



## Public Assistance: Procurement Conducted Under Exigent or Emergency Circumstances

The Federal Emergency Management Agency (FEMA) Public Assistance (PA) Program provides supplemental assistance to states, territories, tribes, and local governmental entities, as well as certain private non-profit organizations (applicants) following major disasters and emergencies declared by the President. FEMA's *Public Assistance Program and Policy Guide* (<http://www.fema.gov/public-assistance-policy-and-guidance>) provides comprehensive information regarding assistance that FEMA can make available, and the requirements that applicants must follow in order to receive the assistance. This Fact Sheet provides key information that non-state applicants need to consider when utilizing contracted resources under exigent or emergency circumstances.

Federal regulations (2 C.F.R. Part 200 – Uniform Administrative Requirements, Cost Principles, and Audit Requirements For Federal Awards) establish requirements for non-state applicants concerning the exigency or emergency exception that permits the use of noncompetitive procurements, frequently referred to as “sole-source contracting.” These exceptions and associated procurement requirements are discussed further below. The information presented within applies to all categories of work under the PA Program. Emergency work funded under Category A (Debris Removal) and Category B (Emergency Protective Measures) is most often associated with a public exigency or emergency. However, there may be instances where exigent or emergency circumstances necessitate the use of noncompetitive procurements for permanent work (Categories C-G). The answers to the frequently asked questions below provide additional guidance on the acceptable use of noncompetitive proposals under exigent or emergency circumstances, which is described in regulation at 2 C.F.R. § 200.320(f)(2).

It is essential that all applicants understand that both FEMA and the U.S. Department of Homeland Security's Office of Inspector General (OIG) closely review applicant procurement actions and contract selections, with a particular emphasis on noncompetitive procurement actions, to evaluate compliance with Federal requirements. ***Failure to follow federal contracting and procurement requirements puts applicants at risk of not receiving reimbursement for otherwise eligible disaster costs.***

### **What is the exigency or emergency exception?**

Non-state applicants must follow the procurement requirements found at 2 C.F.R. §§ 200.317 – 200.326. However, Federal regulations allow for noncompetitive procurements under certain circumstances, including when a non-state applicant determines that immediate actions required to address the public exigency or emergency cannot be delayed by a competitive solicitation. This represents an exception to requirements for full and open competition. FEMA approval is not required for use of noncompetitive procurements under the emergency or exigency exception, however, the use of noncompetitive procurements does not relieve non-state applicants from complying with other procurement requirements or from ensuring that costs are reasonable.

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***“FEMA’s mission is to support our citizens and first responders to ensure that as a nation we work together to build, sustain, and improve our capability to prepare for, protect against, respond to, recover from, and mitigate all hazards.”***

When referring to procurement activity, FEMA defines both exigency and emergency as situations that demand immediate aid or action. The difference between the two is that:

- In the case of an **exigency**, there is a need to avoid, prevent or alleviate serious harm or injury, financial or otherwise, to the applicant, and use of competitive procurement proposals would prevent the urgent action required to address the situation. Thus, a noncompetitive procurement may be appropriate.
- In the case of an **emergency**, a threat to life, public health or safety, or improved property requires immediate action to alleviate the threat.

While emergency conditions generally are short-lived, exigent circumstances can exist for a period of weeks or months.

**Exigency Example:** A tornado impacts a city 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 use by the beginning of the school year in September. The city estimates, based on past experience, that awarding a contract using a sealed bidding process would require at least 90 days, and the city’s engineer estimates that the repair work would last another 60 days. This would extend the project beyond the beginning of the school year. Rather than conducting a sealed bidding process, the city—in compliance with State and local law—wants to sole source with a contractor it has contracted with previously. The City can demonstrate that this constitutes an “exigent circumstance” because use of a sealed bidding process would cause an unacceptable delay and thus procurement by non-competitive methods was necessary based on the particular situation.

**Emergency Example:** Severe weather impacts a city and causes widespread and catastrophic damage, including loss of life, widespread flooding, 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 removal activities immediately to restore access to the community, support search and rescue operations, power restoration, and address health and safety concerns. Under these circumstances, the city may find it necessary to award noncompetitive contracts to address threats to life, property and public health.

