Grizzly Flats Community Services District
Notice of Special Business Meeting of the Board

Date: Thursday, October 27, 2022 Time: 6:00 PM
Location: The Grizzly Flats CSD Office (4765 Sciaroni Rd., Grizzly Flats, CA)

To participate, call 1-(978)-990-5230 and enter access code 840700#

AGENDA

A. CALL TO ORDER, ROLL CALL OF THE BOARD MEMBERS and **SALUTE TO THE FLAG**

B. APPROVAL OF THE AGENDA

C. PUBLIC COMMENT: Items not on the agenda

This is an opportunity to express your views on any topic within the jurisdiction of the District in order to inform the Board. Once recognized by the Chair, you will have 3 minutes to speak. No discussion or action can be taken at this time. The Board may refer the matter to staff or determine whether the matter should be included on a future agenda.

D. DISCUSS FEDERAL PROCUREMENT REQUIREMENTS

E. ADJOURN

- *In compliance with the Americans with Disabilities Act, contact Kim Gustafson at gfwater@sbcglobal.net or (530) 622-9626 if you need special assistance to participate in this meeting. Notification 48 hours prior to the meeting will enable the District to make reasonable arrangements to ensure accessibility to this meeting. (28FR35.102-35.104 ADA Title 11).*
- ***Our next regular Board meeting will be held at the GFCSD office on Thursday, November 10, 2022, at 6:00 PM.***

This institution is an equal opportunity provider and employer.

STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
1102 Q Street • Suite 3000 • Sacramento, CA 95811
(916) 322-5660 • Fax (916) 322-0886

August 15, 2018

Jose M. Sanchez
Interim City Attorney
City of Turlock
555 Capitol Mall, Suite 1200
Sacramento, CA 95814

Re: Your Request for Advice
Our File No. A-18-157

Dear Mr. Sanchez:

This letter responds to your request for advice regarding the conflict of interest provisions of Government Code section 1090. Please note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

Regarding our advice on Section 1090, we are required to forward your request and all pertinent facts relating to the request to the Attorney General's Office and the Stanislaus County District Attorney's Office, which we have done. (Section 1097.1(c)(3).) We did not receive a written response from either entity. (Section 1097.1(c)(4).) We are also required to advise you that, for purposes of Section 1090, the following advice "is not admissible in a criminal proceeding against any individual other than the requestor." (See Section 1097.1(c)(5).)

QUESTION

Does Section 1090 prohibit the City of Turlock from contracting with Carollo Engineers to provide engineering design services during construction of a project if Carollo previously provided pre-construction design services that served as a basis for the contract to perform the actual construction of the same project.

CONCLUSION

No. Based on the facts provided, Section 1090 does not prohibit the City from entering this contract with Carollo because it did not participate in the making of the engineering design services contract through its performance of the pre-construction design services required by the initial contract.

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FACTS AS PROVIDED BY REQUESTOR

You are the Interim City Attorney for the City of Turlock seeking advice on behalf of the City regarding the conflict of interest provisions under Section 1090. We take verbatim the following facts from your letter:

> The City is currently engaged in developing the North Valley Regional Recycled Water Project (hereafter the "Project"). The Project includes the construction of approximately seven miles of pipeline and related structures for the conveyance of tertiary recycled water from the City of Turlock to the recently constructed recycled water pump station at the City of Modesto Jennings Facility. The City contracted with a consulting engineering firm for engineering and design services for the Project that included professional services up to and including the award of bid for the Project ("Pre-Construction Design Services"). The City selected Carollo Engineers ("Carollo") to perform the Pre-construction Design Services and entered into a contract with Carollo to perform said services. The City recently opened bids for the construction of the Project, and is ready to proceed with selection of a general contractor to build the Project. To assist with construction, the City will need to retain a consultant to perform both engineering design services during construction ("EDSDC") and construction management services ("CMS").[1]
>
> For complex projects, such as the Project, the design process continues during construction. Final project drawings, plans, and written specifications (Contract Documents) are prepared in order to allow a basis for competitive bid and award of a contract to a responsible and responsive construction contractor submitting the lowest price. The application and interpretation of Contract Documents continues throughout the construction process. EDSDC consists of reviewing and responding to the construction contractor's submittals, requests for information, and proposed changes orders, as well as preparing design clarifications and attending on-site construction progress meetings. These are engineering decisions that directly impact and modify the final design based on actual conditions encountered during the construction process.
>
> There are cases when bankruptcy, inferior performance, death, or another inability would cause the owner to select an engineer other than the design engineer to provide EDSDC, though the standard industry best practice is for the engineer who performed the Pre-Construction Design Services to also provide the EDSDC. This is because the engineer who provided the Pre-Construction Design Services understands the design intent, and can interpret the Contract Documents

[1] Carollo does not seek to provide services relating to the actual construction or construction management.

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> to make sure the responses to the contractor's inquiries and proposed changes meet the overall project objectives developed and vetted with the project's owner during the extensive design-review process. If anyone other than the original engineer provides the EDSDC, that new engineer would not be aware of the decision making that went into the creation of the Contract Documents. This in turn would create an inefficient and more costly method of project delivery, as the new engineer would need to review and become familiar with the contract documents, meeting notes, and other background information that informs the subsequent design decisions made by the design engineer and owner. Without the benefit of experience, the new engineer could make decisions, responses, and interpretations that are not consistent with the project goals or intent.

ANALYSIS

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Section 1090 is concerned with financial interests, other than remote or minimal interests, that prevent public officials from exercising absolute loyalty and undivided allegiance in furthering the best interests of their agencies. (*Stigall v. Taft* (1962) 58 Cal.2d 565, 569.) Section 1090 is intended "not only to strike at actual impropriety, but also to strike at the appearance of impropriety." (*City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, 197.)

Under Section 1090, "the prohibited act is the making of a contract in which the official has a financial interest." (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.) A contract that violates Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Id.* at pp. 646-649.)

Section 1090 provides, in part, that "[m]embers of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members."

Courts have long found that independent contractors that serve in advisory positions that have a potential to exert considerable influence over the contracting decisions of a public agency are subject to Section 1090. (See *Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114, 1124-1125; *Schaefer v. Berinstein* (1956) 140 Cal.App.2d 278, 291 ["statutes prohibiting personal interests of public officers in public contracts are strictly enforced. [Citation.] ... [¶]... A person merely in an advisory position to a city is affected by the conflicts of interest rule"].)

The California Supreme Court recently affirmed this long-standing rule when it held that "[i]ndependent contractors come within the scope of section 1090 when they have duties to engage in or advise on public contracting that they are expected to carry out on the government's behalf." (*People v. Superior Court* (*Sahlolbei*) (2017) 3 Cal.5th 230, 245 [physician working as an

independent contractor for District Hospital and "tasked with engaging in and advising on physician recruitment" is expected to be faithful to the public in performing those duties and comes within the scope of Section 1090.) This applies equally to corporate consultants. (*Davis v. Fresno Unified School District* (2015) 237 Cal.App.4th 261, 300.)

Here, the City contracted with Carollo to engage in and advise on "[f]inal project drawings, plans, and written specifications (Contract Documents) . . . in order to allow a basis for competitive bid and award of a contract to a responsible and responsive construction contractor." Under these facts, Carollo comes within the ambit of Section 1090.

The determinative question therefore is whether Carollo's work on the initial contract constitutes making or participating in making the second contract for engineering design services during the construction phase. We do not believe it does.

In *Sahlolbei, supra*, the Supreme Court explained that "Section 1090 prohibits officials from being 'financially interested in any contract made by them in their official capacity.' Officials make contracts in their official capacities within the meaning of section 1090 if their positions afford them 'the opportunity to ... influence execution [of the contracts] directly or indirectly to promote [their] personal interests' and they exploit those opportunities." (*Sahlolbei, supra*, at p. 246 quoting *People v. Sobel* (1974) 40 Cal.App.3d 1046, 1052.) For purposes of Section 1090, participating in making a contract is defined broadly as any act involving preliminary discussions, negotiations, compromises, reasoning, planning, drawing plans and specifications, and solicitations for bids. (*Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237; see also *Stigall, supra*, at p. 569.)

The scope of what it means to participate in the making of a contract was illustrated by the *Stigall* matter, where a demurrer to the complaint that alleged a violation of Section 1090 was sustained by the trial court and subsequently reversed by the California Supreme Court. There, a city councilmember who oversaw the council's building committee owned more than 3 percent of a plumbing company. (*Stigall, supra*, at pp. 567.) The building committee had responsibility for drawing of plans and specifications in connection with the construction of a civic center. (*Ibid.*) After bids for the civic center's construction had been submitted, it was revealed that the councilmember's company was the low bidder for the plumbing. (*Ibid.*) The councilmember resigned from the council after objections resulted in a new round of bidding. (*Ibid.*) After this resignation, the construction contract was awarded to a general contractor that included the former councilmember's plumbing company as a subcontractor. (*Ibid.*)

In determining whether the councilmember "made" the contract for purposes of Section 1090, the Supreme Court stated it must "construe its statutory meaning to encompass the planning, preliminary discussions, compromises, drawing of plans and specifications and solicitation of bids, in all of which [the councilmember] participated." (*Id.* at p. 571.)

