5 Million of Public Assistance Grant Funds Awarded to the City of Gautier, Mississippi- Hurricane Katrina*

Terms: local government, socioeconomic contracting, full and open competition, cost and price analysis, T&M contracts, exigent circumstances, qualifications-based contracting, unsupported costs, *FEMA Policy Digest* (2001)

Background: The City (subgrantee) received a Public Assistance subgrant award for damages resulting from Hurricane Katrina, which occurred in August 2005.

Procurement Related Findings

- 1) Subgrantee did not take affirmative steps to assure the use of small businesses, minority owned firms, women’s business enterprises, and labor surplus area firms. [DA-13-17 at 3](#), [44 C.F.R. § 13.36\(e\)\(1\)](#).
- 2) Subgrantee did not solicit competitive bids for non-emergency debris removal work and permanent repair work.⁵⁰¹ [DA-13-17 at 3](#), [44 C.F.R. § 13.36\(c\)](#).
- 3) Subgrantee did not perform a cost or price analysis or compete a contract for debris monitoring services.⁵⁰² [DA-13-17 at 4](#), [44 C.F.R. § 13.36\(f\)\(1\)](#), [44 C.F.R. § 13.36\(c\)](#).

⁵⁰¹ **OIG Interpretive Guidance:** In several cases, subgrantee hired debris removal contractors without competition for work that began 10 -14 months after the disaster. The subgrantee had sufficient time to compete the contracts. The circumstances were not exigent.

⁵⁰² **OIG Interpretive Guidance:** Subgrantee said they did not compete the debris monitoring services because State purchasing laws, by which they abide by, did not require that professional services be competed and they believed that a cost or price analysis was not required because the contracted services were with an engineering firm. However, Federal regulations require competition for all procurement except under certain circumstances, one of which is when the public exigency or emergency will not permit a delay resulting from competitive solicitation. A public exigency or emergency did not exist to warrant the use of noncompetitive contracts for the contracts in question. Further, although the City hired an A/E firm for the monitoring services, this type of work is not professional A/E services. In addition, Federal regulations require that a cost or price analysis be performed for all procurement transactions, irrespective of the type of goods or services being procured. In conclusion, the subgrantee said that they followed the State’s purchasing laws for all procurement actions. However, a local government subgrantee’s procurement procedures must also conform to applicable Federal law and the standards at 44 C.F.R. § 13.36(b).

DHS OIG Audit Report: [DA-13-18](#)
Procurements Under Grants Synopsis

Date: June 5, 2013

Subject: *FEMA Should Recover \$4.1 Million of Public Assistance Grant Funds Awarded to Orlando Utilities Commission -Hurricane Charley*

Terms: local government, socioeconomic contracting, full and open competition, cost and price analysis, exigent circumstances

Background: The Utility (subgrantee) received a Public Assistance subgrant award for damages resulting from Hurricane Charley, which occurred in August 2004.

Procurement Related Findings

- 1) Subgrantee did not take affirmative steps to assure the use of small businesses, minority owned firms, women’s business enterprises, and labor surplus area firms. [DD-13-18 at 3](#), [44 C.F.R. § 13.36\(e\)\(1\)](#).
- 2) Subgrantee did not solicit competitive bids.⁵⁰³ Subgrantee should have openly competed the work because exigent circumstances did not exist to justify the use of noncompetitive contracts. Subgrantee restored electrical power to almost all of its customers on August 22, 2004, which OIG considered the end of the emergency period. The contracts in question were for work performed after August 22, 2004. [DA-13-18 at 3](#), [44 C.F.R. § 13.36\(c\)](#).
- 3) Subgrantee did not perform a cost or price analysis to determine the reasonableness of the contractor’s prices. [DA-13-18 at 4](#), [44 C.F.R. § 13.36\(f\)\(1\)](#).

⁵⁰³ **OIG Interpretive Guidance:** Full and open competition increases the probability of reasonable pricing from the most qualified contractors, and helps discourage and prevent favoritism, collusion, fraud, waste, and abuse. It also allows the opportunity for firms, women’s business enterprises, and labor surplus area firms to participate in federally funded work.

DHS OIG Audit Report: [DS-13-09](#)
Procurements Under Grants Synopsis

Date: April 30, 2013

Subject: *The Alaska Department of Transportation and Public Facilities Did Not Properly Account for and Expend \$1.5 Million in FEMA Public Assistance Grant Funds*

Terms: State, full and open competition, improper procurement, piggybacking, ineligible costs, fringe benefits

Background: The Department (subgrantee) received a Public Assistance subgrant award for costs resulting from severe storms, flooding, landslides, and mudslides.

Procurement Related Findings:

- 1) Subgrantee did not comply with Federal and State procurement requirements in the solicitation and award of a contract requiring full and open competition (piggybacking) and FEMA thus had no assurance that the subgrantee paid a reasonable price.⁵⁰⁴ [44 C.F.R. §13.36](#), [FEMA Public Assistance Guide, FEMA 322, October 1999, p. 39](#), [OIG-13-09 at 3-7](#).
- 2) Subgrantee officials claimed ineligible costs, including fringe benefits, as a result of improper determinations and calculations for various force account labor and equipment expenditures. [2 C.F.R. pt. 225](#), [44 C.F.R. § 13.20](#), [44 C.F.R. pt. 206](#), [OIG-13-09 at 8-11](#).
- 3) Subgrantee officials did not adhere to FEMA's authorized scope of work and Federal criteria when they claimed cost related to the addition of new culverts and the replacement and upgrading of non-disaster-damaged culverts. Federal regulations and FEMA guidelines stipulate that claimed costs must be required as a result of the disaster. [44 C.F.R. § 206.223](#). Improvements can be performed while still restoring the predisaster function of a damaged facility by obtaining the grantee's approval. The Federal funding for such improved projects shall be limited to the Federal share of the approved estimate of eligible costs ([44 C.F.R. § 206.203\(d\)\(1\)](#)) and; Mitigation measures must be related to eligible disaster-related damages

⁵⁰⁴ **OIG Interpretive Guidance:** The OIG cautions FEMA officials from routinely relying upon *reasonableness* in determining the eligibility of costs incurred through the use of improper procurement practices, particularly when the procurement is not used to mitigate safety and security risks to lives and property. Federal criteria stipulate that in determining cost reasonableness, consideration should be given to requirements imposed, such as laws and regulations that are conditions of the Federal award. As the OIG has previously reported, contracting practices that do not comply with Federal procurement regulations result in high-risk contracts that potentially cost taxpayers millions of dollars in excessive costs and often do not provide full and open competition. Fundamentally, full and open competition increases the opportunity for obtaining reasonable pricing from the most qualified contractors and allows the opportunity for minority firms, women's business enterprises, and labor surplus area firms to participate in federally funded work. Further, full and open competition helps discourage and prevent favoritism, collusion, fraud, waste, and abuse.

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(FEMA Hazard Mitigation Policy 9526.1, Section 7.a). [OIG-13-09 at 11-12](#).

DHS OIG Audit Report: [DD-13-08](#)
Procurements Under Grants Synopsis

Date: April 16, 2013

Subject: *FEMA Should Disallow \$4.1 Million of the \$48.5 Million Public Assistance Grant Awarded to ARK Valley Electric Cooperative, Kansas*

erms: private nonprofit, A/E, verbal agreement, socioeconomic contracting, required contract provisions

Background: The Cooperative (subgrantee) received a Public Assistance subgrant award for costs resulting from a severe winter storm. Subgrantee did not use written contracts for work awarded to 3 A/E firms.

Procurement Related Findings:

- 1) Subgrantee awarded the contracts without free and open competition.⁵⁰⁵ [OIG DD-13-08 at 3, 2 C.F.R. § 215.43.](#)
- 2) Subgrantee did not have written procurement procedures. [OIG DD-13-08 at 2, 2 C.F.R. § 215.44\(a\).](#)
- 3) Subgrantee did not take positive efforts to utilize small businesses, minority-owned firms, and women’s business enterprises whenever possible. [OIG DD-13-08 at 2, 2 C.F.R. § 215.44\(b\).](#)
- 4) Subgrantee did not identify the type of procuring instruments used (e.g., fixed price contracts, cost reimbursable contracts, purchase orders, incentive contracts). [OIG DD-13-08 at 3, 2 C.F.R. § 215.44\(c\).](#)
- 5) Subgrantee could not, on request, make pre-award review and procurement documents available for the Federal awarding agency. [OIG DD-13-08 at 3, 2 C.F.R. § 215.44\(e\).](#)
- 6) Subgrantee did not document some form of cost or price analysis in the procurement files in connection with the procurement actions. [OIG DD-13-08 at 3, 2 C.F.R. § 215.45.](#)
- 7) Subgrantee did not include the required provisions in its contracts and subcontracts. [OIG DD-13-08 at 3, 2 C.F.R. § 215.48, Appendix A pt. 215.](#)

⁵⁰⁵ **OIG Interpretive Guidance:** “Because the [subgrantee] did not competitively bid the services provided by these three contractors and did not perform a price analysis to determine the reasonableness of the contractor’s rates, open and free competition did not occur and FEMA has no assurance that the costs were reasonable. A cost or price analysis decreases the likelihood of unreasonably high or low prices, contractor misinterpretations, and errors in pricing relative to the scope of work.”

DHS OIG Audit Report: [DS-13-05](#)
Procurements Under Grants Synopsis

Date: March 27, 2013

Subject: *The California Department of Parks and Recreation Did Not Account for or Expend \$1.8 Million in FEMA Public Assistance Grant Funds According to Federal Regulations and FEMA Guidelines*

Terms: State, State procurement requirements, ineligible costs

Background: The Department (subgrantee) received a Public Assistance subgrant for costs resulting from severe storms, flooding, landslides, and mudslides.

Procurement Related Findings:

- 1) Subgrantee officials did not comply with four California State procurement requirements in the solicitation and award of its contracts. As a result, FEMA and the grantee had no assurance that the subgrantee paid a reasonable price. The subgrantee is a State entity and officials must therefore comply with the same policies and procedures used for procurements for its non-Federal funds ([44 C.F.R. § 13.36\(a\)](#)). This exempted subgrantee officials from compliance with particular Federal criteria, however, State contracting rules also stipulate that when contracting with another public agency, the awarding agency must complete a contract cost justification and address the appropriateness or reasonableness of the contract when not competitively bidding a contract (CSCM 5.70.D). Despite our requests, subgrantee officials could not provide OIG with the justification. [OIG-13-05 at 4-6](#).
- 2) Subgrantee officials improperly charged various costs that they could not support with sufficient documentation. Federal regulations and FEMA guidelines predicates eligibility on sufficient documentary support. [OIG-13-05 at 6-7](#).
- 3) Subgrantee officials improperly charged costs to replace utility components (e.g., sewer, electrical, water) of a facility that was not in *active use* at the time of the disaster. Federal regulations at [44 C.F.R. § 206.226\(k\)\(2\)](#) stipulate that facilities that were not in active use at the time of the disaster are eligible for Federal disaster assistance only in certain circumstances. [OIG-13-05 at 8-9](#).
- 4) Subgrantee officials charged ineligible project costs, emergency work charged to permanent repair projects that were not part of the FEMA-approved scope of work. [44 C.F.R. 13.20, 2 C.F.R. pt. 225, FEMA Public Assistance Guide, FEMA 322, October 1999, pp. 23, 33, and 71–73, FEMA Public Assistance Applicant Handbook, FEMA 323, September 1999, pp. 17, 21–22, 32, and 52, FEMA’s Applicant Handbook, FEMA 323, September 1999, p. 16. OIG-13-05 at 10-11](#).

DHS OIG Audit Report: [DA-13-13](#)
Procurements Under Grants Synopsis

Date: March 15, 2013

Subject: *FEMA Should Recover \$3.2 Million of Public Assistance Grant Funds Awarded to the Moss Point School District Hurricane Katrina*

Terms: local government, socioeconomic contracting, full and open competition, cost and price analysis, T&M contracts, exigent circumstances, qualifications-based contracting, unsupported costs, *FEMA Policy Digest* (2001)

Background: The District (subgrantee) received a Public Assistance subgrant award for damages resulting from Hurricane Katrina, which occurred in August 2005.

Procurement Related Findings:

- 1) Subgrantee did not take steps to assure use of small businesses, minority owned, women owned, and labor surplus area firms. [DA-13-13 at 4](#), [44 C.F.R. § 13.36\(e\)\(1\)](#). Subgrantee said it coordinated with Mississippi Development Authority prior but could not provide evidence.
- 2) Subgrantee did not compete bids for permanent work. [DA-13-13 at 4](#), [44 C.F.R. § 13.36\(c\)](#). Subgrantee believed Federal competition requirements did not apply because the Governor had declared a state of emergency. Although [44 C.F.R. § 13.36\(d\)\(4\)\(i\)\(B\)](#) allows noncompetitive procurement when exigency/emergency will not permit a delay resulting from competition, the work in question was for permanent work and not emergency work.
- 3) Subgrantee did not perform cost/price analysis. [DA-13-13 at 6](#), [44 C.F.R. § 13.36\(f\)\(1\)](#) For one project, subgrantee argued that a cost analysis was not required due to competition, however, Federal regulations require cost/price analyses for all procurements. Subgrantee stated it compared costs that FEMA had approved under a similar project for and determined that the cost was reasonable. According to [44 C.F.R. § 13.36\(f\)\(1\)](#), independent cost estimates must be made before receiving bids and there no documentation to proving a cost/price analysis was performed before award. For a second project, although exigency justified a noncompetitive contract, Federal regulations still require a cost/price analysis.
- 4) Subgrantee used a qualifications-based contracting method to select an A/E firm for project management services.⁵⁰⁶ [DD-13-13 at 5](#), [44 C.F.R. § 13.36\(d\)\(3\)\(v\)](#).

⁵⁰⁶ **OIG Interpretive Guidance:** This contracting method can only be used to procure professional A/E services. Federal regulations do not allow the purchase of other types of services from A/E firms, such as project management services using qualifications-based contracting, [44 C.F.R. § 13.36\(d\)\(3\)\(v\)](#).

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5) Subgrantee did not have adequate documentation to support contractor T&M charges.⁵⁰⁷ [DD-13-13 at 7](#).

⁵⁰⁷ OIG Interpretive Guidance: As stated in FEMA's *Policy Digest* (FEMA 321, October 2001, p. 20), applicants must carefully document contractor expenses when using time-and-material contracts.

**DHS OIG Audit Report: [DA-13-11](#)
Procurements Under Grants Synopsis**

Date: March 12, 2013

Subject: *FEMA Should Recover \$131,064 from a \$3.0 Million Public Assistance Grant Awarded to the City of Norfolk, Virginia, for Tropical Storm Ida and a Nor'easter*

Terms: local government, cost-plus-percentage-of-cost contract, [FEMA Public Assistance Guide \(2007\)](#)

Background: The City (subgrantee) received a Public Assistance subgrant award totaling for damage resulting from Tropical Storm Ida and a Nor'easter, which occurred in November 2009.

