

COVID-19 Financial Recovery Contracts and Procurement

**CAPH
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Logistics

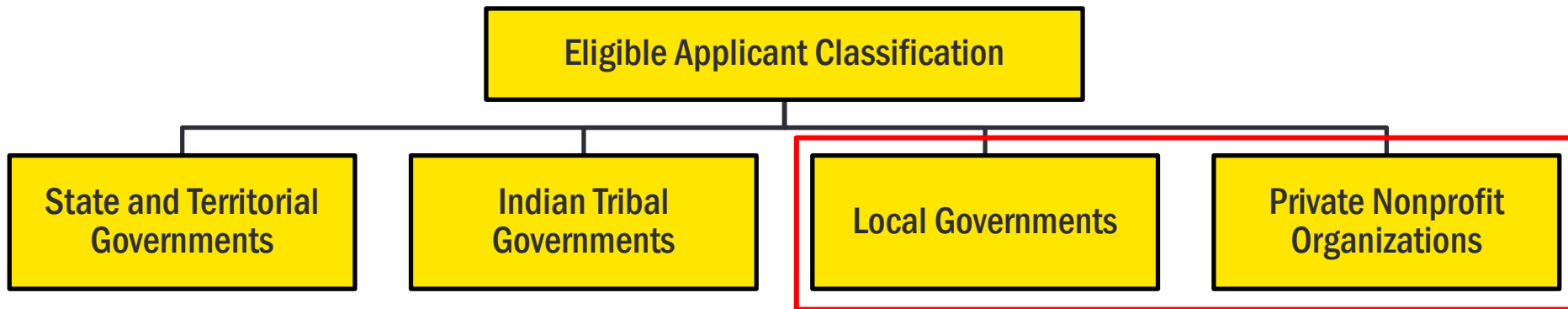
- All participants are **MUTED** upon entry and we ask that you stay muted until the Q&A portion of the presentation
- This presentation is being recorded and will be available for members shortly after this meeting.

Agenda

- **Overview of Contracts and Procurement**
- **Procurement Considerations**
- **Elements of Noncompetitive Procurement Justification**
- **What Costs are Allowable?**
- **Key Supporting Documentation**
- **Contract Provisions**
- **Pre-existing/Pre-awarded Contracts**
- **Oversight**
- **Top 10 Procurement Mistakes under Federal Grants**
- **Major Areas of Risk**
- **Duplicative and Leftover Supplies/Materials**

Local Governments vs. Private Nonprofit Organizations

Eligible Applicant Classification



Contracts and Procurement

Overview

- PHS members must:
 - Follow:
 - Internal procurement policies and procedures;
 - State or Tribal Law; and
 - Federal procurement standards - 2 CFR 200.318-200.326
 - Ensure:
 - Conformity of internal procedures with Federal guidelines
 - Compliance with MOST RESTRICTIVE guideline(s) when there is a difference in rules
- Procurement is usually one of the most heavily scrutinized areas by the Office of Inspector General
 - Note: For COVID-19, it has been established that exigent and emergency circumstances currently exist.