In the *Davis* matter, a school district owned land and leased it to a contractor that would build school facilities on the site, and lease the improvements and site back to the district. (*Davis, supra*, at p. 271.) The contracts were a site lease and a facilities lease (collectively, the Lease-Leaseback Contracts). (*Ibid.*) But prior to awarding the Lease-Leaseback Contracts, it was alleged

the district had entered into a different agreement with the contractor to serve as a consultant to develop plans, specifications and other construction documents for the new school facilities. (*Id.* at p. 295.) Under this scenario, the court of appeal found that, for purposes of demurrer, the allegations were sufficient to show the contractor participated in making of the Lease-Leaseback Contracts. (*Id.* at p. 301.)

In the *Chadwick* Advice Letter, No A-15-147, an independent contractor was involved in designing a golf course project that it then wished to bid on and build. There, the contractor entered into a contract with the city to develop a general plan that would lay out the design of a reconstructed golf course. The contractor advised the city, worked closely with city staff and the project manager, and ultimately designed and developed the plan that later became the RFP. The contractor had been intricately involved in designing the RFP and the RFP was specific on exactly how the project was to be completed. We concluded that Section 1090 applied to prohibit the independent contractor from bidding on the city contract.

The present situation is distinguishable from those matters. In all of them, the independent contractors plainly had the opportunity to participate in their official capacities in the making of subsequent contracts in which they had a financial interest. Here, by contrast, Carollo's initial contract with the City required that it prepare final project drawings, plans, and written specifications (Contract Documents) that would serve as a basis for the award of a contract to a construction contractor who will actually build the Project. Carollo has no financial interest in this contract because it does not seek to build the Project.

Instead, Carollo seeks to provide the engineering design services during construction of the Project, responsible for reviewing and responding "to the construction contractor's submittals, requests for information, and proposed changes orders, as well as preparing design clarifications and attending on-site construction progress meetings." It is plain that Carollo's pre-construction design services did not determine the scope of the engineering design services during construction, which is dependent upon inquiries and requests from the contractor who builds the project. In fact, these engineering services during construction would simply be a continuation of the same pre-construction design services Carollo has already provided.

Your facts state that it is the standard industry best practice to select the engineer who performed the pre-construction design services to then do the engineering design services during construction. Having performed the pre-construction design services, Carollo will obviously be in a better position than other engineers to understand the design intent, interpret the Contract Documents and ensure responses to the contractor's inquiries and proposed changes meet the overall project objectives. That Carollo may be in a favorable position to perform these responsibilities is simply a byproduct of its participation in making a different contract in which it has no financial interest. In this case, no interest is served in disqualifying Carollo from subsequently bidding on the contract for engineering design services during construction based upon its participation in making a different contract for the actual construction of the Project.

Accordingly, the conflict of interest provisions of Section 1090 do not prohibit the City from entering a contract with Carollo for the engineering design services during construction of the Project.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Brian G. Lau
Acting General Counsel

By: Jack Woodside
Senior Counsel, Legal Division

JW:jgl

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STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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November 15, 2019

Hilda Cantu Montoy, Esq.
Montoy Law Corporation
2440 Tulare St, Suite 410
Fresno, CA 93721

Re: Your Request for Advice
Our File No. A-19-176

Dear Ms. Montoy:

This letter responds to your request for advice on behalf of the Selma-Kingsburg-Fowler County Sanitation District regarding Government Code section 1090, *et seq.*[1] Please note that we are only providing advice under section 1090, not under other general conflict of interest prohibitions such as common law conflict of interest, including Public Contract Code.

Also, note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71); any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

We are required to forward your request regarding section 1090 and all pertinent facts relating to the request to the Attorney General's Office and the Fresno County District Attorney's Office, which we have done. (Section 1097.1(c)(3).) We did not receive a written response from either entity. (Section 1097.1(c)(4).) We are also required to advise you that, for purposes of section 1090, the following advice "is not admissible in a criminal proceeding against any individual other than the requestor." (Section 1097.1(c)(5).)

QUESTION

Does section 1090 prohibit the Selma-Kingsburg-Fowler County Sanitation District from contracting with Herwit Engineering for construction management of its Secondary Clarifiers Mixed Liquor Line Improvements Project, when Herwit assisted with pre-construction design bid plans and specifications of the project?

[1] Government Code Sections 1090 through 1097.5. All statutory references are to the Government Code, unless otherwise indicated.

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CONCLUSION

No. Based on the facts provided, section 1090 does not prohibit the District from entering into another contract with Herwit Engineering for construction management of the project because there is no indication Herwit exerted influence on the District in the construction management contract through its performance of pre-construction design services under the initial contract.

FACTS AS PRESENTED BY REQUESTER

The Selma-Kingsburg-Fowler County Sanitation District contracted with Herwit Engineering to assist with design bid plans and specifications on its Secondary Clarifiers Mixed Liquor Line Improvements Project. The design was then reviewed by the District staff. District staff independently prepared the bid package seeking potential bidders on the construction project. The District staff used their standard bid package forms and included Herwit Engineering's design specifications in the package.

After issuing the bid package for the construction phase of the project, District staff solely reviewed the bids it received in response. The District Board of Directors awarded the contract for construction of the project to the lowest responsible bidder.

The bid-successful construction firm has no connection with Herwit Engineering. Only the construction firm will perform the construction of the project. Herwit will not perform any construction.

The District issued a request for proposals in anticipation of entering into a second contract for construction management services of the project. Herwit Engineering did not participate in any way in the development and issuance of the request. Herwit was one of two bidders that submitted a response to the request. The District currently intends to award construction management services to Herwit and inquires whether doing so is permissible under section 1090.

ANALYSIS

Section 1090 provides, in part, that "[m]embers of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members."

Section 1090 is concerned with financial interests, other than remote or minimal interests, that prevent public officials from exercising absolute loyalty and undivided allegiance in furthering the best interests of their agencies. (*Stigall v. Taft* (1962) 58 Cal.2d 565, 569.) Section 1090 is intended "not only to strike at actual impropriety, but also to strike at the appearance of impropriety." (*City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, 197.)

Under section 1090, "the prohibited act is the making of a contract in which the official has a financial interest." (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.) A contract that violates section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Id.* at pp. 646-649.)

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Courts have long found that independent contractors that serve in advisory positions that have a potential to exert considerable influence over the contracting decisions of a public agency are subject to section 1090. (See *Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114, 1124-1125; *Schaefer v. Berinstein* (1956) 140 Cal.App.2d 278, 291.)

The California Supreme Court recently affirmed this long-standing rule when it held that "[independent contractors come within the scope of section 1090 when they have duties to engage in or advise on public contracting that they are expected to carry out on the government's behalf." (*People v. Superior Court* (*Sahlolbei*) (2017) 3 Cal.5th 230, 245 [physician working as an independent contractor for District Hospital and "tasked with engaging in and advising on physician recruitment" is expected to be faithful to the public in performing those duties and comes within the scope of section 1090].) This applies equally to corporate consultants. (*Davis v. Fresno Unified School District* (2015) 237 Cal.App.4th 261, 300.)

Here, the determinative question is whether Herwit Engineering's work on the pre-construction design services related to the construction contract constitutes making or participating in making the contract for construction management services. Based on the information provided, we do not believe that it does.

In *Sahlolbei*, the Supreme Court explained that "Section 1090 prohibits officials from being 'financially interested in any contract made by them in their official capacity.' Officials make contracts in their official capacities within the meaning of section 1090 if their positions afford them 'the opportunity to … influence execution [of the contracts] directly or indirectly to promote [their] personal interests' and they exploit those opportunities." (*Sahlolbei* at p. 246 quoting *People v. Sobel* (1974) 40 Cal.App.3d 1046, 1052.) For purposes of section 1090, participating in making a contract is defined broadly as any act involving preliminary discussions, negotiations, compromises, reasoning, planning, drawing plans and specifications, and solicitations for bids. (*Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal. App.2d 222, 237; see also *Stigall* at p. 569.)

In this case, there is no indication that Herwit Engineering's consulting work on the initial contract afforded it the opportunity to influence the execution of the construction management contract. The construction phase of the project is independent of Herwit's pre-construction design services. District staff independently reviewed Herwit's bid design plans and specifications before incorporating it into their standard bid package for the construction contract. District staff solely reviewed the bids it received in response. The District Board of Directors awarded the construction contract to the lowest responsive and responsible bidder, who has no affiliation with Herwit, and Herwit had no role in the contracting process. Further, the facts do not indicate Herwit influenced the District's process for the construction management contract.

Accordingly, section 1090 does not prohibit the District from awarding the construction management contract to Herwit Engineering.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Dave Bainbridge
General Counsel

By: Ryan O'Connor
Counsel, Legal Division

RPOC:sal

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STATE OF CALIFORNIA
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May 5, 2021

Christian L. Bettenhausen
Westminster City Attorney
Jones & Mayer
3777 N. Harbor Blvd.
Fullerton, CA 92835

Re: Your Request for Advice
Our File No. A-21-021

Dear Mr. Bettenhausen:

This letter responds to your request for advice on behalf of the City of Westminster regarding the Political Reform Act (the "Act")[1] and Section 1090. Please note that our statutory authority to provide advice is limited to the Act and Section 1090. Our analysis is based solely on the facts you provide. Thus, our advice, and any immunity it may provide, is as complete and accurate as the facts provided in your request for advice. If the facts underlying this advice change, then you should contact us for additional advice.