Procurement Related Findings

Subgrantee utilized a prohibited cost-plus-percentage-of-cost contract.⁵⁰⁸ [DA-13-11 at 2, 44 C.F.R. § 13.36\(f\)\(4\)](#). While the subgrantee utilized a contract it had competed in 2006 and renewed yearly under an option to renew clause, the contract included a cost-plus provision whereby the contractor charged materials at cost plus a markup of 34 percent.

⁵⁰⁸ **OIG Interpretive Guidance:** Federal regulations at [44 C.F.R. § 13.36\(f\)\(4\)](#) states that the cost plus a percentage of cost and percentage of construction cost methods of contracting shall not be used. In addition, [FEMA's Public Assistance Guide \(FEMA 322, June 2007, pp. 51–53\)](#) specifies that “cost plus a percentage of costs contracts are not eligible. However, FEMA may separately evaluate and reimburse costs it finds fair and reasonable.” FEMA may grant exceptions to Federal procurement requirements to subgrantees on a case-by-case basis, [44 C.F.R. § 13.6\(c\)](#).

DHS OIG Audit Report: [DD-13-07](#)
Procurements Under Grants Synopsis

Date: February 27, 2013

Subject: *FEMA Should Recover \$881,956 of Ineligible Public Assistance Funds and \$862,983 of Unused Funds Awarded to St. Charles Parish School Board, Luling, Louisiana*

Terms: local government, full and open competition, socioeconomic contracting, contract provisions, grant management, time and material, cost/price analysis

Background: The Parish (subgrantee) received a Public Assistance subgrant award for costs resulting from Hurricane Katrina, Gustav, and Ike.

Procurement Related Findings:

1) Subgrantee enacted its Emergency Purchase Policy to dispense with competitive bidding to immediately stabilize the local school system and community. However, it continued to use noncompetitive time-and-material contracts for various debris removal services after the period of exigency.⁵⁰⁹ [OIG DD 13-07 at 4](#), [44 C.F.R. § 13.36\(c\)](#).

2) Subgrantee did not:

- Maintain a contract administration system to ensure that contractors perform according to terms, conditions, and specifications of their contracts or purchase orders. [OIG DD 13-07 at 4](#), [44 C.F.R. § 13.36\(b\)\(2\)](#).
- Negotiate profit as a separate element of the price for each contract in which there is no price competition. [OIG DD 13-07 at 4](#), [44 C.F.R. § 13.36\(f\)\(2\)](#).
- Avoid use of time-and-material contracts unless a determination is made that no other contract is suitable and that the contract include a ceiling price that the contractor exceeds at its own risk. [OIG DD 13-07 at 4](#), [44 C.F.R. § 13.36\(b\)\(10\)\(i\)-\(ii\)](#).
- Include required contract provisions such as those for records retention, legal remedies, and termination for cause. [OIG DD 13-07 at 4](#), [44 C.F.R. § 13.36\(i\)](#).

⁵⁰⁹ **OIG Interpretive Guidance:** “Generally, we do not question costs based on noncompliance with Federal procurement regulations when lives and property are at risk. However, once the danger passes, subgrantees should fully comply with Federal contracting regulations.” Subgrantee said that it continued to use noncompetitive time-and-material contracts after the schools opened because they were not fully aware of Federal procurement regulations.

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3) Grant Management: Several findings occurred in part because the grantee did not provide proper guidance to the subgrantee, and did not adequately manage and monitor the day-to-day operations of the subgrantee to ensure compliance with Federal regulations. Federal regulation [44 C.F.R. § 13.40\(a\)](#) requires the grantee to manage the day to- day operations of subgrant activity and monitor subgrant activity to assure compliance with applicable Federal requirements. [OIG DD 13-07 at 7](#).

DHS OIG Audit Report: [DD-13-06](#)
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Date: February 27, 2013

Subject: *FEMA Should Recover \$6.7 Million of Ineligible or Unused Public Assistance Funds Awarded to Cameron Parish, Louisiana, for Hurricane Rita*

Terms: local government, duplicate costs, full and open competition, socioeconomic contracting, contract provisions, grant management, cost-plus-percentage

Background: The Parish (subgrantee) received a Public Assistance subgrant award for costs resulting from Hurricane Rita.

Procurement Related Findings:

1) Subgrantee did not provide full and open competition⁵¹⁰ for an A/E contract totaling \$1.8 million.⁵¹¹ [OIG DD 13-06 at 8](#), [44 C.F.R. § 13.36\(c\)](#).

2) Subgrantee did not maintain sufficient records to detail the significant history of procurements. [OIG DD 13-06 at 9](#), [44 C.F.R. § 13.36\(b\)\(9\)](#).

3) Subgrantee did not include a reasonable cost ceiling in a T&M contract.⁵¹² [OIG DD 13-06 at 9](#), [44 C.F.R. § 13.36\(b\)\(10\)\(ii\)](#).

4) Subgrantee did not include the required Federal provisions in all contracts.⁵¹³ [OIG DD 13-06 at 9](#), [44 C.F.R. § 13.36\(i\)](#).

5) Subgrantee did not take necessary affirmative steps to assure use of small businesses, minority firms, women's business enterprises, and labor surplus area firms when possible for contract

⁵¹⁰ The subgrantee awarded a noncompetitive architectural and engineering contract to a contractor that it had used before Hurricane Rita. This pre-existing contract was more than 2 decades old.

⁵¹¹ **OIG Interpretive Guidance:** "FEMA's practice has been to allow contract costs it considers reasonable, regardless of whether the contract complies with Federal procurement regulations. However, Federal procurement policies do not authorize this practice unless lives and property are at stake, because the goals of proper contracting relate to more than just reasonable cost. Full and open competition usually increases the number of bids received and thereby increases the opportunity for obtaining reasonable pricing from the most qualified contractors. Full and open competition also helps to discourage and prevent favoritism, collusion, fraud, waste, and abuse."

⁵¹² **OIG Interpretive Guidance:** The contract had a ceiling of \$50 Million, but the OIG determined that this was unreasonably high and therefore meaningless as a cost control measure for a contract award.

⁵¹³ **OIG Interpretive Guidance:** These contract provisions document the rights and responsibilities of the parties and minimize the risk of contract misinterpretations and disputes.

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work.⁵¹⁴ [OIG DD 13-06 at 9-10](#), [44 C.F.R. § 13.36\(e\)](#).

6) Grant Management: Several findings occurred in part because the grantee did not provide proper guidance to the subgrantee and did not adequately manage and monitor the subgrantee to ensure compliance with Federal regulations. Federal regulation [44 C.F.R. § 13.40\(a\)](#) requires the grantee to manage the day-to-day operations of subgrant activity and monitor subgrant activity to assure compliance with applicable Federal requirements. [OIG DD 13-06 at 12-13](#).

⁵¹⁴ Although the subgrantee did not have steps in place to solicit awards from small businesses, minority-owned firms, women's business enterprises, and labor surplus area firms, it did award 18 of its 40 contracts to such businesses. As such, the OIG did not question the other disaster-related contract costs because the subgrantee otherwise competitively bid its contracts, which included awards to small and disadvantaged businesses.

DHS OIG Audit Report: [DA-13-10](#)
Procurements Under Grants Synopsis

Date: February 22, 2013

Subject: *FEMA Should Recover \$8.5 Million of Public Assistance for Grant Funds Awarded to the City of Gulfport Mississippi, for Debris Removal and Emergency Protective Measures-- Hurricane Katrina*

Terms: local government, cost and price analysis, exigent circumstances, unreasonable costs, *FEMA Public Assistance Guide* (1999)

Background: The City (subgrantee) received a Public Assistance subgrant award for damages resulting from Hurricane Katrina, which occurred in August 2005.

Procurement Related Findings:

- 1) Subgrantee awarded noncompetitive contract for debris removal and did not conduct a cost or price analysis for the contract. The subgrantee awarded a noncompetitive contract for removal of the biohazard debris, which was justified because of the threat to public health and safety posed by the debris. To perform the contract work, the subgrantee issued change orders to an existing contract with its primary debris removal contractor. However, the subgrantee did not conduct a cost or price analysis to determine the reasonableness of the contractor's price or negotiate profit as a separate element of the price. A cost or price analysis decreases the likelihood of unreasonably high or low prices, contractor misinterpretations, and errors in pricing relative to the scope of work. [DA-13-10 at 5, 44 C.F.R. § 13.36\(f\)\(1\)](#).
- 2) Subgrantee claimed \$989,148 in unreasonable costs because it did not conduct a cost or price analysis.⁵¹⁵ [DA-13-10 at 6, FEMA Public Assistance Guide \(FEMA 322, October 1999\)](#).

⁵¹⁵ **OIG Interpretive Guidance:** The subgrantee did not follow Federal procurement procedures and perform a cost or price analysis when costs data were available from another subgrantee project, under which identical work was performed for a significantly lower cost. The *FEMA Public Assistance Guide* (FEMA 322, October 1999, pp. 33-34) states that a cost must be reasonable and necessary to accomplish the work. It further states that 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. In other words, a reasonable cost is a cost that is both fair and equitable for the type of work performed. The guide states that the use of historical documentation for similar work, and average costs for similar work in the area, are among the methods through which reasonable costs can be established.

**DHS OIG Audit Report: [DA-13-09](#)
Procurements Under Grants Synopsis**

Date: February 15, 2013

Subject: *FEMA Should Recover \$1.9 Million of Public Assistance Grant Funds Awarded to the Hancock County Utility Authority Hurricane Katrina*

Terms: local government, cost and price analysis, exigent circumstances, sole source, socioeconomic contracting, *FEMA Public Assistance Guide* (1999)

Background: The Authority (subgrantee) received a Public Assistance subgrant award for damages resulting from Hurricane Katrina, which occurred in August, 2005.

Procurement Related Findings:

- 1) Subgrantee did not take all necessary affirmative steps to assure that small businesses, minority firms, women’s business enterprises, and labor surplus area firms were used when possible. [DS-13-09 at 3](#), [44 C.F.R. § 13.36\(e\)](#). Authority officials said that they believed that when they advertised projects in the newspaper, everyone had an equal chance to bid on the work. However, in addition to normal Federal contracting competitive procedures, [44 C.F.R. § 13.36 \(e\)\(2\)](#) lists additional steps that must be taken to provide opportunities to minority firms, women’s business enterprises, and labor surplus area firms.

- 2) Subgrantee did not perform a cost or price analysis for the contract for emergency work.⁵¹⁶ [DA-13-09 at 4](#), [44 C.F.R. § 13.36\(f\)\(1\)](#).

⁵¹⁶ OIG Interpretive Guidance: Federal regulations require a cost or price analysis in connection with every procurement action, including those awarded under exigent circumstances, and including contract modifications.

**DHS OIG Audit Report: [DD-13-02](#)
Procurements Under Grants Synopsis**

Date: January 3, 2013

Subject: *FEMA Public Assistance Grant Funds Awarded to St. John the Baptist Parish, Louisiana*

Terms: local government, socioeconomic contracting, full and open competition, cost and price analysis, required provisions

Background: The Parish (subgrantee) received a Public Assistance subgrant award for damages resulting from Hurricane Ike, declared on September 13, 2008.

Procurement Related Findings:

- 1) Subgrantee did not always take sufficient steps to assure the use of small businesses, minority owned firms, women’s business enterprises, and labor surplus area firms. [DD-13-02 at 5, 44 C.F.R. § 13.36\(e\)\(1\)](#).
- 2) Subgrantee did not always perform a cost or price analysis in connection with procurement actions. [DD-13-02 at 5, 44 C.F.R. § 13.36\(f\)\(1\)](#).
- 3) Subgrantee did not always include certain required contract provisions such as those for records retention and termination for cause.⁵¹⁷ [DD-13-02 at 5, 44 C.F.R § 13.36\(i\)](#).

⁵¹⁷ In spite of these findings the OIG did not question any costs related to contracting because the subgrantee otherwise properly procured its disaster-related contracts and because it awarded \$4.9 million of the \$5.1 million in contract work to a minority-owned firm.

DHS OIG Audit Report: [DA-13-08](#)
Procurements Under Grants Synopsis

Date: December 4, 2012

Subject: *FEMA Should Recover \$470,244 of Public Assistance Grant Funds Awarded to the City of Lake Worth, Florida-Hurricanes Frances and Jeanne*

Terms: local government, full and open competition, cost and price analysis, T&M contracts, exigent circumstances, sole source, *FEMA Public Assistance Guide* (1999)

Background: The City (subgrantee) received Public Assistance subgrant awards totaling for damages resulting from hurricanes Frances and Jeanne, which occurred in September 2004.

Procurement Related Findings:

- 1) Subgrantee did not award contracts using full and open competition for permanent work, instead continuing to use noncompetitive contracts that it had awarded to perform emergency work necessary to restore power.⁵¹⁸ [DA-13-08 at 4](#), [44 C.F.R. § 13.36\(c\)\(1\)](#).
- 2) Subgrantee did not conduct a cost and price analysis for the sole source contracts. [DA-13-08 at 4](#), [44 C.F.R. § 13.36\(f\)\(1\)](#).
- 3) Subgrantee used T&M contracts without establishing cost ceilings. [DA-13-08 at 4](#), [44 C.F.R. § 13.36\(b\)\(10\)](#).

⁵¹⁸ **OIG Interpretive Guidance:** Noncompetitive proposals should be used only when the award of a contract is not feasible under small purchase procedures, sealed bids, or competitive proposals, and one of the following circumstances applies: (1) the item is available only from a single source, (2) there is an emergency requirement that will not permit a delay for competition, (3) FEMA authorizes noncompetitive proposals, or (4) solicitation from a number of sources has been attempted and competition is determined to be inadequate. In this case, exigent circumstances warranted sole-sourcing the contract until September 29, 2004, when electricity was restored and lives and property were no longer at risk. However, the subgrantee should have competed the permanent repair work after that date.

DHS OIG Audit Report: [DA-13-07](#)
Procurements Under Grants Synopsis

Date: November 20, 2012

Subject: *FEMA Should Recover \$701,028 of Public Assistance Grant Funds Awarded to Memphis Light, Gas and Water Division – Severe Weather February 2008*

Terms: local government, exigent circumstances, cost or price analysis, time and material contracts, reasonable costs, grants management

Background: The Water Division (subgrantee) received a Public Assistance subgrant award for damages resulting from severe storms, tornadoes, straight-line winds, and flooding, which occurred in February 2008.