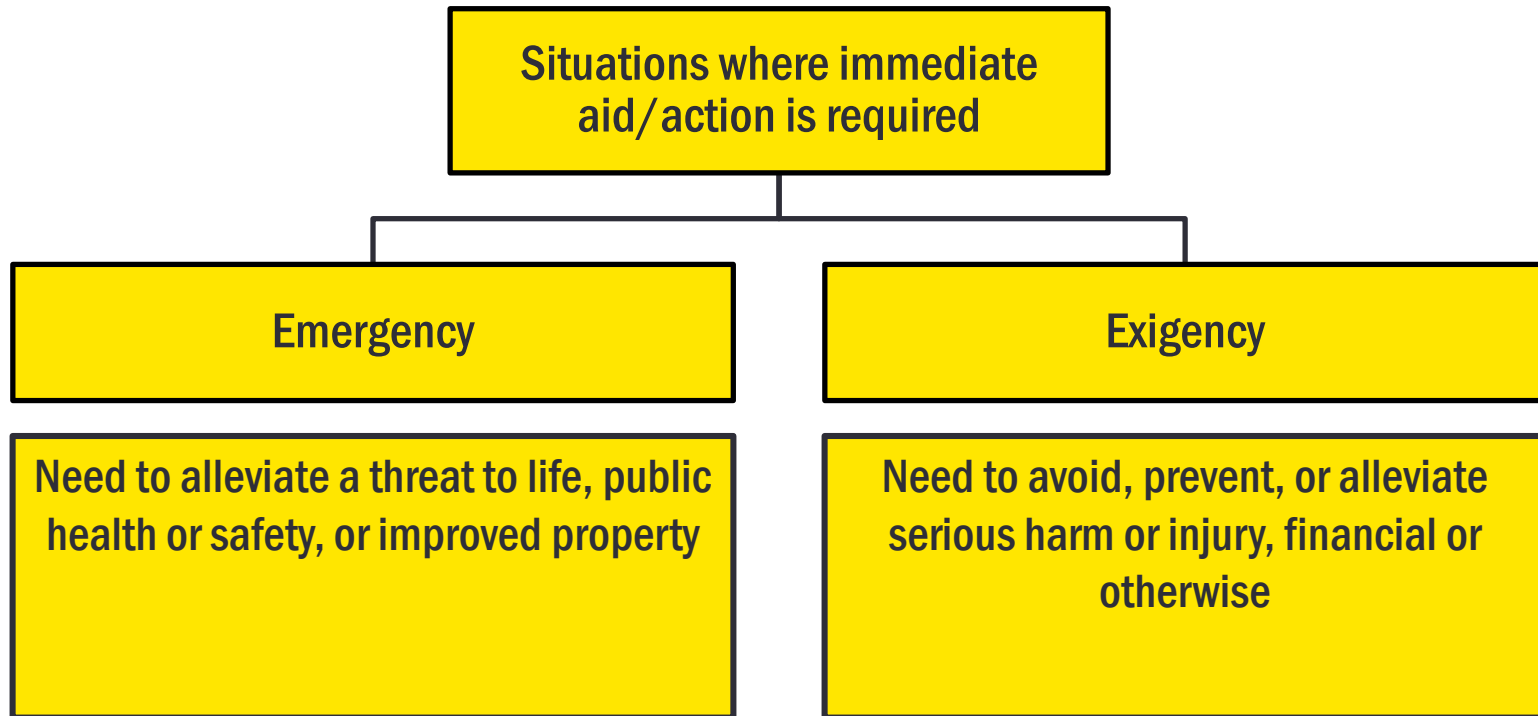
Contracts and Procurement

Procurement Considerations

- The federal procurement standards applicable to federal awards can be found at Title 2 of the Code of Federal Regulations, Part 200, Sections 200.317 through 200.326 (2 C.F.R. §§ 200.317-200.326)
- However, for the COVID-19 event, it has been established that **exigent and emergency** circumstances currently exist.
- For the duration of the Public Health Emergency, local governments, tribal governments, nonprofits, and other non-state entities may **proceed with new and existing noncompetitively procured contracts** in order to protect property and public health and safety, or to lessen or avert the threats created by emergency situations

Contracts and Procurement

Procurement Considerations



Contracts and Procurement

Procurement Considerations

- If using sole sourcing or noncompetitive procurement due to emergency or exigency you must:
 1. Justify with **documentation**
 2. Use the procurement contract only during the **period of actual** exigent or emergency circumstances
 3. Return to full and open competition **as soon as the period ends**
- **LEADING PRACTICE:** Document procurement process in exigent circumstances in memo to justify these procurements (EY team will provide a template)
- You must document the justification for bypassing normal procurement requirements for **each** non-competitive procurement.

Contracts and Procurement

Additional Procurement Considerations

- **Contracts must:**
 - **An actionable termination for convenience clause that will be implemented if any part of the scope of the contract is ultimately not needed, or the needs are less than projected**
 - **Ongoing and projected needs should be based on regular reviews including documenting the review process to support the decision making**
 - **All claimed contract costs must be necessary and reasonable**
- **Include Federal contract provisions (2 C.F.R. §§ 200.322)**
- **Comply with Federal requirements for procurement of recovered materials (2 C.F.R. §§ 200.326)**
- **Suspension and debarment checks through System for Award Management**

Contracts and Procurement

Elements of Noncompetitive Procurement Justification

- Identify the circumstance that justifies noncompetitive procurement.
 - The public exigency or emergency resulting from competitive solicitation
- Provide a brief description of the product/service being procured, and the expected amount of the procurement.
- Explain why noncompetitive procurement is necessary.
- State how long the noncompetitively procured contract will be used for and what the impact would be from not receiving the goods/services from a noncompetitively procured contract.
- Describe steps taken to determine full and open competition could not be used.
- Identify/explain any conflicts of interest.
- Include any other info needed to justify the use of noncompetitive procurement.

Contracts and Procurement

What Costs Are Allowable?

- For a cost to be allowable by FEMA it must be reasonable:
 - 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
- If supplies or equipment are purchased at a premium then:
 - Document the necessity of purchasing the supplies and equipment at the current prices
 - Explain the need, who the supplies or equipment will be used to protect, and the potential outcome of waiting for more favorable conditions.
 - If the supplies or equipment are only available through a single supplier, document what other suppliers you tried to obtain them from.
 - If the supplies or equipment are available through multiple suppliers, and every supplier is charging a premium. Document that you purchased the supplies or equipment through most cost effective supplier.