We are required to forward your request regarding Section 1090 and all pertinent facts relating to the request to the Attorney General's Office and the Orange County District Attorney's Office, which we have done. (Section 1097.1(c)(3).) We did not receive a written response from either entity. (Section 1097.1(c)(4).) We are also required to advise you that, for purposes of Section 1090, the following advice "is not admissible in a criminal proceeding against any individual other than the requestor." (See Section 1097.1(c)(5).)

QUESTIONS

(1) Would the Act's conflict of interest provisions prohibit an independent contractor, paid by the City on an hourly basis pursuant to a City contract to oversee a project to redevelop the City's Civic Center, from taking part in governmental decisions relating to the scope of the project given that those decisions could affect the total compensation the City would pay to the contractor under the contract?

(2) Would the Act's reporting provisions require the independent contractor to file Statements of Economic Interests disclosing compensation paid by the City pursuant to the contract?

[1] The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission (the "Commission") are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated. Section 1097.1 sets forth the Commission's jurisdiction with respect to Section 1090 et seq.

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(3) If the City and the independent contractor execute the contract, would Section 1090 prohibit the contractor from analyzing and making recommendations relating to the project's scope given that those decisions may affect the contractor's total compensation under the contract?

CONCLUSIONS

(1) No. The Act's conflict of interest provisions would not prohibit the independent contractor from taking part in decisions relating to the project's scope pursuant to the contract. However, if the decision at issue may result in any additional work and income for the contractor beyond that provided for in that contract, the City should seek further advice.

(2) No. Although the Act's reporting provisions would require the independent contractor to file Statements of Economic Interests if the contract is executed, the contractor would not be required to report fees paid by the City to the contractor pursuant to the contract because those payments are excluded from the Act's definition of "income."

(3) No. Section 1090 would not prohibit the independent contractor from analyzing and making recommendations relating to the project's scope pursuant to the contract.

FACTS AS PRESENTED BY REQUESTER

You are the City Attorney for the City of Westminster. In 2017, the City entered into an exclusive negotiating agreement with a private developer, which has been extended through the present date. Under that agreement, the developer has the right to negotiate with the City concerning the potential sale and development of approximately 4.25 acres of real property owned by the City (the "Project"). That real property is located within the City's Civic Center and includes the land upon which the existing City Hall and Council Chambers and two large parking lots are located.

The Project would include both a public and private component: the private component would consist of approximately 100 residential units, associated parking, and open space; the public component would include, among other things, the construction of a new City Hall, Council Chambers, parking areas, and a public open space for the Civic Center. The Project would involve the construction of the new City facilities, relocation of City staff into the new facilities, the potential sale of approximately 250 city owned parking spaces to the nearby community college district, and other issues associated with financing the public portion of the Project.

Due to the complexity of the Project, and the fact that City staff is already overtaxed on other projects, the City Manager has decided to contract with an experienced independent contractor to serve as the City's project manager for the Project (the "Potential Project Manager Contract"). Because the Project is still in its early phases of design and development, it is unclear at this point how much time or effort will be required by the contractor to successfully complete the Project. The City has proposed compensating the contractor at an hourly rate and using the City's standard consultant contract. The Potential Project Manager Contract would include a cap on total hours, and the contractor would not be authorized to make independent decisions that would increase the amount the contractor would be paid by the City under the Contract. The Contract would require all work done by the contractor to be overseen by the City Manager and the City's

Community Development Director, and all final decisions to be approved by City staff or the City Council depending on the particular decision under consideration.

ANALYSIS

The Act

The threshold issue is whether the independent contractor that would oversee the Project on behalf of the City under the Potential Project Manager Contract would a "public official" subject to the Act's conflict of interest and reporting provisions due to entering into that Contract.

The Act requires public officials to "perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them." (Section 81001(b).) "No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest." (Section 87100.) "The Act's conflict of interest prohibitions apply only to public officials and only governmental decisions that have a financial effect." (Regulation 18700(b).) The term "public official" includes "every member, officer, employee or consultant of a state or local government agency." (Section 82048(a).)

The term "consultant" is defined in Regulation 18700.3(a). Under this definition, an individual who works pursuant to a contract with an agency is a public official if he or she engages in the following activities under the contract:

> (1) Makes a governmental decision whether to:
> (A) Approve a rate, rule, or regulation;
> (B) Adopt or enforce a law;
> (C) Issue, deny, suspend, or revoke any permit, license, application, certificate, approval, order, or similar authorization or entitlement;
> (D) Authorize the agency to enter into, modify, or renew a contract provided it is the type of contract that requires agency approval;
> (E) Grant agency approval to a contract that requires agency approval and to which the agency is a party, or to the specifications for such a contract;
> (F) Grant agency approval to a plan, design, report, study, or similar item;
> (G) Adopt, or grant agency approval of, policies, standards, or guidelines for the agency, or any subdivision thereof; or
> (2) Serves in a staff capacity with the agency and in that capacity participates in making a governmental decision as defined in Regulation 18704(a) and (b) or performs the same or substantially all the same duties for the agency that would otherwise be performed by an individual holding a position specified in the agency's Conflict of Interest Code under Section 87302.

Thus, there are two ways that an individual can become a "consultant" and thus be a "public official" subject to the Act. First, an individual is a "consultant" if the individual, pursuant to a

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contract with an agency, makes a governmental decision as described in Regulation 18700.3(a)(1). Second, an individual may be a consultant if the individual, pursuant to a contract with an agency, serves in a staff capacity and either participates in governmental decisions, as defined in Regulation 18704(a) and (b), or performs the same or substantially all the same duties that would otherwise be performed by an individual in a position designated in the agency's conflict of interest code.

Pursuant to the Potential Project Manager Contract, the independent contractor at issue would serve as the City's project manager for the Project, advising the City in regard to the Project, a role typically performed by City staff. The City Manager has decided to contract with the contractor because the Project is complex, City staff does not have the excess capacity necessary to take on the Project, and the contractor is an experienced project manager. The contractor's work under the Contract would be overseen by City staff, and all final decisions would be approved by City staff or the City Council, indicating that the contractor's work would be treated similarly to work by City staff on a project. The facts presented provide no indication that the duties performed by the contractor under the Contract are dissimilar from those that would otherwise be performed by a designated employee of the City. Therefore, based on the facts presented, the contractor would be a "consultant" under the Act if the contractor enters into the Contract.

The Act's Conflict of Interest Provisions

The Act's conflict of interest provisions prohibit a public official from making, participating in making, or attempting to use the official position to influence a governmental decision if it is reasonably foreseeable that the decision would have a material financial effect on one or more of the official's financial interests. (Sections 87100 and 87103.) An official's financial interests that may give rise to a disqualifying conflict of interest are identified in Section 87103 and include all the following:

- An interest in any business in which the official has an investment worth $2,000 or more (Section 87103(a)), or in which the official is a director, officer, partner, trustee, employee, or holds any position of management (Section 87103(d)).

- An interest in any real property in which the official has an interest worth $2,000 or more. (Section 87103(b).)

- An interest in any source of income aggregating $500 or more in the 12 months prior to the decision. (Section 87103(c).)

- An interest in any source of a gift or gifts aggregating $520 or more in the 12 months prior to the decision. (Section 87103(e).)

- An interest in the official's personal finances and those of immediate family members.[2] (Section 87103.)

Section 82005 defines "business entity" for purposes of the Act as "any organization or enterprise operated for profit, including but not limited to a proprietorship, partnership, firm,

[2] Section 82029 defines "immediate family" to mean the spouse and dependent children.

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business trust, joint venture, syndicate, corporation or association." The independent contractor's work under the Potential Project Manager Contract would be a for profit enterprise, and the contractor would either be an employee of or hold a management position with that "business entity," based on the facts presented. Therefore, the contractor would have a financial interest in the contractor's consulting business under Section 87103(d) if the contractor enters into the Potential Project Manager Contract. Pursuant to Section 87103(a), the contractor would also have an interest in that business if the contractor has an investment in the business worth $2,000 or more.

Section 82030 defines "income" for purposes of the Act, and subdivision (b)(2) of that section expressly provides that income does not include salary, reimbursement of expenses, and other specified payments received from a state, local, or federal government agency. Regulation 18232(a) defines "salary" from a state, local, or federal government agency to include fees paid to an individual who is a public official on account of being a consultant. Therefore, the payments that the independent contractor would receive from the City pursuant to the Potential Project Manager Contract would not be "income" under the Act. Accordingly, the contractor would not have a financial interest in the City as a source of income.

Thus, based on the facts presented, the independent contractor at issue would have a financial interest in the contractor's consulting business, sources of income to the business other than the City, and a financial interest in the contractor's personal finances and those of immediate family members with respect to decisions relating to the Project's scope if the Potential Project Manager Contract is executed.

