

The federal government has enacted several financial stimuli and emergency grants to assist both the public and private sectors. For private, nonprofit healthcare providers that own or operate medical facilities, one form of this relief may be FEMA grants. Private for-profit providers can be contracted by a state, local, tribal or territorial entity to fulfill this role and be reimbursed for those costs.

While this funding opportunity is ultimately good news, there are certain compliance requirements that may not be business-as-usual practices for many nonprofit providers. This article explores the procurement and documentation requirements associated with obtaining and retaining these vital emergency grants.

Procurement Under Grants

One of the most common missteps in compliance revolves around a private nonprofit provider being unfamiliar with FEMA procurement requirements. FEMA grant programs are subject to the Federal Procurement Standards (2 CFR Parts 200.317–200.326). The following rules apply to these grants:

- 2 CFR Part 200 establishes requirements for the exigency or emergency exception that permits the use of noncompetitive procurement procedures (sole sourcing). Both FEMA and the U.S. Department of Health & Human Services Office of Inspector General closely review procurement actions and contract selections, with emphasis on noncompetitive procurements, to evaluate compliance with federal requirements.
- Failure to follow federal contracting and procurement requirements puts applicants at risk of not receiving reimbursement or not being able to use FEMA grant funds for otherwise eligible costs.
- FEMA approval is not required for use of noncompetitive procurements under the exigency or emergency exception; however, the nonstate entity must document its justification for using noncompetitive procurements, still comply with other procurement requirements and verify all costs are reasonable.
- FEMA may review a provider's justification that exigent or emergency circumstances warrant an exception to competitive procurement. If the agency determines these circumstances did not exist or did not preclude a nonstate entity from adhering to competitive procurement requirements, FEMA may disallow all or part of the nonstate entity's cost related to the contract or take other permitted action.

Required Supporting Documentation

Note: The guidance provided in this section can be found in FEMA's checklist on public assistance contracting.

Justification must be included in a provider's records for each FEMA award, subaward or project. The following is a list of elements providers may include as part of their written justification:

- Identification of which four circumstances listed in 2 CFR Part 200.320(f) justify a noncompetitive procurement, such as:
 - The item is available only from a single source
 - The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation
 - The federal awarding agency or pass-through entity expressly authorizes noncompetitive proposals in response to a written request from the nonfederal entity
 - After solicitation of several sources, competition is determined to be inadequate
- A brief description of the product or service being procured, including the expected amount of the procurement
- Explanation of why a noncompetitive procurement is necessary. The justification should explain the nature of the exigency or emergency, including specific conditions and circumstances that clearly illustrate why procurement other than through noncompetitive proposals would cause an unacceptable delay
- Statement of how long the noncompetitively procured contract will be used for the defined scope of work and the effect on that scope of work should the noncompetitively procured contract not be available for that amount of time, *e.g.*, how long do you anticipate the exigency or emergency circumstances will continue; how long will it take to identify your requirements and award a contract that complies with all procurement requirements; or how long would it take another contractor to reach the same level of competence?
- Description of the specific steps taken to determine that full and open competition could not have been used, or was not used, for the scope of work, *e.g.*, research conducted to determine that there were limited qualified resources available that could meet the contract provisions
- Description of any known conflicts of interest and any efforts made to identify possible conflicts of interest before the noncompetitive procurement occurred. If no efforts were made, explain why. If a conflict of interest is unavoidable, explain how it was unavoidable and any steps taken to address the effect of the conflict of interest
- Any other information justifying the use of noncompetitive procurement in the specific instance

Private nonprofit providers must comply with the following requirements even when exigency or emergency circumstances exist:

- Contracts must include the required contract clauses (2 CFR Part 200.326 and Appendix II)

- Contracts exceeding the federal simplified acquisition threshold must include the federal bonding requirements if the contract is for construction or facility improvement (2 CFR Part 200.325)
- Contracts must be awarded to a reasonable contractor (2 CFR Part 200.318(h))
- The provider must complete a cost or price analysis to determine the cost or price of the contract is fair and reasonable if the contract exceeds or is expected to exceed the federal simplified acquisition threshold (2 CFR Part 200.323(a) and (b))
- The use of cost-plus-percentage-of-cost contracting is prohibited (2 CFR Part 200.323(c))
- Use of time and materials (T&M) contracts must comply with 2 CFR Part 200.318(j)
- The nonstate entity must follow certain documentation, oversight and conflict of interest requirements among other general procurement requirements in 2 CFR Part 200.318. If a conflict of interest is unavoidable due to the exigency or emergency circumstances, the nonstate entity must explain that in the procurement documentation
- If the provider wants to use a pre-awarded or pre-existing contract that is not in compliance with the federal procurement requirements, FEMA recommends that the provider reviews the list of procurement requirements found at 2 CFR Part 200 and takes actions to modify pre-awarded or pre-existing contracts where applicable. The nonstate entity also would need to prepare documentation supporting the noncompetitive procurement
- FEMA advises against the use of T&M contracts by nonstate entities and generally limits the use of these contracts to a short period of time where the scope or duration of work is unclear. T&M contracts do not incentivize contractors to control costs or enhance labor efficiency. FEMA may reimburse costs incurred under a T&M contract only if all the following apply:
 - No other contract was suitable
 - The contract has a ceiling price that the contract exceeds at its own risk
 - The nonstate entity can demonstrate it provided a high degree of oversight to obtain reasonable assurance the contractor used efficient methods and effective cost controls

FEMA prohibits the use of cost-plus-percentage-of-cost contracts or contracts with a percentage-of-construction-cost method by nonstate entities.

Detailed procurement and contracting information is available on [FEMA's Procurement Disaster Assistance](#) website. While the guidance is specifically available to FEMA's Public Assistance Grant Program, it is a useful resource for FEMA's other grant programs, as the procurement requirements in 2 CFR Part 200 apply to all FEMA grant programs.

Due to the rapidly changing information regarding COVID-19, all guidance contained in this article is current as of the date of publication. If you have questions or need assistance, reach out to your **BKD Trusted Advisor™**

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