Contracts and Procurement

Key Supporting Documents

	Micro-Purchases	Small Purchases
Threshold	<ul style="list-style-type: none">➤ < 10k or equivalent internal/local/state threshold, whichever is more stringent	<ul style="list-style-type: none">➤ > 10k but <\$250k or equivalent internal/local/state threshold, whichever is more stringent
Selection Criteria	<ul style="list-style-type: none">➤ Price reasonableness	<ul style="list-style-type: none">➤ Most reasonable and responsive lowest price
Documents	<ul style="list-style-type: none">➤ Invoice with description of work performed➤ Purchase order (if applicable)➤ Proof of payment➤ Any other documentation required by more stringent requirements	<ul style="list-style-type: none">➤ Quotes➤ Evidence of taking affirmative steps for socioeconomic contracting, when possible➤ Invoice with description of work performed➤ Contract/Purchase order (if applicable)➤ Proof of payment➤ Any other documentation required by more stringent requirements

Contracts and Procurement

Key Supporting Documents

Sealed Bidding (SB)/ Competitive Proposals (CP)

Threshold

- > 250k or equivalent internal/local/state threshold, whichever is more stringent

Selection Criteria

- SB: Most reasonable and responsive lowest price
- CP: Provider price, qualifications, experience, knowledge, etc.

Documents

- Bids/Proposals
- Invitation to bid/RFP
- Cost/Price Analysis; as a pre-requisite, prepare independent estimates before receiving bids/proposals
- Bid Tabulation/Pricing Comparison/ Evaluation documents
- Evidence of taking affirmative steps for socioeconomic contracting, when possible
- Basis of contractor selection/ Rationale to award
- Contract
- Invoice with description of work performed
- Purchase order (if applicable)
- Proof of payment
- Any other documentation required by more stringent requirements

Sole Source

- No threshold - exception to any form of competitive procurement

- Price reasonableness

- Cost/Price Analysis, if over \$250k
- Invoice with description of work performed
- Contract
- Purchase order (if applicable)
- Proof of payment
- Non-Competitive Procurement Justification/Memo for each instance of non-competitive procurement

Contracts and Procurement

Key Supporting Documents

Every procurement **above \$250,000** (including contract modifications) requires a cost or price analysis.

Cost Analysis

An evaluation of the separate cost elements or line items in a single proposal as opposed to independent estimates or historical costs

Price Analysis

An evaluation of the total proposed price. This analysis is used when there are multiple offers for items to compare prices against.

Contracts and Procurement

Contract Provisions Recommended by FEMA

FEMA recommends the following provisions:

- **Language stating how the contract can be modified**
- **Contractor Acknowledgements**
 - **DHS has the legal right to access and review the contractor's records**
 - **Permission is required to use the DHS's Seal, Logo, or Flag**
 - **They will comply with all federal laws, regulations, and executive orders.**
 - **The contract is not an obligation of the federal government**
 - **Title 31 of the U.S. Code Chap. 38 -Administrative Remedies for False Claims and Statements -applies to the contractor's actions regarding this contract.**

Contracts and Procurement

Contract Provisions Required for All Federal Awards

1. Contracts in excess of the simplified acquisition threshold (currently \$250,000) must include provisions addressing administrative, contractual, or legal “remedies” in instances where contractor violates or breach terms, and provide for sanctions and penalties when appropriate.
2. Contracts in excess of \$10,000 must address termination for cause and convenience.
3. Construction contracts must include the Equal Employment Opportunity clause.
4. Contract in excess of \$100,000, that involve the employment of mechanics or laborers, must include a provision for compliance with the “Contract Work Hours and Safety Standards Act”.
5. Contracts in excess of \$150,000 must contain a provision that requires the contractor to agree to comply with the Clean Air and Federal Water Pollution Control Acts.
6. All contracts must include language stating the contract is a covered transaction, and that the contractor is subject to Suspension and Debarment.
7. Contracts in excess of \$100,000 must include a provision addressing the Byrd Anti-Lobbying Amendment.
8. All contracts must include language addressing the Procurement of Recovered Materials.

Contracts and Procurement

Pre-existing/Pre-awarded Contracts

- If a pre-existing/pre-awarded contract is not in compliance with federal procurement requirements, it may be possible to use the contract for the duration of the emergency and exigent circumstances.
- Non-state entities should:
 - Take actions to modify pre-awarded or pre-existing contracts where applicable.
 - Justify use of sole-sourced contracts with sufficient documentation.