The Act's conflict of interest provisions, however, would not prohibit the independent contractor from taking part in decisions relating to the Project's scope if the City and the contractor negotiate the Potential Project Manager Contract, including its compensation terms, prior to the City commencing the Project. The *Eckis* Advice Letter, No. A-93-270, which analyzed a comparable circumstance, provides in pertinent part:

> [W]here a governmental entity has already contracted to permit the consultant to make recommendations that result in rendering of identified services for an agreed upon price, there is no conflict of interest. In that case, the consultant's participation in governmental decisions will not have a foreseeable financial effect on the consultant's employer. This is because, according to the *McEwan* advice letter [I-92-481], the agency's decision to pay the consultant's employer for the additional services contemplated by the contract was previously made by disinterested agency officials and the consultant's participation merely constitutes the implementation of that preexisting decision.
>
> However, where a consultant makes a recommendation to a public agency that will create additional work and income for the consultant's employer that is beyond the scope of the contract under which the consultant is rendering advice, then a conflict of interest arises. (*In re Mahoney* (1977) 3 FPPC Ops. 69; *Rose* Advice Letter, No. A-84-306.) In that situation, the consultant's

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> recommendation most likely will have a material financial effect on the consultant's employer.[3]

This reasoning similarly applies to the question presented about whether the Act's conflict of interest provisions would prohibit the independent contractor at issue from taking part in decisions relating to the Project's scope because those decisions may affect the contractor's total hourly compensation under the Potential Project Manager Contract. If such a decision is made pursuant to that Contract, then there is no conflict of interest under the Act. Under the Contract, the contractor would render project-manager services relating to the Project for an agreed upon price. The City's decision to pay the hourly compensation set forth in the Contract will have been made at the time the City and the contractor enter into the Contract, and not at the later time when the City confers with the contractor regarding the Project's scope. However, if the decision relating to the Project's scope at issue may result in additional work and income for the contractor beyond that provided for in the Contract, then the contractor would likely have a conflict of interest under the Act, and the City should seek additional advice.

The Act's Reporting Provisions

Section 87300 requires every agency, including a city, to "adopt and promulgate a Conflict of Interest Code." Section 87302(a) requires a Conflict of Interest Code to enumerate all "positions within the agency, other than those specified in Section 87200, which involve the making or participation in the making of decisions which may foreseeably have a material effect on any financial interest" and to identify the specific types of interests that are reportable for those positions.

A person in a position designated in an agency's Conflict of Interest Code is known as a "designated employee." Section 82019 defines "designated employee," and subdivision (a)(3) of that section provides in pertinent part that a "consultant" is a designated employee if the consultant's position with the agency "entails the making or participation in the making of decisions which may foreseeably have a material effect on any financial interest." Section 87302(b) requires that each designated employee, other than those specified in Section 87200, file Statements of Economic Interests as required by the Act.

The facts presented indicate the independent contractor at issue would be a "consultant," and thus a "designated employee" of the City if the Potential Project Manager Contract is executed. Therefore, if that Contract is executed, the Act would require the contractor to file Statements of Economic Interests pursuant to the City's Conflict of Interest Code and Section 87302(b).

As noted above, however, Section 82030's definition of "income" excludes "salary, reimbursements of expenses, and other specified payments" received from a local government agency, and Regulation 18232(a) defines "salary" from a local government agency to include fees paid by the agency to a consultant. Thus, the Act's reporting provisions would not require the

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[3] Based on the same reasoning, the Commission has made a similar determination regarding state and local agencies contracting with private bond counsel (*Ritchie* Advice Letter, No. 79-045; *McEwan* Advice Letter, *supra*) and real estate brokers (*Pardee* Advice, No. I-91-506), all of whom were compensated by the agency based on a percentage of the value of the bond or the real property at issue.

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independent contractor to report fees paid by the City pursuant to the Potential Project Manager Contract on the contractor's Statements of Economic Interests.

Section 1090

Section 1090 generally prohibits public employees and officers, while working in their official capacities, from making contracts in which they are financially interested. Section 1090 is concerned with financial interests, other than remote or minimal interests, that prevent public officials from exercising absolute loyalty and undivided allegiance in furthering the best interests of their agencies. (*Stigall v. Taft* (1962) 58 Cal.2d 565, 569.) Under Section 1090, "the prohibited act is the making of a contract in which the official has a financial interest." (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.) A contract that violates Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.)

Is the Independent Contractor Subject to Section 1090?

Interpreting "officers and employees" as used in Section 1090, the California Supreme Court has affirmed the long-standing rule from case law that independent contractors are not categorically excluded from Section 1090: "Liability under the statute can extend to independent contractors who have duties to engage in or advise on public contracting." (*People v. Superior Court (Sahlolbei)* (2017) 3 Cal.5th 230, 239.) For example, an independent contractor for a state or local government agency that "has a hand in designing and developing the plans and specifications for the project" has made or participated in the making of a contract for the construction of the project and is therefore prohibited from entering a contract to complete the project. (*Davis v. Fresno Unified School District* (2015) 237 Cal.App.4th 261, 300-301.)

With respect to the Potential Project Manager Contract, the facts presented indicate the independent contractor at issue would have duties to engage in or advise on public contracting with respect to the Project and be involved in the design and development of plans and specifications for the Project under that Contract. Therefore, it appears the contractor would be subject to Section 1090 if that Contract is executed based on the facts presented.

Does Section 1090 Apply to Decisions Relating to the Project's Scope?

Decisions relating to the Project's scope clearly involve the Potential Project Manager Contract. Therefore, we next consider whether Section 1090 would prohibit the independent contractor from engaging in decisions relating to the Project's scope pursuant to the Contract because those decisions may lead to the contractor obtaining additional hourly compensation from the City under the Contract.

In 99 Ops.Cal.Atty.Gen. 35 (2016), the Office of the Attorney General considered whether Section 1090 prohibited a contract city attorney from providing the city with additional "bond counsel" services, with compensation for those services based on a percentage of the city's bond issuances, pursuant to provision of the city attorney's contract with the City contemplating the bond issuances. Because the compensation structure for the additional services created a situation in which the contract city attorney would be financially interested in the size of the City's bond issuances, the opinion concluded that "section 1090 prohibits an arrangement under which a

contract city attorney's compensation for providing the city with additional 'bond counsel' services is based on a percentage of the city's bond issuances."

That Attorney General opinion, however, distinguished situations in which a contract city attorney's advice on a decision may create the need for additional legal services:

> We stress that our conclusion does *not* mean that contract city attorneys may never advise municipal clients on a decision that may create the need for additional legal services. Indeed, to some extent, any advice a contract city attorney gives the city can have a potential financial effect on the contract attorney's compensation. Most commonly, recommendations about whether to pursue litigation result in litigation fees for the contract attorney. However, litigation does not in itself form a separate public contract as does a city's issuance of bonds. And while litigation often involves various related contracts—such as hiring experts or settlement contracts—the contract city attorney does not generally stand to be paid more or less based on whether the city signs those related contracts or what terms are included. Thus, we do not believe that typical services contracts for contract city attorneys—even when they contemplate additional services—will implicate section 1090, because they generally do not provide a *financial interest in specified future public contracts.* (99 Ops.Cal.Atty.Gen. 35, *supra*, fns. omitted.)

Applying the reasoning from this Attorney General opinion to the facts presented, there is no indication decisions relating to the Project's scope would result in the independent contractor at issue being financially interested in any specific future public contract other than the Potential Project Manager Contract. Furthermore, there is no indication of self-dealing: the Contract would include a cap on the contractor's total hours, require all work done by the contractor to be overseen by the City Manager and the City's Community Development Director, and require all final decisions to be approved by City staff or the City Council depending on the particular decision under consideration. For these reasons, we conclude that Section 1090 would not prohibit the contractor from analyzing and making recommendations relating to the Project's scope pursuant to the Contract based on the facts presented.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Dave Bainbridge
General Counsel

Matthew F. Christy

By: Matthew F. Christy
Counsel, Legal Division

MFC:dkv

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Top Mistakes to Avoid When Purchasing Under a FEMA Award Summary

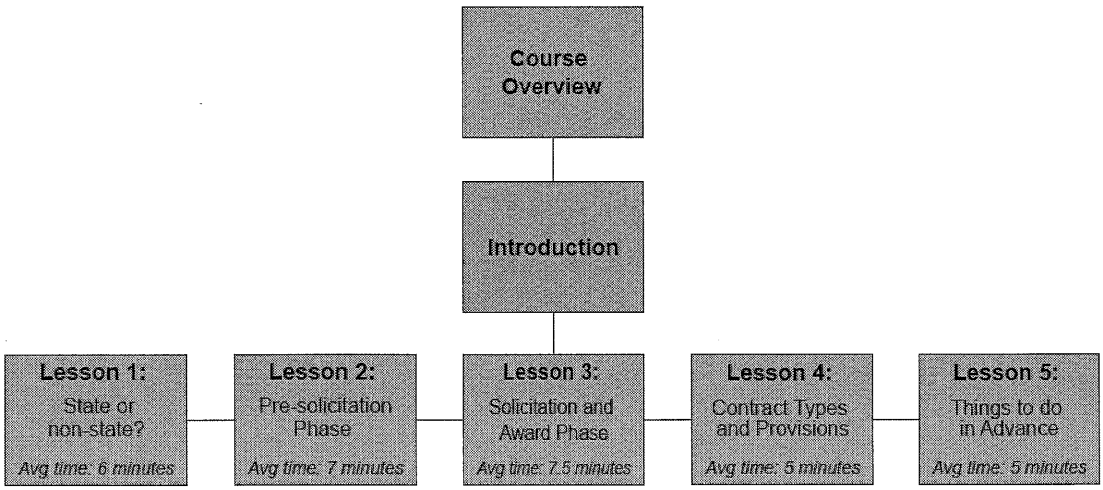
Course Objectives

- Determine applicable procurement rules based on entity type (state or non-state entity), and maintain adequate documentation.
- Identify common issues with full and open competition and list the socioeconomic steps when soliciting goods or services.
- Differentiate between the allowable methods of procurement and avoid pitfalls when sole sourcing and performing a cost or price analysis.
- Apply the federal rules on contract types and incorporate the required contract provisions.
- Identify actions that can be taken prior to the procurement process including developing procurement policies and procedures and creating prequalified lists.