Procurement Related Findings:

- 1) Subgrantee awarded two noncompetitive time-and-material contracts for the restoration of electrical power lost during the disaster. Subgrantee selected the contractors from a list of potential sources it had compiled before the disaster. The subcontractor did not establish ceiling prices that the contractors exceeded at their own risk.⁵¹⁹ [DA-13-07 at 3, 44 C.F.R. § 13.36\(b\)\(10\)](#).
- 2) Subgrantee did not complete a cost or price analysis to determine the reasonableness of the proposed price.⁵²⁰ [DA-13-07 at 3, 44 C.F.R. § 13.36\(f\)\(1\)](#). Subgrantee officials said that they receive rates from contractors annually and compile a list of potential sources (by location, availability, and expertise) in the event of an emergency.
- 3) Grantee did not adequately manage the subgrantee's day-to-day operations, [DA-13-07 at 3, 44 C.F.R. § 13.40\(a\)](#).⁵²¹

⁵¹⁹ **OIG Interpretive Guidance:** The contract work began on February 6, 2008, and continued until February 10, 2008, when all power was restored. OIG concluded that the need for electrical power constituted exigent circumstances that warranted the use of noncompetitive contracts.

⁵²⁰ **OIG Interpretive Guidance:** There no evidence in the subgrantee's files that the lists of prices were negotiated or reviewed for reasonableness. OIG noted that the overtime rates for similar positions varied considerably between the contractors. For example, one contractor's overtime rate for a general foreman was \$85 per hour, while the other contractor's overtime rate for a general foreman was \$133 per hour, or 56.4 percent more. Because the subgrantee did not conduct a cost or price analysis, FEMA has no assurance that the work was obtained at a fair and reasonable price.

⁵²¹ **OIG Interpretive Guidance:** The grantee accepted the costs in question but the documentation did not indicate that the costs were reviewed to ensure compliance with Federal procurement requirements and FEMA guidelines.

**DHS OIG Audit Report: [DA-13-06](#)
Procurements Under Grants Synopsis**

Date: November 20, 2012

Subject: *FEMA Should Recover \$894,764 of Public Assistance Grant Funds Awarded to the Town of Dauphin Island, Alabama - Hurricane Katrina*

Terms: local government, cost or price analysis, reasonable costs

Background: The Town (subgrantee) received a Public Assistance subgrant award for damages resulting from Hurricane Katrina, which occurred in August 2005.

Procurement Related Findings:

1) Subgrantee did not perform a cost or price analysis to determine the reasonableness of the contractor's proposed price (note that subgrantee received only one bid in response to solicitation).⁵²² [DA-13-06 at 2](#); [44 C.F.R. § 13.36\(f\)\(1\)](#).

⁵²² **OIG Interpretive Guidance:** OIG questioned the costs claimed because the subgrantee did not comply with Federal procurement requirements and, as a result, FEMA has no assurance that the price paid for the contract work was reasonable.

DHS OIG Audit Report: [DA-13-05](#)
Procurements Under Grants Synopsis

Date: November 20, 2012

Subject: *FEMA Should Recover \$2.2 Million of Public Assistance Grant Funds Awarded to Memphis Light, Gas and Water Division - Severe Weather, June 2009*

Terms: local government, noncompetitive, time and material, exigent circumstances, cost or price analysis, reasonable costs, grants management

Background: The Water Division (subgrantee) received a Public Assistance subgrant award for damages resulting from severe storms, tornadoes, straight-line winds, and flooding that occurred in June 2009.

Procurement Related Findings:

- 1) Subgrantee awarded T&M contracts without establishing ceiling prices that the contractors exceeded at their own risk.⁵²³ [DA-13-05 at 3, 44 C.F.R. § 13.36\(b\)\(10\)](#).
- 2) Subgrantee did not complete a cost or price analysis to determine the reasonableness of the proposed prices for the T&M contracts.⁵²⁴ [DA-13-05 at 3, 44 C.F.R. § 13.36\(f\)\(1\)](#). The subgrantee provided that it received rates from contractors annually and compile a list of potential sources (by location, availability, and expertise) in the event of an emergency.
- 3) Grantee did not adequately manage the subgrantee's day-to-day operations.⁵²⁵ [DA-13-05 at 3, 44 C.F.R. § 13.40\(a\)](#).

⁵²³ Note that subgrantee awarded these contracts, for power restoration services, using noncompetitive procedures. The subgrantee selected the contractors from a list of potential sources it had compiled prior to the disaster. The contract work began on June 13, 2009, and continued until June 19, 2009, when all power was restored. The OIG concluded that the lack of power constituted exigent circumstances that warranted the use of noncompetitive contracts during this period.

⁵²⁴**OIG Interpretive Guidance:** There no evidence in the subgrantee's files that the lists of prices were negotiated or reviewed for reasonableness. OIG noted that the overtime rates for similar positions varied considerably between the contractors. For example, one contractor's overtime rate for a general foreman was \$98 per hour, while the other contractor's overtime rate for a general foreman was \$133 per hour, or 35.7 percent higher. Because the subgrantee did not conduct a cost or price analysis, FEMA has no assurance that the work was obtained at a fair and reasonable price.

⁵²⁵**OIG Interpretive Guidance:** The grantee accepted the costs in question but the documentation did not indicate that the costs were reviewed to ensure compliance with Federal procurement requirements and FEMA guidelines.

DHS OIG Audit Report: [DA-13-04](#)
Procurements Under Grants Synopsis

Date: November 20, 2012

Subject: *FEMA Should Recover \$7.7 Million of Public Assistance Grant Funds Awarded to the City of Lake Worth, Florida Hurricane Wilma*

Terms: local government, exigent circumstances, cost and price analysis, noncompetitive contracts, reasonable costs

Background: The City (subgrantee) received a Public Assistance subgrant award for damages resulting from Hurricane Wilma, which occurred in October 2005.

Procurement Related Findings:

- 1) Subgrantee awarded time and material contracts without establishing ceiling prices that the contractors exceeded at their own risk. [DA-13-04 at 3, 44 C.F.R. § 13.36\(b\)\(10\)](#).
- 2) Subgrantee did not complete a cost or price analysis to determine the reasonableness of the proposed prices for the time and equipment contracts. [DA-13-04 at 3, 44 C.F.R. § 13.36\(f\)\(1\)](#).
- 3) Subgrantee did not solicit bids for permanent work once electrical power was restored and the exigent circumstances were over.⁵²⁶ [DA-13-04 at 3, 44 C.F.R. § 13.36 \(d\)\(4\)\(i\)](#).

⁵²⁶**OIG Interpretive Guidance:** OIG concluded that the immediate need for electrical power constituted exigent circumstances that warranted the use of noncompetitive contracts through November 7, 2005, because lives and property were at risk. The subgrantee should have openly competed the permanent repair work after this date, because exigent circumstances no longer existed to justify the use of noncompetitive contracts. Instead, the subgrantee used the contractors hired under the noncompetitive contracts for permanent work that was completed by March 6, 2006.

DHS OIG Audit Report: [DA-13-03](#)
Procurements Under Grants Synopsis

Date: November 6, 2012

Subject: *FEMA Should Recover \$5.3 Million of Public Assistance Grant Funds Awarded to University of Southern Mississippi-Hurricane Katrina*

Terms: institution of higher education, duplicate benefits, insurance proceeds, T&M contract, A/E contract, full and open competition, unsupported costs, alternate project funding

Background: The University (subgrantee) received a Public Assistance subgrant award for damages resulting from Hurricane Katrina.

Procurement Related Findings:

- 1) Subgrantee did not adequately justify the use of a T&M contract for permanent repair work.⁵²⁷ [DA-13-03 at 5](#), [2 C.F.R. § 215.44\(c\)](#).
- 2) Subgrantee did not allow for full and open competition when procuring A/E services. Instead of soliciting competitive proposals, the subgrantee used an A/E firm with which it had a contract prior to Hurricane Katrina.⁵²⁸ [DA-13-03 at 6](#), [2 C.F.R. § 215.43](#).
- 3) Subgrantee also did not perform a cost or price analysis before awarding the T&M and A/E services contracts. [DA-13-03 at 6](#), [2 C.F.R. § 215.45](#).
- 4) Subgrantee did not maintain adequate source documentation to support \$979,803 of T&M contract costs claimed. According to [2 C.F.R. § 215.21\(b\)\(7\)](#), recipients' financial management systems shall provide accounting records that are supported by source documentation. [DA-13-03 at 7](#).

⁵²⁷**OIG Interpretive Guidance:** Project documentation showed that a clear scope of work had been developed at the time the contract was awarded. A memo from the project architect stated, "We brought in reputable contractors . . . and reviewed the scope of work." The memo also noted drawings that outlined the proposed work. Because this contract was completed 11 months after the disaster and FEMA's [Public Assistance Guide](#) states that time-and-materials contracts should be avoided but may be used for a limited period (generally not more than 70 hours) for work that is necessary immediately after the disaster has occurred when a clear scope of work cannot be developed. . . . The [Subgrantee] should have used a more appropriate type of contracting method to accomplish the work.

⁵²⁸**OIG Interpretive Guidance:** Full and open competition increases the probability of reasonable pricing from the most qualified contractors and helps discourage and prevent favoritism, collusion, fraud, waste, and abuse.

DHS OIG Audit Report: [DD-12-20](#)
Procurements Under Grants Synopsis

Date: September 12, 2012

Subject: *FEMA Public Assistance Grant Funds Awarded to St. Charles Parish, Louisiana*

Terms: local government, cost and price analysis, sole source, socioeconomic contracting

Background: The Parish (subgrantee) received a Public Assistance subgrant award for damages resulting from Hurricanes Gustav and Ike, occurring September 2008.

Procurement Related Findings:

- 1) Subgrantee did not include required provisions in its contracts. These provisions document the rights and responsibilities and minimize risk of contract misinterpretations and disputes. [DD-12-20 at 6, 44 C.F.R. § 13.36\(i\)](#).
- 2) Subgrantee did not perform a cost or price analysis on any of the six contracts we reviewed. Federal regulations require subgrantees to perform a cost or price analysis for every procurement. Performing a cost or price analysis decreases the likelihood of unreasonably high or low prices, contractor misinterpretations, and errors in pricing relative to the scope of work.⁵²⁹ [DD-12-20 at 6, 44 C.F.R. § 13.36\(f\)\(1\)](#).
- 3) Subgrantee did not take all necessary affirmative steps to assure that small businesses, minority firms, women’s business enterprises, and labor surplus area firms were used when possible.⁵³⁰ [DD-12-20 at 6, 44 C.F.R. § 13.36\(e\)](#).

⁵²⁹ Grantee stated that properly bid contract serves as a cost or price analysis. Grantee also stated that requiring applicants to complete a cost or price analysis on every contract is onerous. OIG disagreed as (1) FEMA is not a party these contracts and, therefore, is not involved in the decision as to the necessity of a cost or price analysis; (2) Federal regulations require cost or price analyses even when contracts are properly bid, in part to lessen the likelihood of underbidding, which can lead to nonperformance and contract disputes, and overbidding, which may occur when bidders have colluded on their bids; and (3) completing a simple cost or price analysis is not onerous; for example, the Parish could have determined what it has paid for similar services, or asked FEMA, GOHSEP, or neighboring parishes what they considered a fair price for similar services.

⁵³⁰ **OIG Interpretive Guidance:** Affirmative steps should include using the services of the Small Business Administration and the Minority Business Development Agency of the Department of Commerce, and requiring the prime contractor to take the affirmative steps listed in Federal regulations 44 C.F.R. § 13.36(e)(2)(i) through (v). During the audit, the subgrantee revised its standard contract template. The revision states that the subgrantee “shall, to the extent consistent with quality, price, risk and other lawful and relevant considerations, use its good faith efforts to achieve participation by minority, women and disadvantaged businesses.” However, simply stating that the subgrantee’s policy is to consider awarding contracts to minority, women-owned, and disadvantaged businesses is not sufficient. Rather, the subgrantee must document the affirmative steps taken to encourage such firms to bid on its contracts.

DHS OIG Audit Report: [DS-12-12](#)
Procurements Under Grants Synopsis

Date: July 18, 2012

Subject: *FEMA Public Assistance Grant Funds Awarded to the Alaska Department of Transportation and Public Facilities, Central Region, Anchorage, Alaska*

Terms: State, full and open competition, cost and price analysis, scope of work, T&M, exigent circumstances, Public Assistance Guide (2007)

Background: The Alaska Department of Transportation and Public Facilities, Central Region was awarded a Public Assistance grant award related to roadway washout damages resulting from severe storms, flooding, mudslides, and rockslides during the period from October 6 through 11, 2009.

Procurement Related Findings:

1) Subgrantee awarded the contracts without full and open competition. Subgrantee improperly invited specific contractors to submit quotes using small procurement procedures. [DS-12-12 at 2](#), [44 C.F.R. § 13.36 \(c\)\(1\)](#).

2) Small procurement procedures that have a \$100,000 limit were used for two contracts with charges in excess of the simplified acquisition threshold. [DS-12-12 at 3](#), Alaskan Statute (AS) 36.30.32

2) The contracts did not include a cost estimate by site or project, and the scope of work for the contracts was broadly worded. As a result, the scopes of work couldn't be reconciled with the project worksheets. [DS-12-12 at 3](#).

3) Subgrantee did not perform a cost or price analysis for the preaward or change order proposals. [DS-12-12 at 4](#), [44 C.F.R. § 13.36\(f\)\(1\)](#).

4) Subgrantee did not document a waiver of competitive requirements for emergency conditions, as required by State procurement rules. [DS-12-12 at 5](#), AS 36.30.310.

5) Subgrantee awarded two T&M contracts with cost ceilings. The subgrantee paid contractor's billings that exceeded the cost ceilings.⁵³¹ [DS-12-12 at 4](#), [FEMA Public Assistance Guide](#).

⁵³¹ **OIG Interpretive Guidance:** Applicants should avoid using time-and-material contracting. FEMA may provide assistance for work completed under such contracts for a limited period (generally not more than 70 hours) that is necessary immediately after the disaster has occurred when a clear scope of work cannot be developed. In all cases, a cost ceiling, or "not-to-exceed" provision, must be included in the contract, and a competitive process should be used for all of the labor and equipment rates (*FEMA Public Assistance Guide*, FEMA 322, June 2007).

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[\(2007\).](#)

**DHS OIG Audit Report: [DD-12-04](#)
Procurements Under Grants Synopsis**

Date: July 18, 2012

Subject: *FEMA Public Assistance Grant Funds Awarded to Cameron Parish School Board, Cameron, Louisiana*

Terms: local government, required provisions, socioeconomic contracting

Background: Cameron (subgrantee) received a Public Assistance subgrant award for damages resulting from Hurricane Rita, which occurred on September 24, 2005.

Procurement Related Findings:

- 1) Subgrantee did not include in its contracts the provisions required by [44 C.F.R. § 13.36\(i\)](#). These provisions document the rights and responsibilities of the parties and minimize the risk of misinterpretations and disputes. [DD-12-04 at 3](#).
- 2) Subgrantee did not take sufficient steps to assure the use of small businesses, minority owned firms, women's business enterprises, and labor surplus area firms.⁵³² [DD-12-04 at 3](#), [44 C.F.R. § 13.36\(e\)](#).