Contracts and Procurement Oversight

- Local Government are required to maintain oversight of their contractors and vendors.
- Efforts taken to maintain oversight should be documented as evidence of compliance
- Examples of oversight include making sure that:

Contractors comply with terms and conditions



Invoices are correct



Goods and services are received



Contracts

Top 10 Procurement Under Grant Mistakes



Restricting full and open competition



Not making and documenting efforts to take all “affirmative steps” for socioeconomic contracting

Not performing detailed cost/price analysis for procurements over 250k

Not including the required contract clauses

Engaging in a sole-sourcing contract w/o documenting E/E situation

Awarding a “cost-plus-percentage-of-cost” or “percentage-of-construction-cost” contract

Continuing work under a sole-source contract after the urgent need has ended

Awarding a contract to contractors that are suspended or debarred

Awarding a “time-and-materials” contract w/o ceiling price and documentation why no other contract type is suitable

Not documenting all steps of procurement to answer questions that could arise months/years later

Contracts

Major Areas of Risk: Applicable regardless of E/E Exception

Federal bonding requirements if contract over 250k is for construction or facility improvement

Documentation, oversight, and conflict of interest requirements among other general procurement requirements

Period of performance for E/E COVID-19 procurement must be starting on or after January 27, 2020 to the end of the public health of emergency period as defined by HHS (currently ongoing)

Contracts

Major Areas of Risk: Risk-Prone Contract Types

Time & Materials (T&M)

- ▶ Generally FEMA advises against and limits use to a short time-frame where scope/duration of work unclear since lack of cost control/maximum labor efficiency
- ▶ Must satisfy the following 3 criteria:
 - ▶ No other contract was suitable
 - ▶ Contract has ceiling price that contractor exceeds at own risk
 - ▶ High degree of oversight can be demonstrated

Piggyback

- ▶ Generally discouraged but may be able to piggyback another entity's contract and expand the scope of contract for the period of E/E circumstance

Cost-Plus-Percentage-of-Cost (CPPC)

- ▶ **PROHIBITED** regardless of E/E since no cost control/incentive to perform work efficiently

Contracts and Procurement

Duplicative and Leftover Supplies/Materials



If at the end of the crisis you have leftover supplies, you may be able to repurpose the supplies for other federally funded programs provided that you inform FEMA first.



Otherwise, the current market value of any unused residual supplies will be calculated. If the total of unused residual supplies is greater than \$5,000, FEMA will reduce eligible funding by this amount.

FEMA Resources

Document Title	FEMA Link
Public Assistance and Program Policy Guide	https://www.fema.gov/media-library-data/1525468328389-4a038bbef9081cd7dfe7538e7751aa9c/PAPPG_3.1_508_FINAL_5-4-2018.pdf
Current 2 C.F.R. Part 200	https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=94a0e8e1a0180960e7218a348a395b20&mc=true&n=pt2.1.200&r=PART&ty=HTML
Procurement Field Manual	https://www.fema.gov/media-library-data/1570129404293-8d938ec9c10063348edca477a7b24bbd/PDATManualUpdate_10-03-19.pdf
Reasonable Cost Evaluation Job Aid	https://www.fema.gov/media-library-data/1539879525279-d00ae1c43f9765c5a4b415e1a31202c5/PA_Reasonable_Cost_Evaluation_Job_Aid_508_FINAL_10-16-2018.pdf
Procurement Under Grants Conducted Under Exigent or Emergency Circumstances Fact Sheet	https://www.fema.gov/media-library-data/1584386517416-40bc24e5a2c4154c1ee44ed143e6491b/Procurement_During_EE_Circumstances_Fact_Sheet_508AB.pdf
Procurement Under Grants Conducted Under Exigent or Emergency Circumstances Memo	https://www.fema.gov/media-library-data/1584457999950-7186ffa29ace3e6faf2ca2f764357013/Procurement_Under_EE_Circumstances_Memo_final_508AB.pdf
Contract Provision Template	https://www.fema.gov/media-library-data/1569959119092-92358d63e00d17639d5db4de015184c9/PDAT_ContractProvisionsTemplate_9-30-19.pdf
Top 10 Procurement Under Grant Mistakes	https://www.fema.gov/media-library-data/1557346995151-1eb78c466ff98f5a58eb6ca7a67ff73b/PDATTop10PuGMistakesExtended.pdf
PA: Contracting Requirements Checklist	https://www.fema.gov/media-library-data/1539875905022-5a495374f920a580e6bba7892879c888/PA_Contracting_Requirements_Checklist_508_Final_10-10-18.pdf

Upcoming Trainings

Tentative Timeline	Proposed Topics
Week of May 25	Labor
Week of June 1	Equipment
Week of June 8	Donated Resources
Week of June 15	Question & Answer Session

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Questions?



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