

Procurement Under FEMA Awards

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



FRANKLIN AYETIN, ATTORNEY ADVISOR
PROCUREMENT DISASTER ASSISTANCE TEAM (PDAT)
DR-4335-VI; DR-4340-VI
MARCH 2018



FEMA

Agenda



- **Introductory Remarks**
- Terminology and Key Players
- Background
- Procurement Standards for States
- Other Considerations for State Procurements



FEMA

Rules of the Road



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



Purpose

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



FEMA



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



Agenda

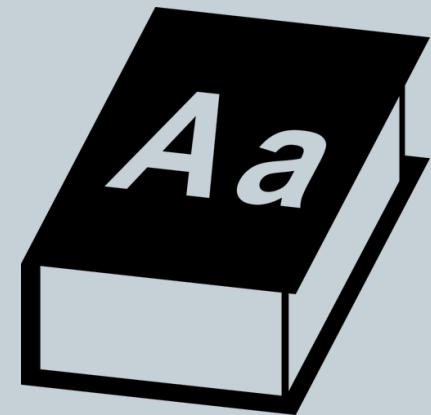


- Introductory Remarks
- Terminology and Key Players
- Background
- Procurement Standards for States
- Other Considerations for State Procurements



Terminology

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



Terminology

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



Key Players

Recipient

Subrecipient

FEMA

DHS OIG



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



FEMA

Key Players

10

Recipient

Subrecipient

FEMA

DHS OIG



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



FEMA

Key Players

Recipient

Subrecipient

FEMA

DHS OIG

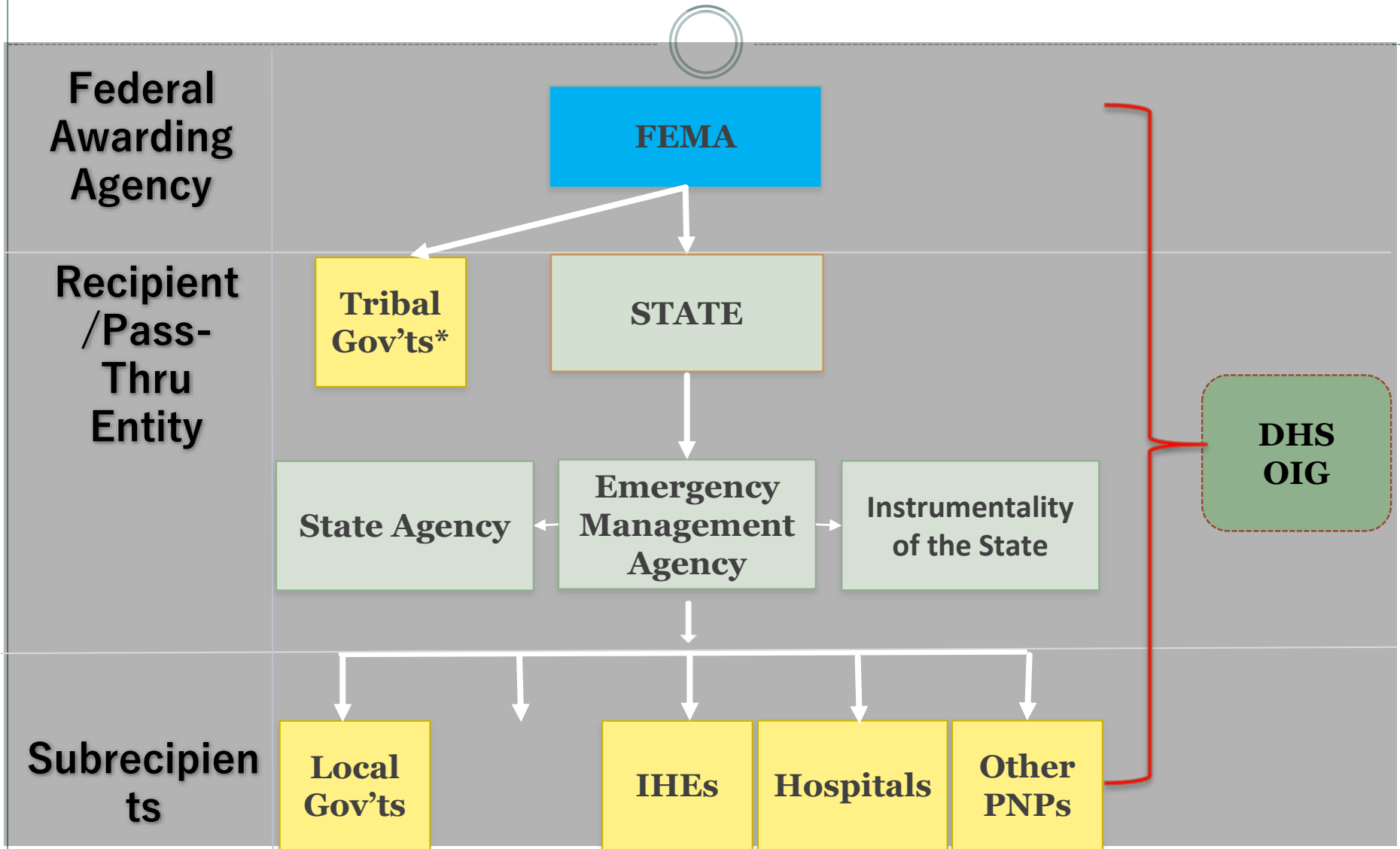


- FEMA is the Federal awarding agency:
 - Has an affirmative duty to manage and administer the Federal award in a manner to ensure that Federal funding is expended for authorized purposes and in accordance with all Federal laws, regulations, and Executive Orders and the terms of the grant award.