Course Structure

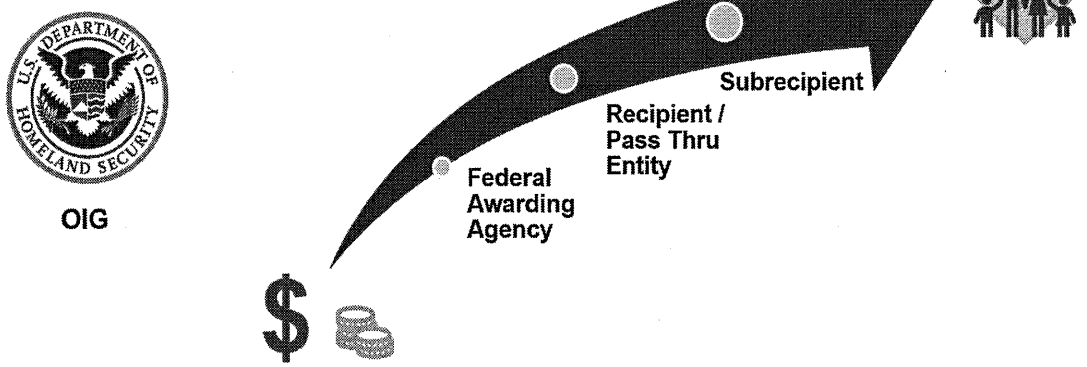
These short lessons are designed to be completed in a logical sequence. However, each lesson is self-contained and can be done in any order to learn procurement concepts, access resources and links, and achieve the lesson objectives. Click on any lesson or the next button to begin!

Mr. Pug is here to provide guidance as you learn about procurement under grants.



Federal Award Flow

Click on Each Key Player to Learn More about the Federal Award Flow



DHS's OIG

The Department of Homeland Security's Office of Inspector General (OIG) provides independent oversight of FEMA's operations and activities, including PA program implementation.

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Federal Awarding Agency

As the Federal awarding agency, FEMA is responsible for ensuring proper performance under the FEMA award, including compliance with the procurement rules.

FEMA grants, DHS/FEMA is the awarding agency.

See: 2 C.F.R. § 200.37

Recipient / Pass Thru Entity

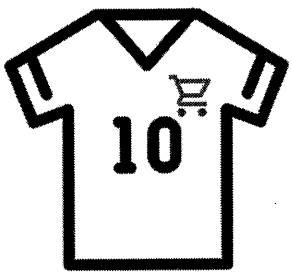
Receives and administers the Federal award.

Examples of "Recipient"(See: 2 C.F.R. § 200.86) or "Pass-through entities" (2 C.F.R. § 200.74) may include: state, Indian Tribal, or territorial governments.

Subrecipient

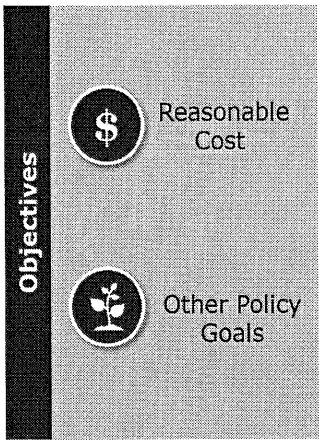
The non-Federal entity that receives a subaward from a recipient entity to carry out part of a Federal program, and which is accountable to the recipient for the use of the funds provided. Includes: Local and Tribal Indian Governments (for declarations of the State), Institutions of Higher Education (IHEs), Hospitals, other Private Nonprofit Organizations (PNPs), Houses of Worship, and State agencies or instrumentalities receiving funds from the pass-through entity.

Introduction to the Uniform Rules



2 C.F.R. §§ 200.317 – 327

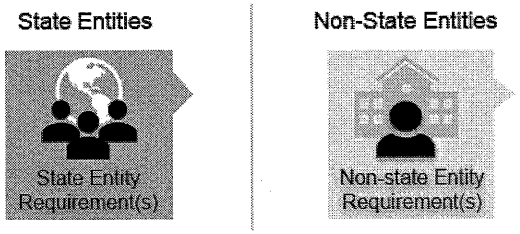
#	Applicable Rules
317	Procurements by States
318	General Procurement Standards
319	Competition
320	Procurement Methods
321	Socioeconomic Contracting
322	Domestic Preferences
323	Recovered Materials
324	Contract Cost or Price
325	Federal awarding agency or pass-through entity review
326	Bonding Requirements
327	Contract Provisions



How does a Grant Entity Know Which Federal Procurement Rules to Apply?

There are different sets of procurement rules that apply to state and non-state entities. An entity, therefore, **must first determine if it is a state or non-state entity.**

The lessons will feature blue boxes and yellow boxes to indicate whether the procurement rules being discussed will apply to state entities, non-state entities, or both types of entities.



Legal Counsel

We will cover the general definitions and rules applicable by entity type next. Entities should consult their legal counsel if they have questions regarding their entity type.

Rules that Apply to States

Are You a State Entity?

- Any State of the United States
- District of Columbia
- US Territories:
  - Commonwealth of Puerto Rico
  - U.S. Virgin Islands
  - Guam
  - American Samoa
  - Commonwealth of the Northern Mariana Islands
- State Agency
- State Instrumentality

Click on each rule to read more

#	Applicable Rules
317	Procurements by States
318	General Procurement Standards
319	Competition
320	Methods of procurement to be followed
321	Socioeconomic Contracting
322	Domestic Preferences
323	Recovered Materials
324	Contract Cost or Price

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325	Federal awarding agency or pass-through entity review
326	Bonding Requirements
327	Contract Provisions

The federal procurement rules applicable to state entities are set forth in 2 C.F.R. § 200.317. State entities include any U.S. state or territory as well as state agencies or state instrumentalities. Local governments are not included in the definition of a "state." When procuring property or services under a financial assistance award, a state entity must:

- Follow the same policies and procedures it uses for procurements from its non-federal funds;
- Comply with 2 C.F.R. § 200.323 (Procurement of Recovered Materials); and
- Ensure that every purchase order or other contract includes any clauses required by 2 C.F.R. § 200.327 (Contract Provisions).

Rules that Apply to Non-State Entities

Are You a Non-State Entity?

- Local Governments
- Tribal Governments
- Institutions of Higher Education
- Hospitals
- Houses of Worship
- Other Private Non-Profit Organizations

See definitions:

Local government: means any unit of government within a state, including a:

- County;
- Borough;
- Municipality;
- City;
- Town;
- Township;
- Parish;
- Local public authority, including any public housing agency under the United States Housing Act of 1937;
- Special district;
- School district;
- Intrastate district;
- Council of governments, whether or not incorporated as a nonprofit corporation under state law; and
- Any other agency or instrumentality of a multi-, regional, or intra-state or local government.

Indian Tribe: Any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. Chapter 33), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians (25 U.S.C. § 450b(e)).9 See annually published Bureau of Indian Affairs list of Indian Entities Recognized and Eligible to Receive Services.

See: 2 C.F.R. § 200.54.

Nonprofit Organization (Private Nonprofit Organization or PNP): Any corporation, trust, association, cooperative, or other organization, not including institutions of higher education (IHE), that:

- Is operated primarily for scientific, educational, service, charitable, or similar purposes in the public interest;
- Is not organized primarily for profit; and
- Uses net proceeds to maintain, improve, or expand the operations of the organization.

See: 2 C.F.R. § 200.70 Under the Public Assistance Program, some institutions of higher education, as defined in 2 C.F.R. § 200.55, may meet the definition of a Private Nonprofit Organization. 44 C.F.R. § 206.221(f).

Click on each rule to read more

#	Applicable Rules
317	Procurements by States
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325	Federal awarding agency or pass-through entity review
326	Bonding Requirements

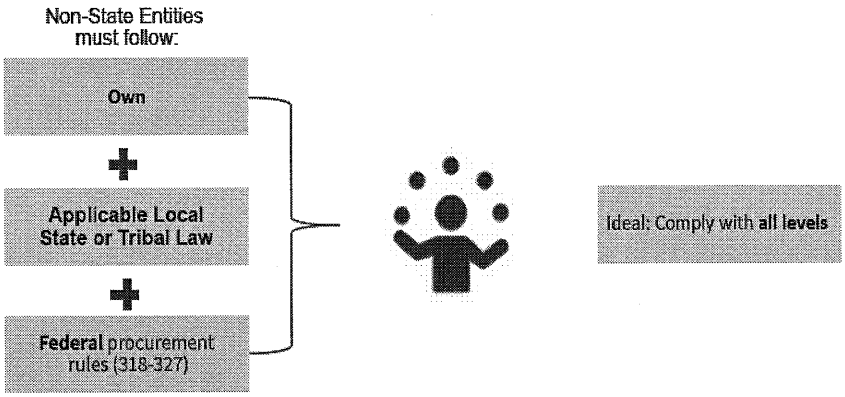
Non-State Entities Requirements:

- Must follow **own** procurement policies and procedures
- Must be in compliance with applicable local **Tribal or state** law
- Must follow **federal** procurement rules (318-327)

All Levels of Compliance

The federal procurement under grant rules only address limited procurement concepts and do not focus on all possible procurement issues. Where the federal rules do not address a specific procurement issue, a non-state entity must abide by the applicable local, state, and/or Tribal procurement rules– whichever applies to the particular non-state entity.