⁵³² **OIG Interpretive Guidance:** Although the subgrantee did not take the specific affirmative steps listed in the regulations, it did award half of its contracts to small or disadvantaged businesses (17 contracts totaling \$14.3 million out of 31 contracts totaling \$49.6 million). Therefore, OIG did not question any costs related to contracting because the subgrantee otherwise properly procured its disaster-related contracts. However, for future federally funded disaster contracts, the subgrantee should ensure that it complies with all Federal procurement standards.

DHS OIG Audit Report: [DA-12-22](#)
Procurements Under Grants Synopsis

Date: July 18, 2012

Subject: *FEMA Public Assistance Grant Funds Awarded to the Long Beach Port Commission, Long Beach, Mississippi*

Terms: local government, full and open competition, cost and price analysis, socioeconomic contracting, exigent circumstances, Public Assistance Guide (1999)

Background: The Port (subgrantee) received a Public Assistance subgrant award for damages resulting from Hurricane Katrina, which occurred in August 2005.

Procurement Related Findings:

- 1) Subgrantee did not take affirmative steps to include minority firms, women’s business enterprises, and labor surplus area firms in its bid process for certain contract work.⁵³³ [DA-12-22 at 3, 44 C.F.R. § 13.36\(e\)\(1\)](#). Subgrantee stated that it advertised all contracts in local and surrounding newspapers. Subgrantee also stated it believed the advertisements had been coordinated through the Mississippi Development Authority, a State agency, which has a process to assure the use of minority firms, women’s business enterprises, and labor surplus area firms. Mississippi Development Authority could not confirm that coordination had taken place and the subgrantee could not otherwise document required affirmative requirements.

- 2) Subgrantee awarded a contract to an A/E firm without full and open competition and did not perform a cost or price analysis of the contractor’s proposed prices.⁵³⁴ [DA-12-22 at 4, 44 C.F.R. § 13.36\(c\)\(1\), 44 C.F.R. § 13.36.36\(f\)\(1\)](#).

⁵³³**OIG Interpretive Guidance:** Federal procurement standards require that procurement transactions be conducted in a manner providing full and open competition. The regulations also require that additional steps be taken, beyond competition, to ensure the use of minority firms, women’s business enterprises, and labor surplus area firms.

⁵³⁴**OIG Interpretive Guidance:** The Port solicited bids from A/E firms and selected one firm using a qualifications-based selection process. However, this method of contracting, where price is not used as a selection factor, may be used only in procurement of A/E professional services ([44 C.F.R. § 13.36\(d\)\(3\)\(v\)](#)). It may not be used to purchase other types of services, such as project management services, from A/E firms.

DHS OIG Audit Report: [DA-12-20](#)
Procurements Under Grants Synopsis

Date: July 15, 2012

Subject: *FEMA Public Assistance Grant Funds Awarded to City of Miramar; Florida-Hurricane Wilma*

Terms: local government, full and open competition, cost and price analysis, socioeconomic contracting, exigent circumstances, Public Assistance Guide (1999), FEMA Policy 9580.4 Fact Sheet: Debris Operations—Clarification: Emergency Contracting vs. Emergency Work (2001)

Background: The City (subgrantee) received a Public Assistance subgrant award for damages resulting from Hurricane Wilma, which occurred in October 2005.

Procurement Related Findings:

1) Subgrantee awarded contracts without full and open competition.⁵³⁵ [DA-12-20 at 3, 44 C.F.R. § 13.36\(c\)\(1\)](#). Subgrantee stated that it awarded the contracts without competition due to exigent circumstances. However, the contracts in question were awarded for debris removal from the City's rights-of-way. FEMA has determined that such activity is not a public exigency or emergency that relieves the applicant of competitive bidding ([FEMA Policy 9580.4, Fact Sheet: Debris Operations – Clarification: Emergency Contracting vs. Emergency Work, January 2001](#)).⁵³⁶

2) Subgrantee did not perform a cost or price analysis of the contractor's proposed prices.⁵³⁷ [DA-12-20 at 3, 44 C.F.R. § 13.36\(f\)\(1\)](#).

⁵³⁵ OIG Interpretive Guidance: Full and open competition increases the probability of reasonable pricing from the most qualified contractors and allows the opportunity for minority firms, women's business enterprises, and labor surplus area firms to participate in federally funded work. Full and open competition also helps discourage and prevent favoritism, collusion, fraud, waste, and abuse.

⁵³⁶ FEMA Policy 9580.4 provides in part that "non-competitive contracting is acceptable ONLY in rare circumstances where there can be no delay in meeting a requirement. In general, contracting for debris work requires competitive bidding. The definition of "emergency" in contracting procedures is not the same as FEMA's definition of "emergency work." "[N]ormally, non-competitive bid awards should not be made several days (or weeks) after the disaster or for long-term debris removal."

⁵³⁷ OIG Interpretive Guidance: A cost or price analysis decreases the likelihood of unreasonably high or low prices, contractor misinterpretations, and errors in pricing relative to the scope of work.

DHS OIG Audit Report: [DS-12-11](#)
Procurements Under Grants Synopsis

Date: July 3, 2012

Subject: *FEMA Public Assistance Grant Funds Awarded to County, EI Dorado, California*

Terms: local government, full and open competition, cost and price analysis, maintain documents

Background: The County (subgrantee) received a Public Assistance subgrant award for debris removal, emergency protective measures, and permanent repairs to facilities damaged as a result of flooding that occurred from December 17, 2005, through January 3, 2006.

Procurement Related Findings:

- 1) Subgrantee awarded the contracts without full and open competition and without adequate justification. Subgrantee awarded a construction contract without competition to the same contractor hired to perform debris removal in the general vicinity. Subgrantee stated it would have taken too long to compete the contract for the road repairs. OIG found that the subgrantee expeditiously competed other contracts, and that several contractors also visited the construction site before the subgrantee decided to forego competition. The OIG also found that subgrantee did not take immediate steps to award these contracts and instead waited two months after deciding to not compete the contracts. [DS-12-11 at 3](#), [44 C.F.R. §§ 13.36 \(c\)\(1\)](#).
- 2) Subgrantee did not perform a cost or price analysis on each procurement action.⁵³⁸ Subgrantee stated it determined the project costs were fair and reasonable by using both FEMA-provided cost estimates and historical costs that subgrantee incurred for similar projects. Subgrantee later shared copies of three worksheets that it claimed were recently located and used to perform a cost or price analysis. Because the three worksheets were not included in subgrantee's contract files and were undated, OIG could not determine their reliability or whether they were used for a cost or price analysis prior to awarding the contract, as the County asserts. [DS-12-11 at 5](#), [44 C.F.R. § 13.36\(f\)\(1\)](#).
- 3) Subgrantee did not maintain records, including documentation as to why the procurement was not competed. The grantee did not monitor the County's procurement activities to ensure adequate documentation was maintained to support procurement actions. [DS-12-11 at 5](#), [44 C.F.R. § 13.36 \(b\)\(9\)](#).

⁵³⁸**OIG Interpretive Guidance:** A cost analysis is necessary when adequate price competition is lacking, and for sole-source procurements, including contract modifications or change orders, unless price reasonableness can be established on other bases mentioned in 44 C.F.R. § 13.36(f)(1). A price analysis will be used in all other instances to determine the reasonableness of the proposed contract price.

DHS OIG Audit Report: [DD-12-15](#)
Procurements Under Grants Synopsis

Date: June 20, 2012

Subject: *FEMA Public Assistance Grant Funds Awarded to Ochsner Clinic Foundation, New Orleans, Louisiana*

Terms: private nonprofit, exigent circumstances, full and open competition, required provisions, cost and price analysis, socioeconomic contracting, small purchase threshold, maintain documents

Background: Ochsner (subgrantee) received a Public Assistance subgrant award for damages resulting from Hurricane Katrina, which occurred on August 29, 2005.

Procurement Related Findings:

- 1) Subgrantee did not conduct procurements in a manner to provide, to the maximum extent practical, open and free competition.⁵³⁹
- 2) Subgrantee did not comply with Federal contracting requirements after the exigent period.⁵⁴⁰ [DD-12-15 at 6, 2 C.F.R. § 215.43.](#)
- 3) Subgrantee did not perform a cost or price analysis on the majority of contracts. [DD-12-15 at 5, 2 C.F.R. § 215.45.](#)
- 4) Subgrantee did not include required provisions in all contracts and subcontracts. [DD-12-15 at 5, 2 C.F.R. § 215.48.](#)
- 4) Subgrantee did not take steps to assure use of small, minority, women-owned and labor surplus area firms. [DD-12-15 at 5, 2 C.F.R. § 215.44.](#)
- 5) Procurement documents are to be made available for awards exceeding the small purchase

⁵³⁹ **OIG Interpretive Guidance:** “FEMA’s general practice has been to allow contract costs it considers reasonable regardless of compliance with Federal procurement regulations. We do not agree with this practice because the goal of proper contracting involves more than just cost. Without open and free competition, FEMA has little assurance that contract costs are reasonable. Open and free competition not only provides an environment for obtaining reasonable pricing from the most qualified contractors, it also discourages favoritism, collusion, fraud, waste, and abuse.”

⁵⁴⁰ **OIG Interpretive Guidance:** “The exigent period is the time when immediate actions are required to protect life and property. We generally do not question costs based on noncompliance with contracting regulations when lives and property are at risk. However, once the danger passes, applicants should fully comply with Federal contracting regulations.”

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threshold.⁵⁴¹ [DD-12-15 at 5, 2 C.F.R. § 215.44.](#)

⁵⁴¹ **OIG Interpretive Guidance:** Ochsner’s claim included \$2,426,451 of unsupported contract costs. The invoices for these costs did not include supporting documentation, such as timesheets and work logs for labor, contract agreements or rate schedules, and evidence of vendor payments. Cost principles at 2 C.F.R. 230, Appendix A, § A.2.g, state that a cost must be adequately documented to be allowable under Federal awards. Therefore, OIG questioned costs totaling \$2,426,451 as unsupported.

DHS OIG Audit Report: [DA-12-18](#)
Procurements Under Grants Synopsis

Date: May 11, 2012

Subject: FEMA Public Assistance Grant Funds Awarded to Henderson Point Water and Sewer District, Pass Christian Mississippi

Terms: private nonprofit, full and open competition, cost and price analysis, socioeconomic contracting, unsupported costs

Background: The District (subgrantee) received a Public Assistance subgrant award for damage resulting from Hurricane Katrina, which occurred in August 2005.

Procurement Related Findings:

- 1) Subgrantee awarded contracts without full and open competition. [DA-12-18 at 3, 2 C.F.R. § 215.43](#). The District used a contractor with which it had an existing business relationship to complete the work authorized under the FEMA projects. Subgrantee said that it made that decision because it was operating under a state of emergency at the time the replacement and repair work began on the sewer system. However, both projects were for permanent repair work and should have been openly competed.
- 2) Subgrantee accepted the contractor's proposed prices without performing an independent analysis of the prices to ensure reasonableness. [DA-12-18 at 3, 2 C.F.R. § 215.45](#).
- 3) Subgrantee did not take positive steps to identify and use small businesses, minority-owned firms, women's business enterprises, and labor surplus area firms. [DA-12-18 at 3, 2 C.F.R. § 215.44\(b\)](#).
- 4) Subgrantee did not have adequate source documentation to support \$443,440 of contract charges.⁵⁴² [DA-12-18 at 4, 2 C.F.R. § 230, Appendix A, § \(A\)\(2\)\(g\)](#).

⁵⁴² **OIG Interpretive Guidance:** Source documentation, such as material invoices and subcontractor invoices, did not support costs billed to the District by the prime contractor. This occurred because the invoices were based upon estimated costs instead of actual costs incurred. 2 C.F.R. § 230, Appendix A, § (A)(2)(g) states that, to be allowable under an award, costs must be adequately documented.

**DHS OIG Audit Report: [DA-12-15](#)
Procurements Under Grants Synopsis**

Date: April 1, 2012

Subject: *FEMA Public Assistance Grant Funds Awarded to City of Coral Springs, Florida - Hurricane Wilma*

Terms: local government, maintain documents, reasonable costs, T&M contract, FEMA Publication 325, *Debris Management Guide*, April 1999

Background: The City (subgrantee) received a Public Assistance subgrant award for damage resulting from Hurricane Wilma, which occurred in October 2005.

Procurement Related Findings:

- 1) Subgrantee did not have adequate documentation to support project activity costs. [DA-12-15 at 4](#), [Cost principles at 2 C.F.R. § 225, Cost Principles for State, Local, and Indian Tribal Governments, Appendix A, § C.1.j](#).
- 2) Subgrantee used a T&M contract for debris removal, including claimed costs for work performed outside FEMA's 70 hour permissible time limit.⁵⁴³ [DA-12-15 at 4](#), [44 C.F.R. § 13.36\(b\)\(10\)](#), [FEMA Publication 325, Debris Management Guide, April 1999](#). Subgrantee claimed that it used a T&M contract because it was inefficient for the contractor to pick up the bags with machinery. OIG disagreed as the contractor often used mechanically loaded trailers and self-loaders to pick up the bags.
- 3) Subgrantee submitted claims for unreasonable costs.⁵⁴⁴ [DA-12-15 at 4](#).
- 4) Subgrantee claimed T&M charges for a debris removal contract after the permissible 70 hour time limit for emergency debris clearance set by FEMA guidelines. [DA-12-15 at 5](#), [FEMA Publication 325, Debris Management Guide, April 1999](#).

⁵⁴³ **OIG Interpretive Guidance:** Federal regulations and FEMA guidelines place restrictions on the use of time-and-materials contracting because it does not encourage effective cost controls.

⁵⁴⁴ **OIG Interpretive Guidance:** Contract terms stipulated that certain types of debris would be charged at a rate of \$3 to \$8 per cubic yard. The subgrantee submitted claims for costs in excess of what should have been incurred applying the highest cubic yard rate. The excess costs are unreasonable.

**DHS OIG Audit Report: [DA-12-13](#)
Procurements Under Grants Synopsis**

Date: March 20, 2012

Subject: *FEMA Public Assistance Grant Funds Awarded to Harrison County Library System, Gulfport, Mississippi*

Terms: local government, socioeconomic contracting

Background: The Library (subgrantee) received a Public Assistance subgrant award for damage resulting from Hurricane Katrina in August 2005.

Procurement Related Findings:

Subgrantee did not take the necessary affirmative steps to assure that minority firms, women's business enterprises, and labor surplus area firms were considered contracts. [DA-12-13 at 5, 44 C.F.R. § 13.36\(e\)\(1\)](#). Subgrantee officials said that they were unaware of the requirement to take affirmative steps to assure that minority firms, women's business enterprises, and labor surplus area firms are used when using Federal funds to procure goods and services. However, subgrantee officials were notified of post-award procurement requirements. Subgrantee officials executed a signed agreement with the State prior to the grant award, which included a stipulation that the subgrantee must comply with all applicable provisions of Federal and State laws and regulations relating to procurement of goods and services.

