



### Key Points for Non-State Entities on How to Avoid the Top 10 Procurement Under Grant Mistakes

In the aftermath of a presidentially-declared disaster, FEMA provides grant funding to local and tribal governments, institutions of higher education, hospitals, and certain private non-profit (“PNP”) entities (collectively, “non-state entities”) to assist them with recovering from the event.

Non-state entities must comply with the federal procurement standards to ensure their procurements are eligible for federal grant funding. These standards are found in Title 2 of the Code of Federal Regulations (“CFR”), sections 200.318 through 200.326 and apply to presidential declarations issued on or after December 26, 2014.

Below is a list of the top 10 mistakes non-state entities make when trying to comply with the requirements of 2 C.F.R. §§ 200.318-200.326.

This document will help to give a better understanding of these top 10 mistakes and how best to avoid making them.

#### 1. Restricting Full and Open Competition

The Uniform Rules require that all procurement transactions be conducted in a manner that provides full and open competition. This means that a complete requirement (scope of work required) is publicly solicited and all responsible sources that are interested in doing so are permitted to compete.

To make sure that there is full and open competition:

- Don't place unreasonable requirements on firms, require unnecessary experience, or specify only a “brand name” product.
- Don't use of state, local, or tribal geographical preferences in the evaluation of bids or proposals.
- Don't allow contractors that develop or draft specifications, requirements, statements of work, invitations for bid or requests for proposal to compete for and be awarded the subsequent contract for that work.
- Don't award noncompetitive contracts to consultants that are on retainer contracts.
- Be aware of noncompetitive pricing practices between firms or affiliated companies.
- Have written standards of conduct covering conflicts of interest and governing the performance of your employees engaged in contract award and administration.





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Full and open competition issues often arise if not using the proper procurement method to ensure competition or if not properly assessing and documenting whether one of the exceptions fits when sole-sourcing. The procurement methods allowed are:

1. Micro purchase procedures (for purchases under a certain dollar amount which is currently \$10,000 – or the equivalent local or state threshold, whichever is lowest);
2. Small purchase procedures (for purchases under a certain dollar amount which is currently \$250,000 – or the equivalent local or state threshold, whichever is lowest);
3. Sealed Bids (award to the lowest priced, responsive, and responsible bidder; recommended for construction contracts);
4. Competitive Proposals (award need not be made to the lowest priced offeror if award criteria establish award is to be based on some other non-price-related factor. Price must be a factor in the determination, but it does not have to be the only factor. For architectural/engineering service contracts, price does not have to be a factor in making the selection); and
5. Noncompetitive Proposals (sole source contracting based on specific circumstances) (see also Mistake #3 below).
  - The noncompetitive proposals method may be used only if the non-state entity has one of the following four circumstances exist:
    1. The item is available from only a single source (not the most convenient source);
    2. After solicitation of several sources, competition is determined to be inadequate;
    3. FEMA or a state pass-through entity expressly authorizes the non-state entity to use this method in response to a written request; or
    4. A Public emergency (threats to health, life or safety) or exigency (threats requiring an immediate response) exists that will not permit a delay resulting from competitive solicitation.

## **2. Not Performing a Detailed Price or Cost Analysis for Procurements Above \$250,000**

A non-state entity must conduct either a price or cost analysis for each procurement above the Simplified Acquisition Threshold, which is currently \$250,000. If the non-state entity is required to perform a cost or price analysis at a number lower than the federal simplified acquisition threshold by a state or local statute/ordinance, regulation, or the non-state entity's own procurement policy, then the non-state entity must ensure it is compliant with its own more restrictive requirement.





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A **price analysis** is the examination and evaluation of a proposed price without evaluating its separate cost elements and proposed profit. Price analysis is typically used when acquiring commercial items (which are items that generally maintain similar standards or quality and differ only in price) or when using the procurement through sealed bidding method.

A **cost analysis** is the review and evaluation of the separate cost elements (such as labor hours, overhead, materials, etc.) and proposed profit in a proposal and the application of judgement to determine how well the proposed costs represent what the contract cost should be. Cost analysis is typically used to establish the basis for negotiating contract prices when: (1) using the competitive proposals method; (2) using the sealed bidding method and price competition is not sufficient; (3) situations where price analysis by itself does not ensure price reasonableness; or (4) procuring professional, consulting, and architectural engineering services contracts.

### 3. Improperly Engaging in Sole-sourcing (Non-competitive) Procurement

One of the foundations of the procurement under grants rules is full and open competition. If the non-state entity is not going to use a competitive process to purchase goods and services, the non-state entity needs to document the reason and for emergency and exigency circumstances, the date those circumstances started and ended.

The documentation justifying the use of sole-sourcing should include, but is not limited to, a brief description of the product or service you are procuring, an explanation of why it is necessary to contract non-competitively, and the impact to your community if you are not able to use the non-competitively procured contract. If a non-state entity is going to use this procurement method, it must still comply with other requirements, including: (1) the contract must include the required contract clauses; (2) the contract must include the Federal bonding requirements, if the contract is for construction or facility improvement; (3) the non-state entity must award to a responsible contractor; (4) the non-state entity must complete a cost or price analysis; and (5) the non-state entity cannot use a cost-plus-percentage-of-cost contract.