However, where a difference exists between a federal procurement standard and a local, state, and/or Tribal procurement standard or regulation, the non-state entity must apply the rule(s) that allow for compliance with all applicable layers.



Documentation

Non-state entities must maintain records for their procurement transactions including:

- Rationale for the method of procurement
- Selection of contract type
- Selection of contractor
- Basis for contract price

2 C.F.R. § 200.318(i) requires the maintenance of records sufficient to detail the history of a procurement.

State entities must follow their own documented procurement policies and procedures when maintaining record keeping.

Lesson Summary

Congratulations on completing Lesson 1. In this lesson, you learned about:

- Rules that apply to state or non-state entities
- Documentation requirements

Determining Procurement Needs

The first step in a procurement life cycle is determining your procurement needs and creating your scope of work.

Entities should seek guidance from their own rules and their legal counsel.

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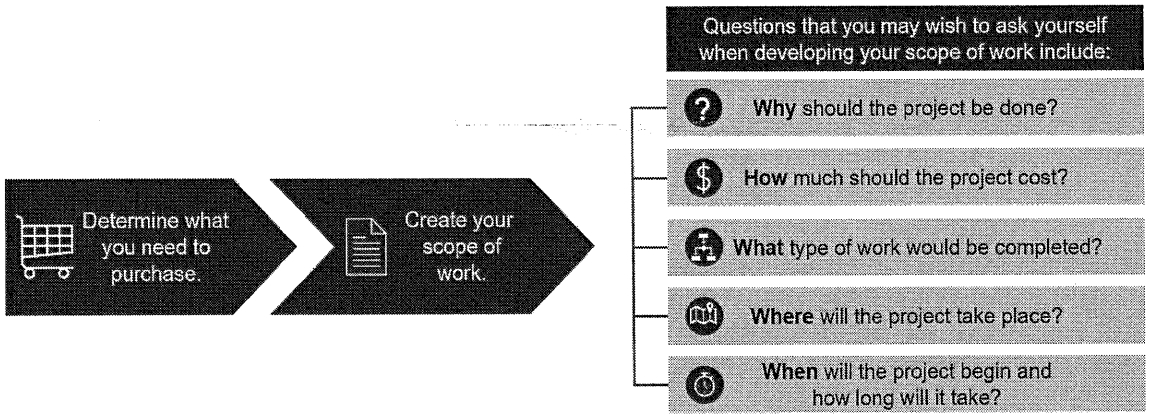
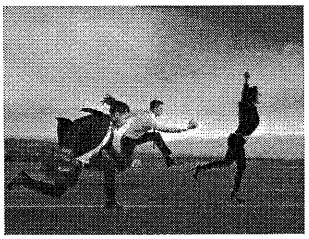


Diagram description

Full and Open Competition

Generally, full and open competition means that all responsible contractors are permitted to submit a sealed bid or proposal on a procureme There are numerous benefits to full and open competition, which include:

- Casting the net broadly to increase the probability of reasonable pricing from the most qualified contractor;
- Preventing favoritism, collusion, fraud, waste, and abuse; and
- Allowing small and minority firms, women's business enterprises, and labor surplus area firms to participate in federally-funded work.



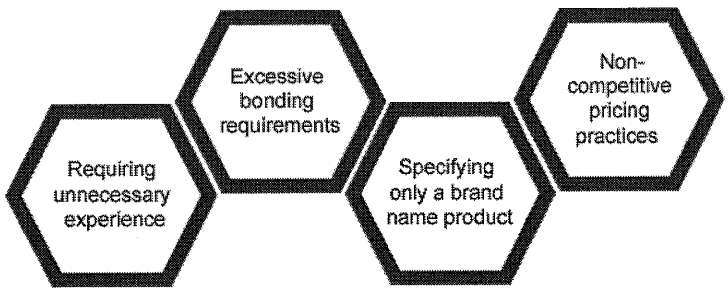
See the Field Manual for more information on policies, procedures, and resources for procurement under grants.

Complying with full and open competition is one of the top 10 issues for non-state entities.

7 Circumstances Considered to be Restrictive of Competiton, Part 1

The federal procurement rules have identified 7 situations (2 C.F.R. § 200.319(a)) that are considered to be restrictive of full and open competition, and therefore should be avoided. Restricting full and open competition is the #1 mistake for non-state entities.

Click on the first four of seven circumstances to learn more:



Requiring Unnecessary Experience

As it relates to experience, this could include requiring unnecessary levels or years of experience for the contractors to be in business, the contractors' workforce, or the contractors' key personnel on a project.

Excessive Bonding Requirements

As it relates to bonding, non-state entities must not require excessive bonding because it increases the costs incurred by the contractor and is restrictive of competition. This is particularly the case with regard to small businesses as they may not have the bonding capacity to compete for projects requiring excessive bonding. Businesses with a limited record of performance may also have difficulty obtaining bonds.

Specifying Only a Brand Name Product

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It is restrictive of competition for non-state entities to specify only a "brand name" product instead of allowing "an equivalent" product to be offered. When it is impractical or uneconomical to write a clear and accurate description of the technical requirements of the good or services to be acquired, non-state entities may use a "brand name or equivalent" description as a means to define the performance or other pertinent requirements of the procurement.

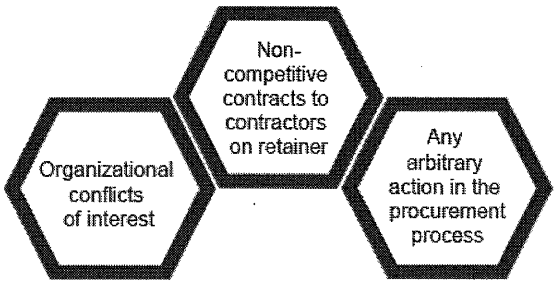
Noncompetitive Pricing Practices

Noncompetitive pricing practices between firms or between affiliated companies is prohibited. Non-state entities must undertake reasonable efforts to ensure that prospective contractors have not engaged in noncompetitive pricing practices when responding to a solicitation. If noncompetitive pricing practices are identified, the activity should be reported to FEMA. The most common forms are bid rigging, bid suppression, complementary bidding, and bid rotation.

7 Circumstances Considered to be Restrictive of Competition, Part 2

The federal procurement rules have identified 7 situations (2 C.F.R. § 200.319(a)) that are considered to be restrictive of full and open competition, and therefore should be avoided. Restricting full and open competition is the #1 mistake for non-state entities.

Click on the remaining three of seven circumstances to learn more:



Contractor Competition

Contractors are prohibited from competing for awards for which they have developed or drafted specifications, requirements, statements of work, invitations for bids, or requests for proposals. In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that have developed or drafted the documents listed above must be excluded from competing for such requirements.

Organizational Conflicts of Interest

Non-state entities must ensure that procurements are free from organizational conflicts of interest. In some cases, an organizational conflict of interest means that, because of relationships with a parent company, affiliate, or subsidiary organization, a non-state entity is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization. In other cases, an organizational conflict of interest means a circumstance where a potential contractor has either impaired objectivity, unequal access to information, or the ability to set the ground rules.

An organizational conflict of interest can also occur when contractors compete for awards for which they have developed or drafted specifications, requirements, statements of work, invitations for bids, or requests for proposals.

In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that have developed or drafted the documents listed above must be excluded from competing for such requirements.

Noncompetitive Contracts to Contractors on Retainer

Non-state entities must not make noncompetitive awards to consultants that are on retainer contracts. A retainer contract is generally any form of agreement for general, unspecified services or broad types of services (e.g., architectural and engineering) entered into in advance of work to be done. Under such agreement, the contractor remains available when the client needs services during a specified period or regarding a specified matter. It is restrictive of competition to use federal grant funds and award a noncompetitive contract to a consultant that is already on retainer, specifically for property or services not specified under the retainer contract.

Any Arbitrary Action in the Procurement Process

Non-state entities must not engage in any arbitrary actions in the procurement process. "Arbitrary" generally refers to an action or decision founded on prejudice or preference rather than on reason or fact; or something that is otherwise unreasonable or unsupported. Arbitrary actions can include, among other things, discretionary actions that show preference or prejudice towards certain contractors in a manner not consistent with full and open competition.