DHS OIG Audit Report: [DD-12-06](#)
Procurements Under Grants Synopsis

Date: February 22, 2012

Subject: *FEMA Public Assistance Grant Funds Awarded to St. Charles Parish, Louisiana*

Terms: local government, required provisions, cost and price analysis, socioeconomic contracting

Background: The Parish (subgrantee) received a Public Assistance subgrant award for damage resulting from Hurricane Katrina, which occurred on August 29, 2005.

Procurement Related Findings:

- 1) Subgrantee did not include in its contracts the provisions required by [44 C.F.R. § 13.36\(i\)](#). These provisions document the rights and responsibilities of the parties and minimize the risk of misinterpretations and disputes. [DD-12-06 at 5](#).
- 2) Subgrantee did not perform a cost or price analysis on the majority of contracts. [DD-12-06 at 6](#), [44 C.F.R. § 13.36\(f\)\(1\)](#).
- 3) Subgrantee did not take sufficient steps to assure the use of small businesses, minority owned firms, women's business enterprises, and labor surplus area firms.⁵⁴⁵ [DD-12-06 at 6](#), [44 C.F.R. § 13.36\(e\)](#).

⁵⁴⁵ **OIG Interpretive Guidance:** Although the subgrantee did not take the specific affirmative steps listed in the regulations, it did award five of its contracts to small or disadvantaged businesses (5 contracts totaling \$1.3 million out of 11 contracts totaling \$6.7 million reviewed). Therefore, OIG did not question any costs related to contracting because the subgrantee otherwise properly procured its disaster related contracts and because the subgrantee did award a portion of its contracts to small or disadvantaged businesses. However, for future federally funded disaster contracts, the subgrantee should take steps to ensure that it complies with all Federal procurement standards.

**DHS OIG Audit Report: [DS-12-03](#)
Procurements Under Grants Synopsis**

Date: February 9, 2012

Subject: *FEMA Public Assistance Grant Funds Awarded to Paso Robles Joint Unified School District, California*

Terms: local government, full and open competition, cost and price analysis, maintain documents, socioeconomic contracting, *Public Assistance Guide* (1999)

Background: The Town (subgrantee) received a Public Assistance subgrant award for debris removal, emergency protective measures, and permanent repairs to facilities damaged as a result of flooding that occurred from December 17, 2005, through January 3, 2006.

Procurement Related Findings:

- 1) Subgrantee awarded the contracts without full and open competition, and without justification, in nonexigent circumstances.⁵⁴⁶ [DS-12-03 at 5](#), [44 C.F.R. §§ 13.36 \(c\)\(1\)](#) and [\(d\)\(4\)\(i\)\(B\)](#). Subgrantee agreed it did not compete the contracts associated with this project, although one contractor was “prequalified” by the subgrantee—5 years prior to the disaster—to perform work for the subgrantee. This does not, and cannot, excuse the subgrantee from the requirement to comply with Federal procurement rules and regulations applicable to federally awarded funds.
- 2) Subgrantee did not perform a cost or price analysis on each procurement action, [DS-12-03 at 6](#), [44 C.F.R. § 13.36\(f\)\(1\)](#).
- 3) Subgrantee did not take all necessary affirmative steps to assure that small businesses, minority firms, women’s business enterprises, and labor surplus area firms were used when possible. [DS-12-03 at 6](#), [44 C.F.R. § 13.36\(e\)](#).
- 4) Subgrantee did not maintain records, including documentation as to why the procurement was not competed. [DS-12-03 at 6](#), [44 C.F.R. § 13.36 \(b\)\(9\)](#).
- 5) Subgrantee did not include required provisions within its contracts. [DS-12-03 at 6](#), [44 C.F.R. § 13.36 \(i\)](#).

⁵⁴⁶ **OIG Interpretive Guidance:** The subgrantee awarded contracts for permanent work, in nonexigent circumstances and without justification, to a contractor that the subgrantee used before the disaster and to other contractors with which the subgrantee was familiar. Full and open competition increases the opportunity for obtaining reasonable pricing from the most qualified contractors and allows minority firms, women’s business enterprises, and labor surplus area firms to participate in federally funded work. In addition, full and open competition helps discourage and prevent favoritism, collusion, fraud, waste, and abuse.

DHS OIG Audit Report: [DS-12-01](#)
Procurements Under Grants Synopsis

Date: December 16, 2011

Subject: *FEMA Public Assistance Grant Funds Awarded to Town of Fairfax, California*

Terms: local government, full and open competition, cost and price analysis, maintain documents, socioeconomic contracting, *Public Assistance Guide* (1999)

Background: The Town (subgrantee) received a Public Assistance subgrant award for debris removal, emergency protective measures, and permanent repairs to facilities damaged as a result of flooding that occurred from December 17, 2005, through January 3, 2006.

Procurement Related Findings:

- 1) Subgrantee awarded the contracts without full and open competition, and without justification, in nonexigent circumstances.⁵⁴⁷ [DS-12-01 at 3](#), [44 C.F.R. §§ 13.36 \(c\)\(1\)](#) and [\(d\)\(4\)\(i\)\(B\)](#).
- 2) Subgrantee did not perform a cost or price analysis on each procurement action. [DS-12-01 at 3](#), [44 C.F.R. § 13.36\(f\)\(1\)](#).
- 3) Subgrantee did not take all necessary affirmative steps to assure that small businesses, minority firms, women’s business enterprises, and labor surplus area firms were used when possible. [DS-12-01 at 3](#), [44 C.F.R. § 13.36\(e\)](#).
- 4) Subgrantee did not maintain records, including documentation as to why the procurement was not competed. [DS-12-01 at 3](#), [44 C.F.R. § 13.36\(b\)\(9\)](#).

⁵⁴⁷ **OIG Interpretive Guidance:** The subgrantee awarded contracts for permanent work, in nonexigent circumstances and without justification, to the contractor that the subgrantee used before the disaster. Full and open competition increases the opportunity for obtaining reasonable pricing from the most qualified contractors and allows minority firms, women’s business enterprises, and labor surplus area firms to participate in federally funded work. In addition, full and open competition helps discourage and prevent favoritism, collusion, fraud, waste, and abuse.

DHS OIG Audit Report: [DA-12-02](#)
Procurements Under Grants Synopsis

Date: December 1, 2011

Subject: *FEMA Public Assistance Grant Funds Awarded to Long Beach School District, Long Beach, Mississippi*

Terms: local government, cost-plus-percentage-of-cost, maintain documents, full and open competition, cost and price analysis, monitor contracts

Background: The School District (subgrantee) received a Public Assistance subgrant award for damage resulting from Hurricane Katrina in 2005.

Procurement Related Findings:

- 1) Subgrantee awarded a cost-plus-percentage-of-cost contract. [DA-12-02 at 2, 44 C.F.R. § 13.36\(f\)\(4\)](#). Subgrantee stated the costs should be allowed because the contract was awarded prior to their State-applicant agreement and that other school districts were using similar types of contracts. Although the contract was entered into prior to the State-applicant agreement and the costs were accepted by the State and FEMA during the reimbursement process, cost-plus-percentage-of-cost contracts are prohibited under Federal regulations.
- 2) Subgrantee did not have adequate documentation to support \$575,369 of contract charges.⁵⁴⁸ [DA-12-02 at 3, 2 C.F.R. § 225, Cost Principles for State, Local, and Indian Tribal Governments, Appendix A, § C.1.j.](#)
- 3) Subgrantee awarded a noncompetitive contract without conducting a cost and price analysis.⁵⁴⁹ [DA-12-02 at 3, 44 C.F.R. § 13.36\(f\)\(1\).](#)

⁵⁴⁸**DHS OIG Interpretive Analysis:** The District and contractor provided a summary of costs to support the charges, but did not have detailed invoices. Without such invoices, we were unable to verify the accuracy and validity of the contractor's charges. Cost principles at [2 C.F.R. § 225, Cost Principles for State, Local, and Indian Tribal Governments, Appendix A, § C.1.j](#) state that a cost must be adequately documented to be allowable under Federal awards.

⁵⁴⁹**DHS OIG Interpretive Analysis:** The noncompetitive contract was justified because of the urgent need to reopen the schools following the disaster. However, the subgrantee failed to perform a price analysis to determine if the contractor's proposed price was fair and reasonable. Note that the exigent circumstance described here falls outside the scope of the "protection of life and property" standard often employed by DHS OIG in defining emergency/exigent circumstances.

**DHS OIG Audit Report: [DD-11-22](#)
Procurements Under Grants Synopsis**

Date: September 27, 2011

Subject: *FEMA Public Assistance Grant Awarded to Henderson County, Illinois*

Terms: local government, full and open competition, public exigency, T&M, cost or price analysis, price competition, project splitting, lump sum, unit price, or cost-plus-fixed-fee contract and scope of work.

Background: The County (subgrantee) received a Public Assistance subgrant award for damage caused by severe storms and flooding that began on June 1 and continued through July 22, 2008.

Procurement Related Findings:

- 1) Subgrantee awarded a noncompetitive, T&M contract. [DD-11-22 at 3](#); [44 C.F.R. § 13.36\(c\)\(1\)](#), [44 C.F.R. § 13.36\(b\)\(10\)\(ii\)](#).
- 2) Subgrantee awarded a T&M contract without a ceiling price or other required contract provisions. [DD-11-22 at 3](#), [44 C.F.R. § 13.36\(b\)\(10\)\(ii\)](#), [44 C.F.R. § 13.36\(i\)](#).
- 3) Subgrantee did not perform a cost or price analysis. [DD-11-22 at 3](#), [44 C.F.R. § 13.36\(f\)\(1\)](#).
- 4) Subgrantee did not negotiate profit as a separate cost element. [DD-11-22 at 3](#), [44 C.F.R. § 13.36\(f\)\(2\)](#).
- 5) Subgrantee did not maintain records of its procurement actions. [DD-11-22 at 3](#), [44 C.F.R. § 13.36\(b\)\(9\)](#).
- 6) Subgrantee did not obtain required performance and payment bonds.⁵⁵⁰ [DD-11-22 at 3-4](#), [44 C.F.R. § 13.36\(h\)](#).

⁵⁵⁰**OIG Interpretive Guidance:** “The Federal Acquisition Regulation prohibits breaking down a proposed large purchase into multiple small purchases merely to permit use of simplified acquisition procedures. Further, although 44 CFR 13.36 does not include a specific prohibition against such circumvention, we believe that any action specifically designed to circumvent a Federal regulation is not allowable [emphasis added].”

DHS OIG Audit Report: [DD-11-21](#)
Procurements Under Grants Synopsis

Date: September 26, 2011

Subject: *FEMA Public Assistance Grant Awarded to Jesuit High School, New Orleans, Louisiana*

Terms: private nonprofit, noncompetitive, cost-plus-percentage of costs, exigent circumstances, open and free competition, reasonable costs, cost or price analysis, ineligible costs

Background: Jesuit (subgrantee) received a Public Assistance subgrant award for damage resulting from Hurricane Katrina, which occurred August 29, 2005.

Procurement Related Findings:

1) Subgrantee awarded contracts without free and open competition as it did not advertise the solicitation and instead invited preselected contractors to bid.⁵⁵¹ Subgrantee stated that “word of mouth” was the best way to provide open and free competition considering the state of affairs after the disaster, however, a public notification system was available (newspapers) and thus the subgrantee should have publicly solicited. Subgrantee stated that they did not limit the number of potential contractors and accepted bids from any interested party; however, they could not have known the number of potential offerors without open and free competition.⁵⁵² [DD-11-21 at 3-4, 2 C.F.R. § 215.43](#).

2) Subgrantee awarded cost-plus-percentage-of-costs contracts. Subgrantee argued the contract was not a cost-plus-percentage-of-cost contract because it contained a not-to-exceed limit. OIG provided that such a clause limits the amount of total costs incurred, but it does not provide an incentive for the contractor to control costs before reaching the guaranteed maximum price. [DD-](#)

⁵⁵¹ OIG Interpretive Guidance: Generally, open and free competition means that all responsible sources are allowed to compete for contracts.

⁵⁵² OIG Interpretive Guidance: FEMA attempted to determine cost reasonableness by comparing to another school’s contract with the same contractor, however, the two contracts had different scopes of work and the other school also did not compete its contract. FEMA’s comparison with different work scopes, especially to a contract that was not competed, did not provide an appropriate basis for determining the reasonableness of cost. Even if FEMA’s cost analysis had accurately determined that the contract costs were reasonable, Federal procurement regulations require open and free competition to the extent practicable, not only to achieve a reasonable cost, but also to allow all qualified, responsible parties an equal chance to compete for the work. FEMA’s practice has been to allow contract costs it considers reasonable, regardless of whether the contract complies with Federal procurement regulations. OIG does not agree with this practice unless lives and property are at stake as the goals of proper contracting relate to more than just cost. Open and free competition usually increases the number of bids received and thereby increases the opportunity for obtaining reasonable pricing from the most qualified contractors. Open and free competition also helps to discourage and prevent favoritism, collusion, fraud, waste, and abuse.

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[11-21 at 4](#), [2 C.F.R. § 215.44\(c\)](#).

3) Subgrantee did not perform cost or price analyses. [DD-11-21 at 5](#), [2 C.F.R. § 215.45](#).

4) Subgrantee did not include the required provisions in its contracts.⁵⁵³ [DD-11-21 at 5](#), [2 C.F.R. § 215.48](#), [Appendix A pt. 215](#).

⁵⁵³[OIG Interpretive Guidance](#): Required provisions document the rights and responsibilities of the parties and minimize the risk of misinterpretations and disputes.

**DHS OIG Audit Report: [DA-11-24](#)
Procurements Under Grants Synopsis**

Date: September 15, 2011

Subject: *FEMA Public Assistance Grant Awarded to Wayne County, Mississippi, Board of Supervisors*

Terms: local government, reasonable cost, monitoring, duplication of benefits, procurement, cost or price

Background: The County (subgrantee) had received a Public Assistance subgrant award for damage resulting from Hurricane Katrina in August 2005.

Procurement Related Findings:

- 1) Subgrantee awarded two contracts for debris removal activities without performing a cost or price analysis. [DA-11-24 at 3](#); [44 C.F.R. § 13.36 \(f\)\(1\)](#). Subgrantee provided that they met the requirements for a price analysis because of the sealed bid process they used to award the contract. However, Federal regulations require an independent estimate of contract cost or price before the receipt of bids or proposals. OIG review of prices paid by neighboring counties for similar services under the disaster established that the contract costs were reasonable, therefore, the OIG did not question any contract costs because of noncompliance with Federal procurement regulations.⁵⁵⁴
- 2) Subgrantee's failure to have adequate debris monitoring procedures constituted a failure to have an adequate contract administration system. The performance of the debris monitoring contractor suffered from multiple failures: the contractor has no experience and was provide no training in debris monitoring, load tickets were deficient, and there was no means to verify truck capacities. [DA-11-24 at 6](#), [44 C.F.R. § 13.36\(b\)\(2\)](#).