 - Educate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



FEMA

Key Players



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

Agenda



- Introductory Remarks
- Terminology and Key Players
- Background
- Procurement Standards for States
- Other Considerations for State Procurements



Why We're Here...

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

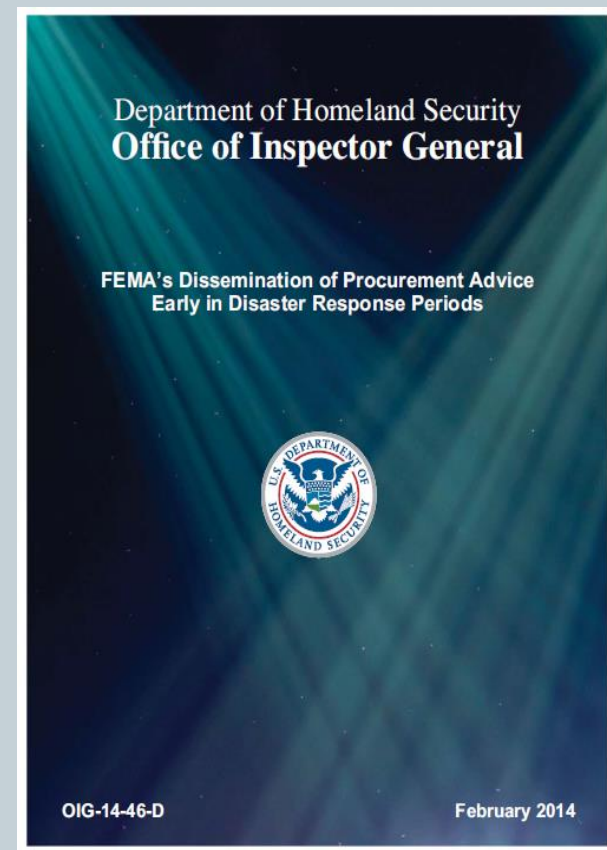
Non-compliance with the Federal procurement requirements may comprise a material failure to comply with the terms of the disaster grant award and violate the FEMA-State Agreement.



FEMA

FEMA Procurement Disaster Assistance Team (PDAT)

- PDAT was created by the FEMA Office of Chief Counsel in April 2014 to train and assist applicants, emergency management personnel at all levels, and FEMA personnel on the procurement rules that must be followed when contracting for work using Federal disaster assistance funds. This constitutes a large part of PDAT's mission.



FEMA Procurement Disaster Assistance Team (PDAT)

- We also assist applicants by reviewing questions from, and providing answers through FEMA personnel, as we are not legal advisors for applicants.
- We also deploy to Joint Field Offices (“JFO”) to provide support to applicants, deployed FEMA personnel, and emergency management personnel on the ground.