### **When does the exigency or emergency exception apply and for how long?**

Use of the public exigency or emergency exception *is only permissible during the actual exigent or emergency circumstances*. Exigency or emergency circumstances will vary for each incident, thus it is difficult to determine in advance or assign a particular time frame when noncompetitive procurements may be warranted. Exigent or emergency circumstances may exist for two days, two weeks, two months or even longer in some cases. Non-state applicants must ensure that work performed under the noncompetitively procured contracts is specifically related to the exigent or emergency circumstance in effect at the time of procurement. Importantly, because the exception to competitive procurement is available only while the exigent or emergency circumstances exist, applicants should, upon awarding a noncompetitive contract, immediately begin the process of competitively procuring similar goods and services in order to transition to the competitively procured contracts as soon as the exigent or emergency circumstances cease to exist.

FEMA may review a non-state applicant’s justification that exigent or emergency circumstances warrant an exception to competitive procurement. If the agency determines that exigent or emergency

circumstances did not exist or did not preclude a non-state applicant from adhering to competitive procurement requirements, FEMA may disallow all or part of the non-state applicant's cost related to the contract. (2 C.F.R. 200.338)

**What documentation is required to support the use of the exigency or emergency exception?**

While FEMA approval is not required to use noncompetitive procurement proposals under the emergency or exigency exception, non-state applicants must document and provide justification for the use of the exigent or emergency exception. A list of elements that applicants may wish to include as part of its written justification can be found at the end of this Fact Sheet. The justification must be included in the non-state applicant's records for each Public Assistance-funded project.

**Do any Federal procurement requirements apply if a non-state applicant is sole sourcing a contract under exigent or emergency circumstances?**

Yes, non-state applicants must comply with the following requirements, regardless of whether exigent or emergency circumstances exist:

- Contracts must include the required contract clauses (2 C.F.R. 200.326 & Appendix II);
- Contracts must include the Federal bonding requirements if the contract is for construction or facility improvement (2 C.F.R. 200.325);
- Contracts must be awarded to a responsible contractor (2 C.F.R. 200.318(h));
- The non-state applicant must complete a cost or price analysis to determine that the cost or price of the contract is fair and reasonable; (2 C.F.R. 200.323(a) and (b));
- The use of cost-plus-percentage-of-cost contracting is prohibited (2 C.F.R. 200.323(c)).
- Use of time and materials contracts must comply with 2 C.F.R. 200.318(j)

**What if the non-state applicant wants to use a pre-awarded or pre-existing contract in an exigency or emergency, and that contract does not comply with the Federal procurement requirements?**

If a pre-awarded or pre-existing contract is not in compliance with the Federal procurement requirements (e.g., the contract was not fully and openly competed, or the six affirmative socioeconomic contracting steps were not completed (2 CFR 200.321)), it may still be possible to use the contract for the duration of the exigency or emergency. FEMA recommends that applicants review the list of procurement requirements above and take actions to modify pre-awarded or pre-existing contracts where applicable. In addition, applicants must prepare the appropriate documentation to justify the use of a noncompetitively procured contract.

**Can non-state applicants use Time and Materials (T&M) contracts in an exigency or emergency?**

Yes, but only under certain circumstances. FEMA advises against the use of T&M contracts and generally limits the use of these contracts to a short time period where the scope or duration of the work is unclear. T&M contracts do not incentivize contractors to control costs or maximize labor efficiency. FEMA may reimburse costs incurred under a T&M contract only if all of the following apply:

- No other contract was suitable;
- The contract has a ceiling price that the contractor exceeds at its own risk; and
- The applicant can demonstrate it provided a high degree of oversight to obtain reasonable assurance that the contractor used efficient methods and effective cost controls.

**Can a non-state applicant award cost-plus-a-percentage-of-cost contracts or contracts with a percentage-of construction-cost method in an exigency or emergency?**

No. This prohibition applies to all work, regardless of the circumstances (2 C.F.R. § 200.323(d)).

**Can non-state applicants use *piggyback* contracts in an exigency or emergency?**

Piggyback contracting occurs when one entity assigns the contractual rights it has in a contract to a non-state applicant. Generally, FEMA discourages piggyback contracts because the original contract pertains to the needs of the original entity, with a specific scope of work for that entity. While there may be circumstances when piggybacking is permissible, in almost all instances, the scope of work would need to be changed to include the needs of a non-state applicant, and changes to the scope of work are generally not permitted as there is not likely to be full and open competition for the expanded scope of work. However, during emergency and exigency circumstances, non-state applicants may be able to piggyback another entity's contract and expand the scope of a contract for the period of the emergency or exigency circumstance.