For more information on how to avoid these 7 circumstances, take a look at this helpful resource: Key Points for Non-State Entities on How to Avoid the Top 10 Procurement Under Grant Mistakes

Socioeconomic Steps/Actions, Part 1

In addition to the requirements of full and open competition, both state and non-state entities must take the affirmative actions (2 C.F.R. § 200.321) to make sure small and minority businesses, women-owned enterprises, and labor surplus area firms are used when possible. Affirmative steps must include the following actions:

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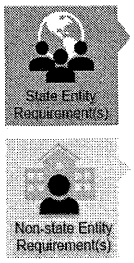
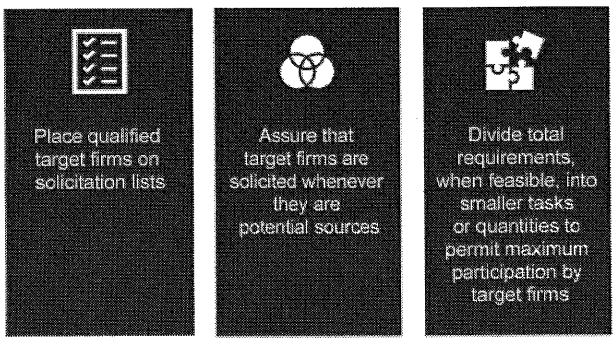
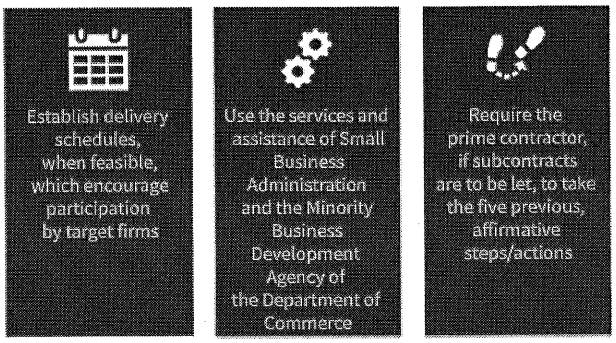




Socioeconomic Steps/Actions, Part 2



Taking the socioeconomic is not the same as applying set aside procedures in favor target firms.

Lesson Summary

Congratulations on completing Lesson 2. In this lesson, you learned how to:

- Determine procurement needs
- Promote full and open competition
- Avoid situations that are restrictive of competition
- Identify the socioeconomic steps

Methods of Procurement

Non-state entities must comply with one of the five methods of procurement set forth at 2 C.F.R. § 200.320, which include:

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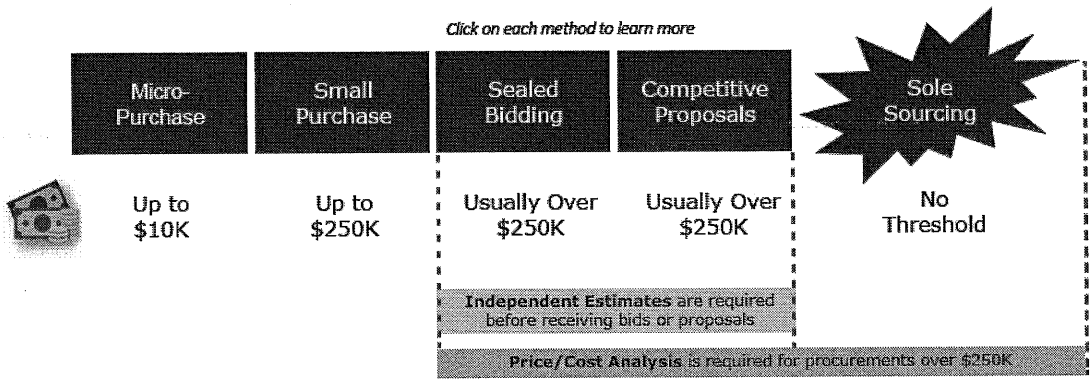

Most Restrictive Threshold

Use of these methods vary depending on the contract scope and dollar amount.

Entities must follow the most restrictive threshold. Whether it be their own, applicable local, state, or tribal, or federal procurement rules.

Micro-Purchase

Contract is awarded to: Qualified supplier(s) A non-state entity may use the micro-purchase procedures for the acquisition of supplies or services where the total dollar amount of the services or supplies does not exceed the micro-purchase threshold. While the micro-purchase threshold is adjusted from time to time, it is currently $10,000.

See: 2 C.F.R. § 200.320(a)

Small Purchase

Contract is awarded to: One vendor after receiving price or rate quotations from adequate number of qualified vendors (For PA, this means no less than 3 qualified vendors).

Small Purchase Procedures are a relatively simple and informal method of procurement allowed for purchases where the total dollar amount of the requirement does not exceed the simplified acquisition threshold (SAT). While the SAT is adjusted from time to time, it is currently $250,000.

See: 2 C.F.R. § 200.320(b)

Sole Sourcing

A non-competitive contract (or sole-sourced contract) can only be awarded when one or more of the following circumstances apply:

1. Micro-purchase
2. Single source
3. Public Emergency or Exigency
4. Awarding agency approval
5. Inadequate competition

See: 2 C.F.R. § 200.320(f)

Sealed Bidding

Contract is awarded to: Lowest price, responsive bid, and responsible bidder

The sealed bidding method of procurement is the preferred method of contracting when the non-state entity's requirement is known and specific in detail and the procurement lends itself to a fixed price contract type. Selection of the successful bidder will be made principally based on price.

See: 2 C.F.R. § 200.320(c)

Competitive Proposals

Contract is awarded to: Responsible firm with proposal most advantageous to the program (price & other factors considered)

The competitive proposal method is normally used when the conditions are not appropriate for sealed bidding, including when the requirement is not specific in detail. Procurement of A/E professional services is the only instance when price may be excluded as an evaluation factor. Under this qualifications-based procurement of A/E professional services, competitors' qualifications are evaluated, and the most qualified competitor is selected.

See: 2 C.F.R. § 200.320(d)

Avoid Sole-Sourcing Mistakes

The federal procurement rules are clear regarding the need to have full and open competition. There are, however, limited situations where noncompetitive proposal methods may be allowed; but only in instances where one or more of the following circumstances apply.

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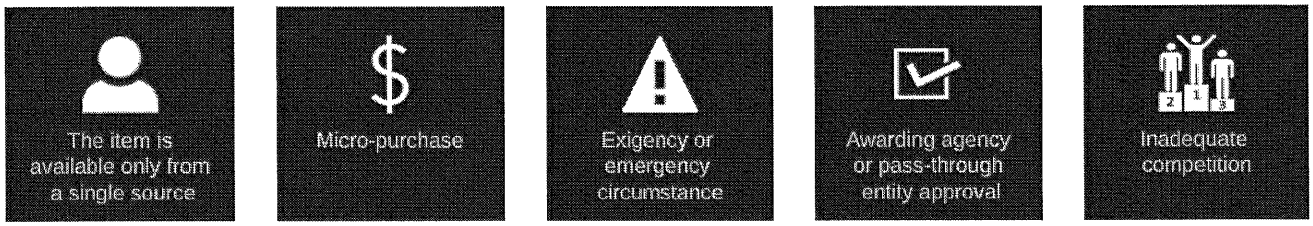
Click on each box to learn more



The non-state entity must document the basis for the justification of the noncompetitive (sole-sourced) procurement.

Helpful resource: **Procurement Under Grants Conducted Under Exigent or Emergency Circumstances**

The item is available only from a single source

The item is available only from a single source: The use of this exception to full and open competition is allowed when the non-state entity requires supplies or services that are truly only available from a single source.

Exigency or emergency circumstance

Exigency or emergency circumstance: The public exigency or emergency will not permit a delay resulting from the full and open competition process.

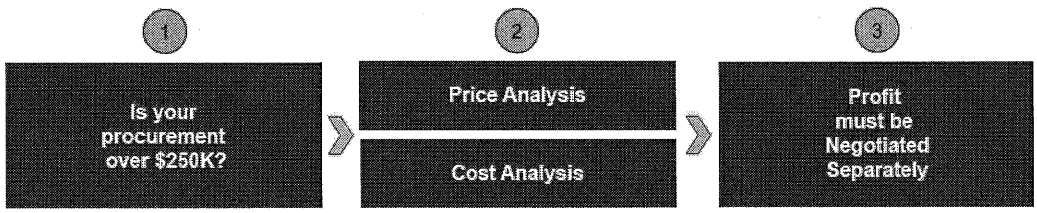
Awarding agency or pass-through entity approval

Awarding agency or pass-through entity approval: The non-state entity may use this noncompetitive proposal method in the rare instance when the "awarding agency" or "pass-through entity" expressly authorizes the sole source in response to a written request from the non-Federal entity.

Inadequate competition

Inadequate competition: This exception can be used when, after solicitation of a number of sources, competition is determined inadequate.

- The solicitation must have complied with all procurement rules and still only received a single offer or bid, single responsive offer or bid, or no responsive bids or proposal caused by conditions outside of the subrecipient's control.
- If only one bid or proposal is received, the entity should ensure there is nothing in the solicitation restricting competition.



Helpful resource: Public Assistance: Reasonable Cost Evaluation

Note: *Non-state entity should follow their own rules related to cost or price analysis for procurements under the simplified acquisition threshold (currently $250,000).*

Is your procurement over $250K?

Cost or price analysis is required if your procurement is over $250K.