### 4. Continuing Work under a Sole-source Contract After the Urgent Need Has Ended

An exigency or emergency period will last often for a short time. A contract procured under this circumstance can only be used while the exigency or emergency is ongoing. Once the emergency or exigency period ends, the contract must be re-solicited under full and open competition. Note: A contractor who fulfilled the requirement under





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emergency or exigent circumstances cannot compete for the new contract **if** that contractor helped the non-state entity develop or draft specifications, requirements, statements of work, or solicitation documents in support of the competitive procurement.

### **5. Not Making and Documenting Efforts to Take All Socioeconomic “Affirmative” Steps**

The non-state entity must take the six steps to involve small and minority businesses, women’s business enterprises, and labor surplus area firms (collectively, target firms) in the procurement process:

1. Place qualified socioeconomic firms on solicitation lists;
2. Assure that socioeconomic firms are solicited whenever they are potential sources;
3. Divide total requirements, when economically feasible, into smaller tasks or quantities;
4. Establish delivery schedules, where the requirement permits, which encourage participation by socioeconomic firms;
5. Use the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Minority Business Development Agency of the Department of Commerce; and
6. Require prime contractors to take steps (1) through (5) if they use subcontractors.

In most instances, local or state programs, such as Historically Underutilized Businesses initiatives and set-asides / quotas for use of these types of businesses, cannot replace or be substituted for a non-state entity taking the six affirmative steps provided in the regulation.

### **6. Improperly Awarding a “Time-and-materials” (T&M) Contract**

T&M contracts can be used for a reasonable period of time only when: (1) there is a determination made that no other contract is suitable; (2) The contract includes a ceiling price that the contractor exceeds at its own risk; (3) the applicant maintains a high degree of contractor oversight; and (4) the T&M contract is used only for a reasonable amount of time.

This type of contract is often used where the scope of work or the duration of the work is unclear. Because this type of contract requires significant oversight to ensure costs are reasonable, the non-state entity should start thinking about switching to a different type of contract as soon as it awards a T&M contract.





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Once the scope of work becomes clear, the non-state entity must switch to a different type of contract, like a cost reimbursement or fixed price contract.

### **7. Not Including the Required Contract Clauses**

A non-state entity's contracts must contain the applicable contract clauses required by 2 C.F.R. § 200.326 and described in Appendix II to the Uniform Rules. Some of the provisions are based on sound contracting principles and others are required by other Federal laws, executive orders, or regulations. For a detailed list of the required contract clauses, please review the PDAT Contract Provisions Template which can be found [here](#).

### **8. Awarding a Prohibited “Cost-plus-percentage-of-cost” or “Percentage-of-construction-cost” Contract**

These are contracts where the contractor's profit is based on a percentage of the underlying project costs actually incurred. Such contracts are explicitly prohibited by the federal procurement standards and ineligible for FEMA grant funding because they incentivize the contractor to increase their actual cost to increase the associated profit. Non-state entities should work closely with their attorneys and procurement staff to read contracts carefully to ensure these types of provisions are not included in a contract, as they can be difficult to identify.

### **9. Awarding a Contract to Contractors that Were Suspended or Debarred**

Any contractors that have been suspended or debarred by a federal agency cannot receive a federal award or contract. (See 2 C.F.R. pt. 3000). Prior to entering into a contract, the non-state entity should go to the System of Award Management website at [sam.gov](http://sam.gov) to check if their anticipated contractor has been suspended or debarred. If they have, per federal regulation, they are not eligible to receive payment under a contract supported by a federal award.

### **10. Not Properly Documenting All Steps of a Procurement**

A non-state entity must maintain sufficiently detailed records that document the procurement history. These records must include, but are not necessarily limited to, the following: rationale for the method of procurement, selection of contract type, contractor





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selection or rejection, and the basis for the contract price. 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

### Beyond the Top 10 Mistakes

Below are other items that non-state entities should be aware of:

**Piggyback Contracts.** Adopting a pre-existing contract solicited and awarded by another entity is referred to as "piggybacking." This practice is challenging because it is difficult to execute these agreements in compliance with the federal procurement rules. However, if a non-entity entity obtains contractual rights through assignment, it may properly use this type of contract under a grant award if it determines that:

- The original contract was procured in compliance with 2 C.F.R. §§ 200.318-200.326;
- 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;
- The contract contains all the federally required contract provisions;
- The scope of work to be performed falls within the scope of work under the original contract and there are no changes to the contract that fall outside of what was reasonably considered by the parties when they entered into the contract;





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- 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 federal regulations require the recipient or subrecipient 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 and thus should not be used; and
- 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.

**Additional information and resources about non-state entity requirements under the federal procurement standards can be found at the following webpage: [www.fema.gov/procurement-disaster-assistance-team](http://www.fema.gov/procurement-disaster-assistance-team).**