Note that a non-state applicant may choose to enter into a separate contract with the same contractor as another entity, using the same terms and conditions as in that other entity's contract, with only a change in the scope of work and the associated costs. However, this is sole-source contracting rather than piggyback contracting and it must meet the requirements for noncompetitive procurement under exigency or emergency circumstances as described elsewhere in this Fact Sheet.

***If a non-state applicant is contemplating the use of piggyback contracting, they should contact their state or territory liaison to request FEMA assistance with contract review.***

**Can States use Time and Materials (T&M) or Cost Plus Percentage of Cost contracts in an exigency or emergency?**

2 C.F.R. § 200.317 requires state applicants to follow: (1) the same policies and procedures they use for procurements using non-Federal funds; (2) 2 C.F.R. §200.322 (procurement of recovered materials); and (3) 2 C.F.R. §200.326 (required contract provisions). These requirements apply regardless of whether exigency or emergency circumstances exist. For purposes of the federal procurement requirements, states are defined as the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, the Commonwealth of Northern Mariana Islands, and any agency or instrumentality thereof except for local governments. Tribal governments are not considered to be States when applying federal procurement standards required by 2 C.F.R. Part 200.

States must ensure that they are in compliance with the cost principles in 2 C.F.R. §§200.400 – 200.474, including ensuring that costs are reasonable, as defined in 2 C.F.R. § 200.404. While the federal procurement rules do not prohibit the use of T&M contracts and Cost Plus Percentage of Cost contracts by state entities, FEMA discourages states from using these contracts because they generally lack provisions that control costs and maximize efficiency in performing work. FEMA and the OIG closely scrutinize these types of contracts for cost reasonableness.

Although T&M contracts are discouraged, there may be instances where T&M contracts are appropriate in the short term for activities such as debris removal, emergency power restoration, or other immediate actions required to address emergency health and safety threats. States entering into T&M contracts are encouraged to include language in the contract that specifies a ceiling price and limits the duration of the

contract to a short time period, thus providing the state time to develop a scope of work and transition to the more competitive procurement procedures.

### **Additional Information and Resources**

Non-state applicants should consult as soon as possible after a declared disaster with all appropriate parties, including legal counsel, to review their procurement policies, actions and contracts against federal procurement requirements. Non-state applicants also should contact their State or Territory liaisons to request assistance with any procurement activity concerns.

Detailed procurement and contracting information is available on the FEMA website at [www.fema.gov/procurement-disaster-assistance-team](http://www.fema.gov/procurement-disaster-assistance-team). FEMA's *Public Assistance Program and Policy Guide* is available at (<http://www.fema.gov/public-assistance-policy-and-guidance>), and the Code of Federal Regulations referenced in this guidance can be accessed at [www.eCFR.gov](http://www.eCFR.gov).

## Suggested Elements for Noncompetitive Procurement Justification

1. Identify which of the four circumstances listed in 2 C.F.R. § 200.320(f) justify a non-competitive procurement:
  - (1) The item is available only from a single source;
  - (2) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;
  - (3) The Federal awarding agency or pass-through entity expressly authorizes noncompetitive proposals in response to a written request from the non-Federal entity; or
  - (4) After solicitation of a number of sources, competition is determined inadequate.
2. Provide a brief description of the product or service being procured, including the expected amount of the procurement.
3. Explain why a noncompetitive procurement is necessary. The justification should explain the nature of the public exigency or emergency, including specific conditions and circumstances that clearly illustrate why procurement other than through noncompetitive proposals would cause unacceptable delay in addressing the public exigency or emergency. (Failure to plan for transition to competitive procurement cannot be the basis for continued use of noncompetitive procurement based on public exigency or emergency).
4. State how long the non-competitively procured contract will be used for the defined scope of work, and the impact 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).
5. Describe 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).
6. Describe any known conflicts of interest and any efforts that were made to identify possible conflicts of interest before the noncompetitive procurement occurred. If no efforts were made, explain why.
7. Include any other information justifying the use of noncompetitive procurement in the specific instance.

*NOTE: A separate justification is required for each instance of noncompetitive procurement.*