FEMA Procurement Disaster (PDAT)

Procurement Disaster Assistance Team Field Manual_Final Dec 14.pdf

Checklist for Reviewing Procurements Under Grants by Non-Federal Entities (States, local an...

2 CFR 200.326 and 2 CFR Part 200 Appendix II Required Contract Clauses

2 C.F.R. § 200.326 and 2 C.F.R. Part 200, Appendix II, Required Contract Clauses

Requirements under the Uniform Rules. A non-Federal entity's contracts must contain the applicable contract clauses described in Appendix II to the Uniform Rules (Contract Provisions for non-Federal Entity Contracts Under Federal Awards), which are set forth below. 2 C.F.R. § 200.326. For some of the required clauses we have included sample language or a reference a non-Federal entity can go to in order to find sample language. Please be aware that this is sample language only and that the non-Federal entity alone is responsible ensuring that all language included in their contracts meets the requirements of 2 C.F.R. § 200.326 and 2 C.F.R. Part 200, Appendix II. We do not include sample language for certain required clauses (remedies, termination for cause and convenience, changes) as these must necessarily be written based on the non-Federal entity's own procedures in that area.

1. Remedies.

- a. **Standard:** Contracts for more than the simplified acquisition threshold (\$150,000) must address administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as appropriate. See 2 C.F.R. Part 200, Appendix II, ¶ A.
- b. **Applicability:** This requirement applies to all FEMA grant and cooperative agreement programs.

2. Termination for Cause and Convenience.

- a. All contracts in excess of \$10,000 must address termination for cause and for convenience by the non-Federal entity including the manner by which it will be effected and the basis for settlement. See 2 C.F.R. Part 200, Appendix II, ¶ B.
- b. **Applicability.** This requirement applies to all FEMA grant and cooperative agreement programs.

3. Equal Employment Opportunity.

- a. **Standard.** Except as otherwise provided under 41 C.F.R. Part 60, all contracts that meet the definition of "federally assisted construction contract" in 41 C.F.R. § 60-1.3 must include the equal opportunity clause provided under 41 C.F.R. § 60-1.4(b), in accordance with Executive Order 11246, *Equal Employment Opportunity* (30 Fed. Reg. 12319, 12935, 3 C.F.R. Part, 1964-1965 Comp., p. 339), as amended by Executive Order 11375, *Amending Executive Order 11246 Relating to Equal Employment Opportunity*, and implementing regulations at 41 C.F.R. Part 60 (Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor). See 2 C.F.R. Part 200, Appendix II, ¶ C.
- b. **Key Definitions.**



FEM

Background

Stafford Act

Applicability

Grace Period

Contracting



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



FEMA

Background

19

Stafford Act

Applicability

Grace Period

Contracting

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



FEMA

Background

Stafford Act

Applicability

Grace Period

Contracting

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

Dec. 26, 2014

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

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

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

Grace Period
(2 CFR § 200.110)

Background

Stafford Act

Applicability

Grace Period

Contracting



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



Background

22

Stafford Act

Applicability

Grace Period

Contracting



BREAKDOWN:

- What is the 2 C.F.R. pt. 200 effective date? → December 26, 2014
- Who's fiscal year is used to measure? → The applicant's fiscal year
- When do you start measuring? → The first fiscal year after the effective date



FEMA

Background

Stafford Act

Applicability

Grace Period

Contracting

Example 1: Applicant Fiscal Year = Calendar Year

- 2 C.F.R. pt. 200 Effective Date → December 26, 2014
- First Additional Fiscal Year (FY) → Begins on the start of the first FY after December 26, 2014, which is January 1, 2015 in this example
- Second Additional FY → Same start/end dates as applicable for the first additional FY
- Third Additional FY → Same start/end dates applicable for the first and second additional FYs

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
Fiscal Year 15												Fiscal Year 16											
JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
Fiscal Year 17																							



FEMA

Background

Stafford Act

Applicability

Grace Period

Contracting

Example 2: Applicant Fiscal Year = Non-Calendar Year

- 2 C.F.R. pt. 200 Effective Date → December 26, 2014
- First Additional Fiscal Year (FY) → Begins on the start of the first FY after December 26, 2014, which is October 1, 2015 in this example.
- Second Additional FY – Same start/end dates as applicable for the first additional FY
- Third Additional FY – Same start/end dates as applicable for the first and second additional FYs