⁵⁵⁴ The subgrantee disagreed with the finding, saying that the procurements conformed to State of Mississippi law. However, [44 C.F.R. § 13.36\(b\)](#) states that subgrantees will use their own procurement procedures, which reflect applicable state and local laws and regulations, provided that the procurements conform to applicable Federal law and standards.

DHS OIG Audit Report: [DS-11-12](#)
Procurements Under Grants Synopsis

Date: September 13, 2011

Subject: *FEMA Public Assistance Grant Awarded to City of Paso Robles, California*

Terms: local government, full and open competition, reasonable prices, favoritism, collusion, fraud, waste and abuse, minority firms, women’s business enterprises, labor surplus

Background: The City (subgrantee) received a Public Assistance subgrant award for debris removal, emergency protective measures, and permanent repairs to facilities damaged as a result of the San Simeon earthquake of December 22, 2003.

Procurement Related Findings:

- 1) Subgrantee did not solicit competitive bids in awarding contracts, and was unable to reasonably justify why full and open competition did not occur as no records were maintained documenting such justification.⁵⁵⁵ [DS-11-12 at 3](#), [44 C.F.R. § 13.36\(c\)](#), [44 C.F.R. § 13.36\(b\)\(9\)](#).
- 2) Subgrantee did not take necessary affirmative steps to assure that minority firms, women’s business enterprises, and labor surplus area firms were used. [DS-11-12 at 3](#), [44 C.F.R. § 13.36\(e\)](#).
- 3) Subgrantee did not prepare a cost or price analysis for each procurement action. [DS-11-12 at 3](#), [44 C.F.R. § 13.36\(f\)\(1\)](#).
- 4) Subgrantee did not include the required provisions within their contracts. [DS-11-12 at 3](#), [44 C.F.R. § 13.36\(i\)](#).
- 5) Subgrantee charged excessive costs for construction management, A/E, and design services. The City charged as much as 63% for A/E services. [DS-11-12 at 4](#), [2 C.F.R. § 225, Cost Principles for State, Local, and Indian Tribal Governments, Appendix A, § C.2.](#)
- 6) The OIG determined that the subgrantee included costs that were beyond FEMA’s approved scope of work and should be disallowed. [DS-11-12 at 5](#), [44 C.F.R. § 206.223\(a\)\(1\)](#).
- 7) Subgrantee charged unsupported costs that the OIG recommended to be disallowed. [DS-11-12 at 5](#), The OIG found the subgrantee did not have fiscal controls and accounting procedures

⁵⁵⁵ **OIG Interpretive Guidance:** Full and open competition increases the opportunity for obtaining reasonable pricing from the most qualified contractors and allows the opportunity for minority firms, women’s business enterprises, and labor surplus area firms to participate in federally funded work. In addition, full and open competition helps discourage and prevent favoritism, collusion, fraud, waste, and abuse.

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that permit the tracing of funds to a level of expenditure adequate to establish that such funds are not used in violation of applicable statutes. [DS-11-12 at 5](#), [44 C.F.R. § 13.20\(a\)\(2\)](#).

DHS OIG Audit Report: [DD-11-20](#)
Procurements Under Grants Synopsis

Date: September 2, 2011

Subject: *FEMA Public Assistance Grant Awarded to Calcasieu Parish School Board, Lake Charles (CPSB), Louisiana*

Terms: local government, noncompetitive, cost-plus-percentage of costs, exigent circumstances, full and open, reasonable costs, fraud, waste and abuse, cost or price analysis, unreasonably high prices, ineligible costs.

Background: CPSB (subgrantee) received a Public Assistance subgrant award for damages resulting from Hurricane Rita, which occurred on September 24, 2005.

Procurement Related Findings:

- 1) Subgrantee awarded four noncompetitive cost plus percentage of costs contracts. Subgrantee contended the improper contract type is mitigated by cost reasonableness.⁵⁵⁶ [DD-11-20 at 4, 44 C.F.R. § 13.36\(c\), 44 C.F.R. § 13.36\(f\)\(4\).](#)
- 2) Subgrantee did not include required Federal contract provisions in any of its contracts. [DD-11-20 at 4, 44 C.F.R. § 13.36\(i\).](#)
- 3) Subgrantee awarded six small purchases without obtaining quotes from qualified sources. Small purchase procedures require that price or rate quotations be obtained from an adequate number of qualified sources (generally three or more). As the contracts were awarded under exigent circumstances, the OIG did not question the costs. [DD-11-20 at 4, 44 C.F.R. § 13.36\(d\)\(1\), 44 C.F.R. § 13.36\(d\)\(4\)\(i\)\(B\).](#)
- 4) Subgrantee did not perform a cost or price analysis for most contracts.⁵⁵⁷ [DD-11-20 at 4, 44 C.F.R. § 13.36\(f\)\(1\).](#)
- 5) Subgrantee did not include required Federal contract provisions in any of its contracts.⁵⁵⁸

⁵⁵⁶ **OIG Interpretive Guidance:** “FEMA’s general practice is to allow contract costs it considers reasonable regardless of compliance with Federal procurement regulations. We do not agree with this practice because the goals of proper contracting involve more than just cost. Without full and open competition, FEMA has little assurance that contract costs are reasonable. Full and open competition provides an environment for obtaining reasonable pricing from the most qualified contractors and helps discourage favoritism, collusion, fraud, waste, and abuse.”

⁵⁵⁷ **OIG Interpretive Guidance:** “Not performing a cost or price analysis increases the likelihood of unreasonably high or low prices, contractor misinterpretations, and errors in pricing relative to the scope of work.”

⁵⁵⁸ **OIG Interpretive Guidance:** “These provisions document the rights and responsibilities of the parties and minimize the risk of misinterpretations and disputes.”

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[DD-11-20 at 4, 44 C.F.R. § 13.36\(i\)](#).

6) Subgrantee did not negotiate profit as a separate element of cost for any of the contracts awarded. [DD-11-20 at 4, 44 C.F.R. § 13.36\(f\)\(2\)](#).

DHS OIG Audit Report: [DA-11-23](#)
Procurements Under Grants Synopsis

Date: August 26, 2011

Subject: *FEMA Public Assistance Grant Funds Awarded to Gulf Coast Community Action Agency, Gulfport, Mississippi*

Terms: private nonprofit, compete, reasonable cost, open and free competition, qualified, responsible parties

Background: The Gulf Coast Community Action Agency (subgrantee) received a Public Assistance subgrant award for damages as a result of Hurricane Katrina.

Procurement Related Findings:

1) Despite OIG's finding the costs to be reasonable, the OIG concluded there was no free and open competition. The subgrantee sole sourced the contract on the basis that the firm selected was the only source capable of performing the work but had no documentation supporting this determination. [DA-11-23 at 3](#); [2 C.F.R. § 215.43](#). Cost were found to be reasonable based on *P.A. Guide*, Oct 1999, p.78; [DA-11-23 at 3](#). OIG recommend complying with Federal regulations when acquiring goods and services.

2) Subgrantee did not separately account for expenditures and receipts for each building or Project Worksheet. Instead, the subgrantee created one general ledger account to record all disaster-related expenditures and receipts. [DA-11-23 at 2](#); [2 C.F.R. § 215.21\(b\)\(2\)](#); [44 C.F.R. § 206.205\(b\)\(1\)](#)

**DHS OIG Audit Report: [DD-11-15](#)
Procurements Under Grants Synopsis**

Date: August 5, 2011

Subject: *FEMA Public Assistance Grant Awarded to Saint Mary’s Academy (SMA), New Orleans, Louisiana*

Terms: private nonprofit, open and free competition, statement of work, brand name or equal, solicitation, cost-plus-percentage of cost, non-competitive awards, reasonable costs, fraud and waste, prohibited costs

Background: SMA (subgrantee) received a Public Assistance subgrant award for damages resulting from Hurricane Katrina, which occurred on August 29, 2005.

Procurement Related Findings:

- 1) Subgrantee did not meet free and open competition due to failure to publicly advertise solicitations.⁵⁵⁹ [DD-11-15 at 3](#), [2 C.F.R. § 215.43](#).
- 2) Subgrantee gave unfair competitive advantage to a subcontractor by allowing it to prepare drawings and specifications for the scope of work. [DD-11-15 at 3](#), [2 C.F.R. § 215.43](#).
- 3) Subgrantee also gave subcontract “Southwest” an unfair advantage by soliciting “Southwest or equal” in its request for bid documents but did not describe the specific technical requirements that would equal Southwest’s product. [DD-11-15 at 3-4](#), [2 C.F.R. § 215.44\(a\)\(3\)\(iii\)-\(iv\)](#).
- 4) Subgrantee awarded a prohibited cost-plus-percentage-of-cost basis contract. Subgrantee stated that FEMA and grantee approved the contract terms; however, no documentation was provided to support this statement. [DD-11-15 at 4](#), [2 C.F.R. § 215.44\(c\)](#).
- 5) None of the subgrantee’s contracts and subcontracts contained all the contract provisions and required clauses.⁵⁶⁰ [DD-11-15 at 4](#), [2 C.F.R. § 215.48](#), [Appendix A pt. 215](#).

⁵⁵⁹ **OIG Interpretive Guidance:** Federal regulations require that all procurement transactions be conducted in a manner to provide, to the maximum extent practical, open and free competition, which means that all responsible sources are allowed to compete for contracts.

⁵⁶⁰ **OIG Interpretive Guidance:** FEMA’s practice has been to allow contract costs it considers reasonable, regardless of whether the contract complies with Federal procurement regulations. The OIG does not agree with this practice unless lives and property are at stake, because the goals of proper contracting relate to more than just cost. Without open and free competition, FEMA has little assurance that costs are reasonable. Open and free competition usually increases the number of bids and thereby increases the opportunity for reasonable pricing from the most qualified contractors. Open and free competition also discourages and prevents favoritism, collusion, fraud, waste, and abuse.

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6) Subgrantee accepted vendor costs and rates higher than stipulated in a contract.⁵⁶¹ [DD-11-15 at 5](#).

⁵⁶¹ OIG Interpretive Guidance: Accepting contract prices at rates higher than stipulated in a contract is a waste of Federal funds, encourages abuse of the contract process, and invites acts of fraud.

APPENDIX B

**SYPNOSES OF PUBLIC ASSISTANCE SECOND APPEALS INVOLVING
PROCUREMENT UNDER PUBLIC ASSISTANCE GRANTS**

-B-1-

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LIST OF SECOND APPEALS

MAJOR DISASTER	SECOND APPEAL TITLE	DATE	PAGE
FEMA-1607-DR-LA	Town of Vinton, Procurement, FEMA-1607-DR-LA; PA ID# 019-78820-00; PW ID# 564	Aug. 20, 2014	B-4
FEMA-4029-DR-TX	Bluebonnet Electric Cooperative, Restoration of Power, FEMA-4029-DR-TX; PA ID# 000-UJ7K3-00; PW ID# 500, 602, 603, 748, and 789	May 20, 2014	B-5
FEMA-1603-DR-LA	Orleans Parish Sheriff's Office, PA ID 071-UPP9W-00, OIG Audit Report DD-10-08, FEMA-1603-DR-LA, Project Worksheets (PWs) 1320 and 15882	Feb. 26, 2014	B-6
FEMA-4019-DR-NC	County of Hyde, Debris Removal Costs, FEMA-4019-DR-NC, Project Worksheet (PW) 1296	Jan. 7, 2014	B-7
FEMA-1763-DR-IA	City of Cedar Rapids, Regulated Asbestos Containing Material (RACM) Demolition and Debris Removal, FEMA-1763-DR-IA, Project Worksheets (PWs) 10433, 10523, 10524, 10525, and 10445	Dec. 19, 2013	B-8
FEMA-1577-DR-CA	Santa Barbara County, Road Work, FEMA-1577-DR-CA, Multiple Project Worksheets	Nov. 4, 2013	B-10
FEMA-1771-DR-IL	Henderson County, FEMA-1771-DR-IL, Procurement Standards	Sep. 20, 2013	B-12
FEMA-1633-DR-IL	City of Springfield, Office of Inspector General, Audit Report DD-10-04, FEMA-1633-DR-IL	Dec. 28, 2012	B-13
FEMA-1915-DR-SD	Brule County, Embankment Erosion, FEMA-1915-DR-SD, Project Worksheet (PW) 847	July 25, 2012	B-14
FEMA-1646-DR-CA	Spanish Flat Water District, Sewer Treatment Plant Effluent Pond, FEMA-1646-DR-CA, Project Worksheet (PW) 173	May 22, 2012	B-15
FEMA-1379-DR-TX	City of Houston, Audit Report Number DD-07-04, Project Worksheets (PWs) 19, 55, 759, 761 and 960	Mar. 29, 2010	B-16

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MAJOR DISASTER	SECOND APPEAL TITLE	DATE	PAGE
FEMA-1607-DR-LA	City of Lake Charles (Applicant), Debris Removal from Catch Basins, FEMA-1607-DR-LA, Project Worksheet (PW) 2635	July 1, 2009	B-17
FEMA-1603-DR-LA	St. Bernard Parish, Debris Removal, FEMA-1603-DR-LA, PWs 2050, 3078, 3112, and 3657	Oct. 21, 2008	B-18
FEMA-1603-DR-LA	City of New Orleans, FEMA-1603-DR-LA	Feb. 5, 2008	B-19
FEMA 1366-DR-KS	City of Hoisington, Audit Resolution, FEMA 1366-DR-KS	May 29, 2007	B-20
FEMA-1425-DR-TX	Guadalupe Blanco River Authority, FEMA-1425-DR-TX, PW 850, Contract Services and Force Account Labor costs	Mar. 27, 2007	B-21
FEMA-1491-DR-VA	City of Norfolk, Debris Removal, FEMA-1491-DR-VA	Aug. 2, 2006	B-22

**Public Assistance Second Appeals: [FEMA 1607-DR-LA](#)
Procurements Under Grants Synopsis**

Date: August 20, 2014

Re: FEMA 1607-DR-LA; PA ID# 019-78820-00; Town of Vinton; PW ID# 564; Procurement

Terms: local government, procurement by noncompetitive proposals, emergency

Background:

High winds due to Hurricane Rita resulted in downed tree limbs which severely interrupted electrical service throughout the Town of Vinton's service area. The Town of Vinton (Applicant) contracted to removal tree limbs from electric utility power lines. The Applicant did not have a written contract with the contractor that included language accepting higher rates for disaster conditions. In its second appeal, the Applicant cited 44 C.F.R. § 13.36(d)(4), Procurement by noncompetitive proposals, as supporting its claim regarding the reasonableness of the contractor's hourly rate.

Procurement Related Finding(s):

Noncompetitive procurement methods may be used in limited circumstances, such as in an emergency that will not permit a delay for competition. [44 C.F.R. § 13.36\(d\)\(4\)](#).