OCT 2015 NOV DEC JAN 2016 FEB MAR APR MAY JUN JUL AUG SEP 2016	OCT 2016 NOV DEC JAN 2017 FEB MAR APR MAY JUN JUL AUG SEP 2017
Fiscal Year 16	Fiscal Year 17
OCT 2017 NOV DEC JAN 2018 FEB MAR APR MAY JUN JUL AUG SEP 2018	Fiscal Year 18



FEMA

Background

25

Stafford Act

Applicability

Grace Period

Contracting

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



FEMA

Background

26

Stafford Act

Applicability

Grace Period

Contracting

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



FEMA

Background

Applicability

Grace Period

Contracting

Noncompliance



Remedies for Non-Compliance with the Federal Procurement Standards:

(2 C.F.R. § 200.388)

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



FEMA

Suspension and Debarment



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



Agenda



- Introductory Remarks
- Terminology and Key Players
- Background
- Procurement Standards for States
- Other Considerations for State Procurements



Summary of Procurement Standards



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



State Definition



- **“State”** – means
 - any state of the United States,
 - the District of Columbia, the Commonwealth of Puerto Rico, U.S. Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and
 - any agency or instrumentality thereof exclusive of local governments. (2 CFR §200.90)
- Each NFE has to determine the status of a particular entity before contracting to determine which rules it should follow.



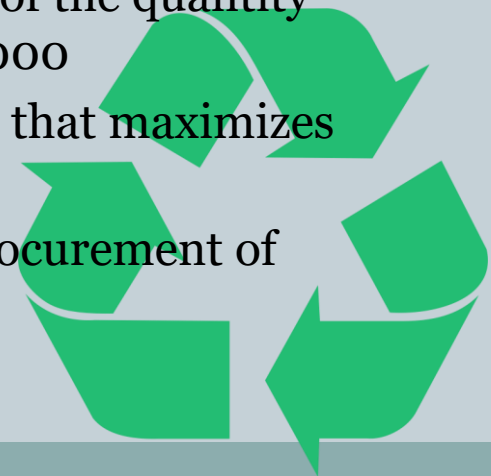
#1 States Must Follow Your Own Standards

- States must ensure compliance with the policies and procedures it follows for procurements using non-Federal funds.
- States must be prepared to provide FEMA with its procurement policies and procedures.
- States must maintain documentation to evidence how they complied with their own policies and procedures.

#2 Procurement of Recovered Materials



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



3 Required Contract Provisions

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



FEMA

Required Contract Provisions

- Required Contract Provisions (cont'd):
 - ✓ > \$100k + mechanics or laborers – Contract Work Hours and Safety Act
 - ✓ Rights to Inventions Made Under a Contract or Agreement (Inapplicable)
 - ✓ > \$150k – Clean Air Act & the Federal Water Pollution Control Act
 - ✓ Debarment and Suspension – “SAM”
 - ✓ > \$100k award – Byrd Anti-Lobbying Amendment
 - ✓ § 200.322 – Procurement of Recovered Materials



Hypothetical: States

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

Is there an issue with the State's procurement?



Agenda



- Introductory Remarks
- Terminology and Key Players
- Background
- Procurement Standards for States
- Other Considerations for State Procurements



Cost Reasonableness



- 2 CFR Subpart E – Cost Principles
- State must comply with the cost principles
- 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 (2 C.F.R. § 200.404)



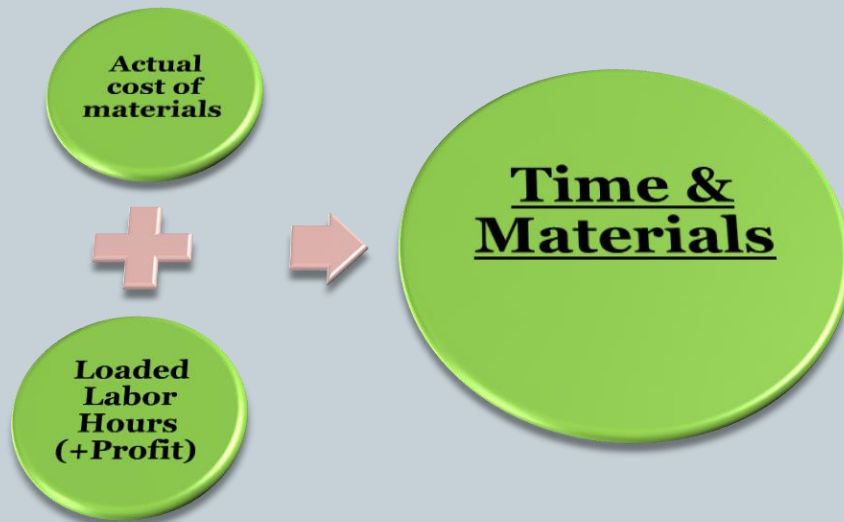
T&M and CPPC Rules for State Entities

- The Federal procurement standards do not address the use of T&M and CPPC for states
- However, states are subject to the cost principles in subpart E of 2 CFR part 200.
- FEMA will scrutinize all contracts to ensure that costs are reasonable.
- States should carefully deliberate whether its contract are likely to result in unreasonable costs.
- T&M and CPPC contracts will be carefully reviewed by FEMA for cost reasonableness



FEMA

Possible Issue – Time and Materials Contracts



Consider whether or not this is the most suitable contract type; consider if there is clear scope of work

Consider including a contract ceiling that the contractor exceeds at its own risk

Monitor these contracts closely

When Time and Materials Contracts are used, there is no incentive for contracts to be cost effective and efficient. No incentive for contractor to control cost; contractor has financial interest in increasing cost of performance.



Possible Issue – Cost Plus Percentage of Cost Contracts



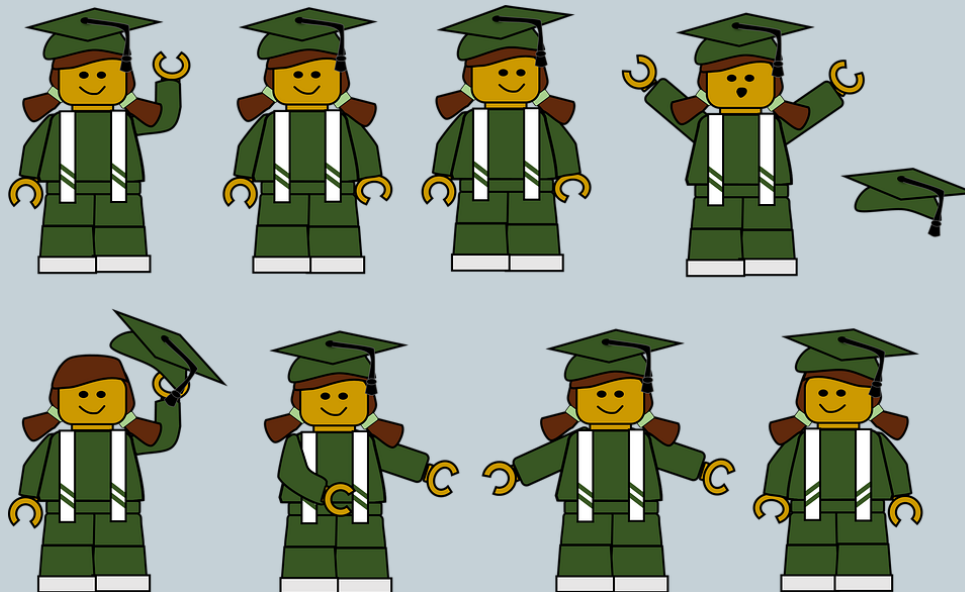
- These contracts may be allowed under state law, but are generally discouraged
- No incentive for contractor to control cost; contractor has financial interest in increasing cost of performance
- Criteria evidencing this type of contract:
 - (1) Payment is on a predetermined percentage rate;
 - (2) The predetermined percentage rate is applied to actual performance costs;
 - (3) The contractor's entitlement is uncertain at the time of contracting;
 - (4) The contractor's entitlement increases commensurately with increased performance costs.



Questions

- Additional resources can be found at the following link:

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



FEMA



Homeland Security



FEMA