- The immediate necessity to restore the Applicant's electrical system constitutes an emergency.

**Public Assistance Second Appeals: [FEMA 4029-DR-TX](#)
Procurements Under Grants Synopsis**

Date: May 20, 2014

Re: FEMA 4029-DR-TX; PA ID# 000-UJ7K3-00; Bluebonnet Electric Cooperative
PW ID# 500, 602, 603, 748, and 789; Restoration of Power

Terms: local government, full and open competition, actual cost

Background:

The significant portion of the Bluebonnet Electric Cooperative's electrical distribution system was burned, damaged, or destroyed by wildfires during the August 2011 to December 2011. Contrary to procurement requirements, Bluebonnet Electric Cooperative (Applicant) utilized an existing time and equipment contract without cost ceilings.

Procurement Related Finding(s):

Time and material type contracts may be used only after a determination that no other contract is suitable and the contract includes a ceiling price that the contractor exceeds at its own risk.

[44 C.F.R. §13.36\(b\)\(10\)](#).

- The Applicant violated federal procurement regulations by using its existing time and equipment contracts that contained no cost ceilings or not-to-exceed clauses for the restoration work.

**Public Assistance Second Appeals: [1603-DR-LA](#)
Procurements Under Grants Synopsis**

Date: February 26, 2014

Re: Orleans Parish Sheriff's Office, PA ID 071-UPP9W-00, OIG Audit Report DD-10-08, FEMA-1603-DR-LA, Project Worksheets (PWs) 1320 and 15882

Terms: local government reasonable cost, price analysis, full and open competition

Background:

High winds and flooding associated with Hurricane Katrina damaged all 10 correctional facilities owned and operated by the Orleans Parish Sheriff's Office ("Applicant"), and as a result, the kitchen facilities where meals were prepared and provided to employees and inmates, were rendered inoperable. While the Applicant constructed an emergency and temporary kitchen, meals for employees and inmates were obtained from a caterer from September 2005 until August 2006 when the temporary kitchen became functional.

Procurement Related Findings:

The Applicant paid an excessive amount for employees' meals because the Applicant did not solicit proposals through full and open competition or conduct a price analysis. [1603-DR-LA](#), [44 C.F.R. § 13.36 \(d\)\(2\) and \(3\)](#), [44 C.F.R. § 13.36\(f\)\(1\) and \(2\)](#).

- 1) Initially, employees' and inmates' meal costs were priced at \$46.00 per individual per day. In November 2005, the Applicant renegotiated, but did not re-bid, the employees' meals to a cost of \$40.00 per day. At approximately the same time, inmate meals were re-bid to a cost of \$27.50 per day. The lack of competitive contracting resulted in unreasonable costs.
- 2) To determine a reasonable cost for the employee meals, FEMA reviewed the scope and unit costs of similar meal rates using the Market Analysis. Based on the daily meal rates for entities with similar contract requirements, a rate of \$29.75 per employee per day was deemed a reasonable cost in lieu of competitive procurement of the services. There was no justification for higher employee meal costs after the disaster since employee meal costs (\$2.69 per person, per day) and inmate meal costs (\$3.82 per person, per day) were similar before the disaster. OIG therefore recommended disallowing the difference between employee and inmate meal rates after November 2, 2005.

**Public Assistance Second Appeals: [4019-DR-NC](#)
Procurements Under Grants Synopsis**

Date: January 7, 2014

Re: FEMA-4019-DR-NC, County of Hyde, Debris Removal Costs, Project Worksheet (PW) 1296

Terms: local government, debris removal, reasonable cost

Background:

In August 2011, strong winds from Hurricane Irene downed tree limbs and generated vegetative debris throughout Hyde County, North Carolina. FEMA prepared Project Worksheet (PW) 1296 for \$1,833,070 to fund Hyde County’s (“Applicant”) debris removal activities countywide. The Applicant employed a contractor through a “pre-event contract” it entered into in 2010 for debris removal services, but the contractor the Applicant selected was the highest bidder. During the review of the PW, FEMA reduced the eligible amount by \$407,442, based on the contract rates proposed by the lowest bidder that had responded to the Applicant’s request for proposals (“RFP”) for the pre-event contract. The de-obligation was upheld.

Procurement Related Findings:

- 1) The Applicant must provide documentation that it evaluated all four proposals based on the areas of consideration listed in its RFP during the “pre-event contract” selection process when the lowest bidder is not chosen; statements in support of its decision to award the contract to the highest bidder alone is not sufficient.⁵⁶² [4019-DR-NC](#) , [44 C.F.R. § 13.36\(b\)\(8\)](#).
- 2) Pre-event contracts, under which the applicant may choose to solicit bids and award contracts before a disaster strikes, are listed as an allowable method for expediting the procurement process. [FEMA Debris Management Guide \(FEMA 325, July 2007\)](#), [FEMA RP9580.201, Fact Sheet: Debris Removal –Applicant’s Contracting Checklist](#),⁵⁶³ [44 C.F.R. § 13.36\(d\)\(4\)\(i\)\(B\)](#).

⁵⁶² The decision cites to 44 C.F.R. § 13.36(b)(8) which specifies that grantees and subgrantees “will make awards only to responsible contractors possessing the ability to perform successfully under the terms and conditions of the proposed procurement.” It is not clear why this provision is cited in this context. The failure to document the basis for a source selection decision *could* have been cited as failure to comply with 44 C.F.R. § 13.36(b)(9) (failure to document significant part of procurement history), 44 C.F.R. § 13.36(c)(1)(vii) (arbitrary action in the competitive process), 44 C.F.R. § 13.36(d)(3)(iv) (failure to make award to the firm whose proposal is most advantageous to the program, with price and other factors considered).

⁵⁶³ The decision cites to FEMA RP95880.201—however, the Fact Sheet only describes pre-qualify debris removal contractors. The Debris Management Guide at Ch. 10, does provide that pre-event contracts are acceptable.

**Public Assistance Second Appeals: [1763-DR-IA](#)
Procurements Under Grants Synopsis**

Date: December 19, 2013

Re: FEMA-1763-DR-IA, City of Cedar Rapids, Regulated Asbestos Containing Material (RACM) Demolition and Debris Removal, Project Worksheets (PWs) 10433, 10523, 10524, 10525, and 10445

Terms: local government, sealed bids, geographic preference, bonding

Background:

In June 2008, severe storms and flooding caused extensive damage to the Sinclair Warehouse Complex which was purchased by City of Cedar Rapids (“Applicant”) in 2007. Local building officials determined that the damaged facilities at the Sinclair Warehouse were unsafe and issued a notice and order to demolish the structures. The Applicant prepared a Request for Bids (“RFB”) on December 31, 2009 for demolition and disposal of the RACM debris from Sinclair. In the RFB, the Applicant specified that the debris was to be disposed of at the Cedar Rapids/Linn County Solid Waste Agency Landfill Site Number 1 (Site No. 1), located 1.5 miles from Sinclair.

The original RFB did not contain an estimate of the quantity of debris. In addendums to the RFB, the Applicant estimated the debris at 100,000 tons, and later at 65,000 tons. The Applicant also amended the RFB to reduce the requirement on performance and payment bonds from 100 percent to 75 percent of the contract price. On January 15, 2010, the Applicant received 11 sealed bids. Unit prices ranged from \$65 per ton to \$173 per ton for removal and disposal of debris. The Applicant considered the lowest bid non-responsive to its RFB because the contractor proposed taking the debris to an alternate landfill approximately 90 miles from Sinclair to Milan, Illinois. The Applicant rejected all bids and rebid the project on March 5, 2010, maintaining the requirement for disposal at Site No. 1.

Procurement Related Findings:

1) The Applicant’s requirement for contractors to use Site No. 1 in its RFB is not a prohibited geographic preference. Applicants are generally prohibited from using geographic preferences for contractors, and it generally applies to location-based preference given to contractors in the bidding process, and not to a specification within the contract such as the landfill. [1763-DR-IA, 44 C.F.R. § 13.36\(c\)\(2\)](#).

2) The Applicant’s re-bid of the project at almost half the estimated debris quantity to allow contractors to avoid acquiring performance and payment bonds for the higher contract cost of the

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higher quantity of debris constitutes an inaccurate representation of the scope of work.⁵⁶⁴ [1763-DR-IA](#), [44 C.F.R. § 13.36\(d\)\(2\)\(i\)\(A\)](#), [44 C.F.R. § 13.36\(d\)\(2\)\(ii\)\(B\)](#).

⁵⁶⁴ The decision provides that FEMA initially found that Applicant also violate the regulatory requirement for bonding at 44 C.F.R. §13.36(h)(2) but does not discuss in the analysis of the appeal, however, having intentionally circumvented the requirement it would appear that this regulation was violated .

Public Assistance Second Appeals: [1577-DR-CA](#)
Procurements Under Grants Synopsis

Date: November 4, 2013

Re: FEMA-1577-DR-CA, Santa Barbara County, Road Work, Multiple Project Worksheets;
OIG Audit Report DS-11-04

Terms: T&M contract, scope of work

Background:

Severe storms that occurred from December 27, 2004, through January 11, 2005, caused damage to the Santa Barbara County (“Applicant”) public infrastructure. FEMA approved 150 PWs, totaling \$14.6 million, to fund debris removal, emergency protective measures, and the permanent repair of facilities. The Office of Inspector General (“OIG”) recommended that FEMA de-obligate a total of \$1,916,663 from 17 PWs based on six findings.

Only one OIG finding is at issue in the second appeal. Finding A was related to debris removal and road repairs performed by two contractors. The Applicant hired the two contractors without formal written contracts, under an emergency resolution that the Applicant’s Board of Supervisors passed, allowing them to waive a competitive bidding process in favor of T&M contracts for a pre-selected list of contractors. FEMA responded to the OIG’s Audit Report with a determination that \$1,243,850 from eleven PWs related to “Finding A” required de-obligation. In its second appeal, the Applicant requested re-obligation of \$1,063,952 related to Finding A.

Procurement Related Finding(s):

1) The Applicant’s use of the T&M contracts for 47 days violated FEMA’s general restriction of T&M contracts and did not comply with Federal procurement regulations setting forth specific requirements for the use of T&M contracts. The Federal regulations require a contract cost ceiling, and FEMA’s guideline which generally restricts the use of T&M contracts to “70 hours for work immediately after a disaster when a clear scope of work cannot be determined.” [1577-DR-CA](#), [44 C.F.R. §13.36\(b\)\(10\)](#), [Public Assistance Guide \(FEMA 322, page 53\)](#).

- The OIG determined that the Applicant did not perform any cost or price analysis, and did not negotiate any not-to-exceed contract provisions. The OIG stated that there was no documentation to identify the composition of the rates charged, such as profit or overhead. The OIG also stated that the T&M contracts exceeded the 70-hour time period allowed under FEMA policy.

2) Even relying on the public exigency exception for noncompetitive proposals, the Applicant has not demonstrated the existence of a public exigency that would prevent it from identifying a scope of work and competitively bidding the work for approximately 40 days beyond FEMA’s

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generally allowable timeframe for T&M contracts. [1577-DR-CA](#), [44 C.F.R. § 13.36\(d\)\(4\)\(i\)\(B\)](#).

Public Assistance Second Appeals: [1771-DR-IL](#)
Procurements Under Grants Synopsis

Date: September 20, 2013

Re: FEMA-1771-DR-IL, Henderson County, Procurement Standards

Terms: local government, T&M, reasonable costs

Background:

Severe storms resulting in widespread flooding of the Mississippi River between June 1, 2008, and July 22, 2008, caused a 2,000-foot breach in the Henderson County (“Applicant”) levee flooding areas in Henderson County, the Village of Gulfport, and approximately 5 miles of U.S. Route 34.

The Applicant entered into a sole-source, T&M contract with the contractor for all necessary emergency services to dewater approximately 28,000 acres, and to restore county functions to normal. The contract did not have a clear, well-defined scope of work. The contractors subcontracted out the work required to construct a 3,000-foot, temporary levee and to de-water the area. The Applicant sought reimbursement for the costs it incurred under the contract from FEMA.

In light of the contracting deficiencies, the OIG recommended de-obligating costs associated with dewatering and levee construction. Concurring with the recommendation, the Region V Deputy Regional Administrator de-obligated \$343,376 and \$2,721,712, respectively. However, FEMA is authorized to reimburse allowable costs associated with eligible work under 44 C.F.R. § 13.22, even if the costs are incurred under contracts that an applicant improperly procures. FEMA reimbursed the Applicant \$343,376 associated with dewatering, and \$2,721,712 associated with levee construction because the Applicant was able to produce sufficient documentation supporting the amounts.

Procurement Related Finding(s):

The use of a T&M contract and the lack of a clear scope of work amount to contracting deficiencies warranted deobligation. [1771-DR-IL](#), [44 C.F.R. § 13.36\(b\)\(10\)](#).

Public Assistance Second Appeals: [1633-DR-IL](#)
Procurements Under Grants Synopsis

Date: December 28, 2012

Re: FEMA-1633-DR-IL, City of Springfield, Office of Inspector General, Audit Report DD-10-04

Terms: local government, cost-plus-percentage-of cost contract

Background:

In 2006, tornadoes and heavy rains caused extensive damage to the electrical distribution system in Springfield, Illinois. As no other entities were available to assist with the repair, the City of Springfield (“Applicant”) supplemented its force account capability by executing a Mutual Aid Agreement (“MAA”) with AMEREN, a private utility company, to restore the system. FEMA reimbursed the Applicant the Federal share of \$11.4M in emergency and permanent work costs.

The OIG determined that some of the costs related to mutual aid labor and force account labor were ineligible and questioned \$794,732 in funding. The Regional Administrator (RA) agreed with the OIG recommendations and requested that the Applicant return the funds.

Procurement Related Finding(s):

The mutual aid costs represented a form of cost-plus-percentage-of cost (CPPC) contract, which is prohibited for the procurement of services under a Federal grant. [1633-DR-IL](#), [44 C.F.R. § 13.36\(f\)\(4\)](#).

- The ineligible line item mark-ups included \$252,694 for a labor adder equal to 25 percent of the loaded labor rate (regular pay + premium pay + taxes + pension + leave allowance + medical insurance and other costs), \$499,405 in Management Support Personnel costs equal to 82.52 percent of the actual labor costs (regular + premium pay), and \$9,908 in Tools equal to 9.98 percent of regular pay.

Public Assistance Second Appeals: [1915-DR-SD](#)
Procurements Under Grants Synopsis

Date: July 25, 2012

Re: FEMA-1915-DR-SD, Brule County, Embankment Erosion, Project Worksheet (PW) 847

Terms: local government, full and open competition

Background:

From March 10, 2010 to June 20, 2010, extensive flooding damaged infrastructure in several South Dakota counties. In Brule County (“Applicant”), floodwater eroded the embankment of Boyer Bottom Road in three locations. On August 5, 2010, FEMA inspected the sites and prepared PW 847 in the amount \$44,270 for repair of the embankment.

However, the Applicant had not competitively bid the project, nor solicited multiple quotes for the work, nor defined a scope of work for repairs, nor demonstrated that the invoiced costs were reasonable. The Applicant contends that the process of procuring contracted services for the repair of Boyer Bottom Road was consistent with local and State laws which, for this type of project, require competitive bids only when the projected costs exceed \$50,000.

Procurement Related Finding(s):

While the actions of the Applicant in securing the non-competitive contract to perform emergency road repair may be legal under applicable local and State law, the procurement practice does not meet Federal procurement requirements for competition. [1915-DR-SD](#), [44 C.F.R. § 13.36\(b\)](#), [44 C.F.R. § 13.36\(d\)\(4\)](#).

**Public Assistance Second Appeals: [FEMA-1646-DR](#)
Procurements Under Grants Synopsis**

Date: May 22, 2012

Re: FEMA-1646-DR-CA, Spanish Flat Water District, Sewer Treatment Plant Effluent Pond, Project Worksheet (PW) 173

Terms: local government, cost-plus-percentage-of-cost

Background:

In April 2006, heavy rain saturated the soil and caused rapid runoff from surrounding hillsides into the Spanish Flat Water District (“Applicant”) sewer treatment plant effluent pond, damaging a portion of the pond’s levee and causing wastewater to flow into Lake Berryessa. FEMA prepared PW 173 for \$113,061 to repair the breach in the pond levee. Subsequently, the Applicant made significant changes to the scope of work for the levee repairs at a total project cost of \$352,839. FEMA determined that the project was an Improved Project and capped the funding. In the first appeal, the Applicant appealed the Improved Project determination. FEMA Region IX concurred that the project was not an Improved Project because the scope of work had expanded due to geological site conditions necessitating deeper excavation than originally anticipated. However, the Region determined that the Applicant had used a cost plus percentage contract for the expanded scope of work, and limited funding to only the portion of work completed under the fixed price contract, \$81,786, plus other eligible costs of \$35,449, for a total of \$117,234.

Procurement Related Finding(s):

The expanded scope of work was accomplished using a cost-plus-percentage-of cost (CPPC) contract which is prohibited for the procurement of services under a Federal grant. [FEMA-1646-DR, 44 C.F.R. § 13.36\(f\)\(4\)](#).

- The provision of the contract that was used is under the heading “Time and Expense Change Orders” in the March 1, 2007, contract which reads: “Payment to the Contractor for extra work performed on a time and expense basis shall consist of the actual necessary expense for doing the work, plus an allowance of 15 percent of labor, material and equipment rental for overhead, general superintendence and profits, plus one percent for bonds.” The contract did not include a “ceiling” or “not to exceed” amount. Furthermore, upon review of the Daily Extra Work Reports (DEWR) FEMA found an allowance of 20 percent for overhead and 5 percent profit was added to labor, material, and equipment rental costs.

Public Assistance Second Appeals: [FEMA-1379-DR](#)
Procurements Under Grants Synopsis

Date: March 29, 2010

Re: FEMA-1379-DR-TX, City of Houston, Audit Report Number DD-07-04, Project Worksheets (PWs) 19, 55, 759, 761 and 960

Terms: local government, cost-plus-percentage-of-cost

Background:

Between June 5 and 9, 2001, Tropical Storm Allison produced heavy rains and flooding in the Houston area. Following the flooding, the City of Houston's ("Applicant") Solid Waste Department performed debris removal operations, its Convention and Entertainment Facilities Department performed emergency protective measures within the City's Theater District Parking Garages, and its Fire Department performed search and rescue operations throughout the City. The OIG questioned \$15,148 for subcontractor costs based on a determination that these costs were part of cost-plus-percentage-of-costs contracts. Since the enforcement mechanism is to limit reimbursement to reasonable costs, rather than to deny reimbursement altogether, FEMA concluded in PW 759 that the questioned costs were reasonable, and re-obligated the questioned costs

Procurement Related Finding(s):

Cost-plus-percentage-of-cost (CPPC) contracts are prohibited for the procurement of services under Federal grants even if they were pre-existing and properly awarded according to city guidelines and FEMA concluded that the costs were reasonable. [FEMA-1646-DR, 44 C.F.R. § 13.36\(f\)\(4\)](#).

- The Applicant argued that it had a pre-existing contract and performed the work pursuant to that contract that was, "properly awarded according to City guidelines and its validity was not disputed when the contract was discussed with FEMA....FEMA in its PWs concluded: 'A review of the contractor's costs has been performed and (those costs) are considered reasonable....'"

Public Assistance Second Appeals: [FEMA-1607-DR](#)
Procurements Under Grants Synopsis

Date: July 1, 2009

Re: FEMA-1607-DR-LA; City of Lake Charles (Applicant), Debris Removal from Catch Basins, Project Worksheet (PW) 2635

Terms: local government, cost analysis

Background:

On September 23, 2005, Hurricane Rita brought heavy winds and severe rainfall to the City of Lake Charles (“Applicant”) resulting in the accumulation of debris in storm water catch basins throughout the City. The Applicant solicited bids from four contractors, only two of whom responded. The Applicant entered into a contract with Unified Recovery Group (URG) to remove debris from the City’s catch basins at a unit price of \$300 per catch basin. URG requested payment from the Applicant for cleaning 9,481 catch basins from October 25, 2005 through December 30, 2005. In February 2006, FEMA prepared Project Worksheet (PW) 2635 to fund the removal of debris from catch basins and power washing of street gutters. However, FEMA considered the unit price of \$300 per catch basin unreasonably high and also disputed the number of catch basins eligible for cleaning. Because the regulations require that the costs be reasonable and the work be necessary, FEMA reduced the unit price to \$148.75 per catch basin to reflect what it considered a more reasonable unit price. The Applicant appealed claiming that it performed cost analysis that validated the unit price of \$300, and the second appeal granted \$1,594,780 for the adjustment to the unit cost for catch basin cleaning and power washing of the gutters.

Procurement Related Finding(s):

The Applicant’s City Engineer prepared a memorandum dated February 16, 2006, to Charles Eastland, FEMA Debris Specialist, with information on unit costs ranging from \$200 to \$500 for catch basin cleaning paid by several municipalities and/or Parishes in Louisiana and one city in Georgia prior to FEMA preparing PW 2635, which constitutes contract cost and price analysis required by the Federal procurement regulations. [FEMA-1607-DR, 44 C.F.R. § 13.36\(f\)\(1\)](#).

Public Assistance Second Appeals: [FEMA-1603-DR](#)
Procurements Under Grants Synopsis

Date: October 21, 2008

Re: FEMA-1603-DR-LA, St. Bernard Parish, Debris Removal, PWs 2050, 3078, 3112, and 3657

Terms: local government, full and open competition, exigent circumstances

Background:

As a result of Hurricane Katrina on August 29, 2005, large quantities of disaster-related debris were deposited on public and private property in St. Bernard Parish (“Applicant”). The Applicant entered into two contracts: one on September 3, 2005, and another in late October 2005.

1st contract: On September 3, 2005, the Applicant entered into a non-competitive debris removal contract with the Unified Recovery Group (URG). URG consisted of four companies that had previously entered into separate unsolicited, non-competitive contracts with the Parish. The scope of work for this contract included the removal of vegetative, construction, and demolition debris, as well as white goods, silt, hazardous trees, hazardous limbs priced on a per-cut basis, cars, and boats. It also included management of temporary debris storage and reduction sites (TDSRS) and recovery of Freon.

2nd contract: In late October 2005, the Applicant solicited competitive proposals to perform the debris removal work in the parish. Twelve debris removal contractors responded to the solicitation, and on December 9, 2005, the Applicant awarded the contract to URG based on the evaluation criteria published with the request for proposals. Although URG was not the lowest bidder, the Applicant determined that URG provided the best value considering the evaluation criteria which included past accomplishments, technical capabilities, and reasonableness of cost. Reasonableness of cost was weighted 15 percent for the proposal evaluation. The contract went into effect in January 2006.

Procurement Related Finding(s):

- 1) The Applicant has demonstrated that exigent circumstances resulting from Hurricane Katrina justify the noncompetitive bid solicitation for the first contract. [FEMA-1603-DR](#), [44 C.F.R. § 13.36\(d\)\(4\)\(i\)\(B\)](#).
- 2) The Applicant also properly procured the second contract in compliance with the methods of procurement outlined in the Federal procurement regulations, specifically, the Request for Proposal was properly publicized and identified all evaluation criteria. [FEMA-1603-DR](#), [44 C.F.R. § 13.36\(d\)\(3\)](#).

Public Assistance Second Appeals: [FEMA-1603-DR-LA](#)
Procurements Under Grants Synopsis

Date: February 5, 2008

Re: FEMA-1603-DR-LA; City of New Orleans

Terms: local government, reasonable cost, cost-plus-percentage-of-cost

Background:

The City of New Orleans (“Applicant”) solicited contracts to remove disaster-related sediment from its storm sewer system. The Applicant amended an existing contract with Montgomery Watson Harza (“MWH”) for \$24,664,161 to perform the work over a 36-day period. It amended the contract again for \$9,654,061 to clean storm sewers during an additional 30-day period. The Applicant requested reimbursement of \$34,318,222 from FEMA. FEMA determined that the costs were unreasonable and the Applicant had not documented some of the claimed costs. FEMA evaluated the reasonableness of cost because there was only one responsible bidder for the work and the Applicant used a cost-plus-percentage-of-cost contract.

Procurement Related Finding(s):

1) The Applicant’s contract with MWH stated that the Applicant would pay MWH thirteen (13) percent of cost incurred on the project as profit. This meets the definition of the cost plus contract. [FEMA-1603-DR-LA](#), [44 C.F.R. § 13.36\(f\)\(4\)](#).

2) In situations where there is inadequate competition before a contract is awarded, an applicant must perform a cost analysis. [FEMA-1603-DR-LA](#), [44 C.F.R. § 13.36\(d\)\(4\)\(ii\)](#).

- The Applicant argued that it performed a cost analysis, but it did not provide any information to substantiate its claim. Therefore, the City failed to comply with the mandates of the Federal procurement regulations.

Public Assistance Second Appeals: [FEMA-1366-DR](#)
Procurements Under Grants Synopsis

Date: May 29, 2007

Re: FEMA 1366-DR-KS, City of Hoisington, Audit Resolution

Terms: local government, cost-plus-percentage-of-cost contract

Background:

Tornadoes that developed when severe storms struck Kansas devastated Hoisington, Kansas and outlying areas. The City of Hoisington (“Applicant”) requested assistance from FEMA for approximately \$2.26 million for debris removal, certain emergency response measures, and permanent restoration projects. In October 2003, the OIG issued Audit Report DD-02-04 questioning \$293,364.18 of the total grant amount received by the Applicant. FEMA Region VII disagreed with the findings and recommended a de-obligation of only \$8,060 in volunteer credit, non-disaster related work, contractor markups, duplicated benefits, and undocumented force account costs. The OIG Field Office rejected the Region’s recommendation. In August 2004, the Regional Director requested that the Headquarters Program Office (Recovery Division) and the Assistant IG for Audit review make a determination regarding the audit. FEMA determined that the markup constituted a cost-plus-percentage-of-cost method of contracting, which is prohibited.

Procurement Related Finding(s):

The Applicant used a standing KDHE contract that reimburses the contractor the cost of its subcontractors plus a 10% administrative fee, which constitutes a cost-plus-percentage-of-cost type contract. [FEMA-1366-DR](#), [44 C.F.R. § 13.36\(f\)\(4\)](#).

Public Assistance Second Appeals: [FEMA-1425-DR](#)
Procurements Under Grants Synopsis

Date: March 27, 2007

Re: FEMA-1425-DR-TX, Guadalupe Blanco River Authority, PW 850, Contract Services and Force Account Labor costs

Terms: local government, full and open competition, exigent circumstances, interlocal agreement

Background:

As a result of severe storms and flooding, the Guadalupe-Blanco River Authority (“Applicant”) contracted for services for emergency repair of flood-damaged spillway gates. The Applicant called the Lower Colorado River Authority (LCRA) to help repair the roof weir gate. The LCRA, located about 50 miles away from the dam, had specialized experience with roof weir gates and a crew available to begin the repairs the day after the scope of work was determined (the Brazos River Authority has similar capabilities but was located over 300 miles away). No written agreement existed between the Applicant and the LCRA at the time of the disaster and prior to the onset of work. The LCRA charged only actual labor costs plus costs incurred to transport, house, and feed employees while on the job at this remote location. The LCRA did not collect a mobilization fee, accounting fee, overhead, or profit. On September 24, 2003, a competitively bid contract to complete the permanent repairs was let to Holloman Construction, and work began on September 29, 2003.

FEMA denied \$24,985.29 for contract services payable to LCRA for emergency repair work to the spillway gates because the Applicant did not go through proper contract bidding procedure as required by law.

Procurement Related Finding(s):

- 1) The Applicant’s interlocal cooperative agreement with the LCRA was authorized under Texas State law. [FEMA-1425-DR](#), [44 C.F.R. § 13.36\(b\)\(1\)](#).
- 2) While not explained in the decision, the decision appears to rest upon the conclusion that the interlocal cooperation contract was noncompetitive procurement. Upon that apparent determination, Applicant is allowed to use non-competitive proposals in the face of an emergency. [FEMA-1425-DR](#), [44 C.F.R. § 13.36\(d\)\(4\)\(i\)\(B\)](#).
 - The work was completed under emergency conditions and had to be completed in less than two weeks due to the scheduled flood releases from the upstream USACE Canyon Reservoir.

Public Assistance Second Appeals: [FEMA-1491-DR](#)
Procurements Under Grants Synopsis

Date: August 2, 2006

Re: FEMA-1491-DR-VA, City of Norfolk, Debris Removal

Terms: local government, cost analysis

Background:

As a result of Hurricane Isabel on September 8, 2003, the City of Norfolk (“Applicant”) removed storm-related debris city-wide. Between October, 2003, and May, 2004, FEMA obligated 20 versions of PW 6 for a total of \$10,774,419. The Applicant used two contractors to remove debris from public beaches. One contractor, procured competitively, charged \$63.90 per cubic yard. The other contractor, procured on an emergency sole source basis, charged \$108 per cubic yard for essentially the same work. On November 16, 2004, based on a final inspection, FEMA obligated an additional \$1,024,624 (version 20) but denied funding for versions 21, 22, 23, 24, 26, 27, and 30 because many load tickets did not include loading and unloading times. FEMA also reduced funding for version 31 because it deemed the contractor’s costs to be excessive.

Procurement Related Finding(s):

Federal procurement regulations require that applicants provide a cost analysis when using non-competitively procured contractors and no such study was included in the Applicant’s second appeal. [FEMA-1491-DR](#), [44 C.F.R. § 13.36\(d\)\(4\)\(ii\)](#).