Price Analysis

Price Analysis: The examination and evaluation of a proposed price without evaluating its separate cost elements and proposed profit. Techniques may include comparing offers with one another; comparing prior proposed prices and contract prices with current proposed prices for the same or similar goods or services; comparing offers with competitive published price lists, published market prices, or similar indexes; comparing proposed prices with independently developed estimates of the non-state entity; and comparing proposed prices with prices of the same or similar items obtained through market research.

Cost Analysis

Cost Analysis: The review and evaluation of the separate cost elements (such as labor hours, overhead, materials, etc.) and proposed profit in a proposal to determine a fair and reasonable price for a contract and the application of judgment to determine how well the proposed costs represent what the cost of the contract should be.

Profit must be Negotiated Separately

- As a separate element of price for contracts with no price competition
- Always when doing a cost analysis

Contractor Responsibility

Non-state entities must award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement.

Matters to be considered:

1. Contractor integrity
2. Compliance with public policy
3. Record of past performance
4. Financial and technical resources

This includes checking SAM.gov to ensure the contractor has not been suspended or debarred.

For more information see: FEMA Suspension & Debarment Frequently Asked Questions Brochure

Lesson Summary

Congratulations on completing Lesson 3. In this lesson, you learned about:

- The allowable methods of procurement
- When it is appropriate to use noncompetitive proposal methods
- Documenting and performing a cost or price analysis
- Ensuring contracts are awarded only to responsible contractors

Contract Type: Time & Materials (T&M)

A time and materials contract is a contract type whose cost to a non-state entity is the sum of the *actual cost of materials; and direct labor hours charged at fixed hourly rates* that reflect wages, general and administrative expenses, and profit.

Click here to determine when to use a T&M Contract

Time & Materials (T&M) Formula:

Actual cost of materials

+

Direct labor hours charged at **fixed hourly rates**

T&M contracts provide no positive profit incentive to the contractor for cost control or labor efficiency, which is why the rules require the inclusion of a contract ceiling price.

See: 2 C.F.R § 200.31 General procurement standards

Cost Plus a Percentage of Cost Contracts Are Prohibited!

A cost plus percentage of cost contract or CPPC is a cost reimbursement contract containing some element that obligates the non-state entity to pay the contractor an amount, undetermined at the time the contract was made and to be incurred in the future, based on a percentage of future costs. CPPC Contracts are prohibited for non-state entities.

Why? (2 C.F.R §200.324 (d))

- There is no incentive to control costs
- The contractor has a financial interest in increasing the cost of performance

How do you know you're using a CPPC?

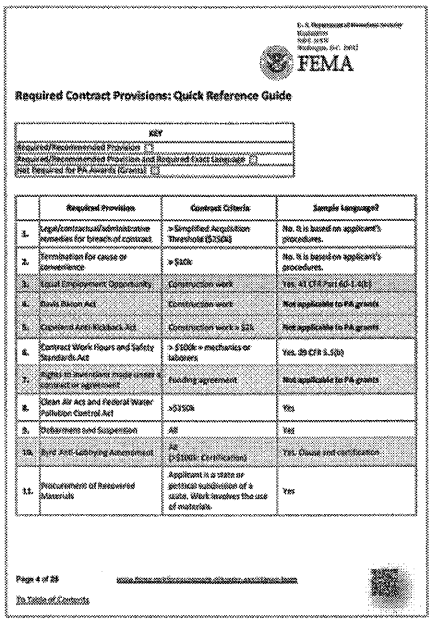
- Payment is at a predetermined rate
- Rate is applied to actual performance costs Contractor's entitlement is uncertain at the time of contracting Rate increases with increased performance

Contract Provisions

Under 2 C.F.R. § 200.327, all contracts (state and non-state entities) must contain the applicable provisions described in Appendix II to Part 200—Contract Provisions for non-Federal Entity Contracts Under Federal Awards.

- State and non-state entity contracts are required to contain certain provisions.
- Provisions may apply based on project:
  - Dollar amount
  - Project type
  - Entity type

Contract Provisions Template



FEMA

Required Contract Provisions: Quick Reference Guide

	Required Provision	Contract Criteria	Sample Language?
1.	Legal/contractual/administrative remedies for breach of contract	> Simplified Acquisition Threshold ($250k)	No. It is based on applicant's procedures.
2.	Termination for cause or convenience	> $10k	No. It is based on applicant's procedures.
3.	Equal Employment Opportunity	Construction work	Yes. 41 CFR Part 60-1.4(b)
4.	Davis Bacon Act	Construction work	Not applicable to PA grants
5.	Copeland Anti-Kickback Act	Construction work > $2k	Not applicable to PA grants
6.	Contract Work Hours and Safety Standards Act	> $100k + mechanics or laborers	Yes. 29 CFR 5.5(b)
7.	Rights in inventions made under a contract or agreement	Funding agreement	Not applicable to PA grants
8.	Clean Air Act and Federal Water Pollution Control Act	>$150k	Yes
9.	Debarment and Suspension	All	Yes
10.	Byrd Anti-Lobbying Amendment	All (>$100k: Certification)	Yes. Clause and certification
11.	Procurement of Recovered Materials	Applicant is a state or political subdivision of a state. Work involves the use of materials.	Yes

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Lesson Summary

Congratulations on completing Lesson 4. In this lesson, you learned about:

- Contract types
- Contract provisions
- Federal procurement rules that are associated with contract types

Written Procurement Policies & Procedures

All non-state entities must have written policies and procedures for procurement transactions which reflect applicable local, state, tribal, and federal laws.

These procedures should:

- Incorporate clear and accurate descriptions of the requirements for procuring goods or services.
- The description of technical requirements must not unduly restrict competition.
- Identify all requirements which the offerors must fulfill.

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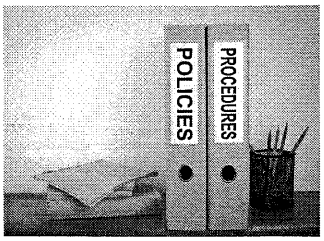
- Include written standards of conduct covering conflicts of interests and governing the actions of employees engaged in the selection, award, and administration of contracts. These standards must include disciplinary actions in the event of violations of the standards of conduct.



Helpful resource:

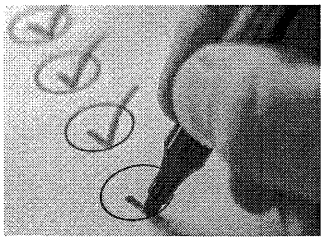
Field Manual (page 57)

Prequalified List

A prequalified list is a list of vendors that you have vetted in advance and may be used to satisfy your procurement needs.

These vendors will have:

- Reasonable prices
- Quality goods and services
- Necessary qualifications and technical and financial abilities
- A record of integrity and good standing



2 C.F.R § 200.319(d)

Creating a Prequalified List

To create a prequalified list, you can first conduct market research by gathering information about the types of goods and services you may need in the event of a disaster, what vendors provide these goods and services, and how much they charge.

When you create a prequalified list, make sure to:

- Include enough vendors to ensure full and open competition
- Include small, women-owned, minority-owned, and labor surplus area firms in order to follow the socioeconomic affirmative steps
- Record cost estimates for the goods or services Keep the list up-to-date

You may use the prequalified list during the solicitation phase of your procurement. This list will help you determine what goods and services are available, how much they cost, and the differences between vendors so you can more quickly and effectively meet your procurement needs when a disaster strikes. Prequalified lists can help in the procurement process before, during, and after a disaster.

Additionally, prequalified lists may also be useful for non-disaster situations to help non-state entities prepare for procurements to carry out a FEMA grant should they receive one. They can also help inform their grant application by finding out in advance whether certain goods are services are available and what the cost might be. While you may solicit directly from vendors on the prequalified list, you must also open the solicitation to the public to ensure full and open competition, except in the case of an emergency or exigency procurement.

Prepositioned or Advanced Contracts For Disasters

FEMA encourages entities applying for disaster grant assistance to award prepositioned contracts, or advanced contracts, before an incident occurs for the potential performance of work under the FEMA disaster grant award.

Use of prepositioned contracts allows entities to conduct a deliberate procurement process outside of the pressure and immediate demands of a disaster and helps to ensure contractors are readily available to perform work quickly after an incident occurs.

Prepositioned contract requirements

Prepositioned contract requirements: When using a prepositioned contract, entities must ensure that:

- The contract was procured in compliance with the applicable procurement under grant rules for its entity type (state or non-state); and

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- The contract's scope of work must adequately encompass the type and extent of future work. Failure to do so may result in noncompliance with full and open competition requirements. (State entities should ensure out of scope changes are consistent with their own procurement policies and procedures).

FEMA recommends the use of prepositioned contracts for purchasing under a disaster grant.

Lesson Summary

Congratulations on completing Lesson 5. In this lesson, you learned about:

- Developing written procurement policies & procedures
- Developing prequalification lists
- Prepositioned or advanced contracts

Resources

Learning about the procurement rules is an ongoing process. You are encouraged to explore the resources below.

Job Aids:

- Field Manual (PDAT)
- Public Assistance Reasonable Costs
- Quick Guide to SBA Tools
- FEMA Suspension & Debarment FAQs
- Top 10 Procurement under Grant Mistakes Flyer
- Preparedness Grants Manual
- Procurement Under Grants Conducted Under Exigent or Emergency Circumstances

Websites:

- FEMA.gov/grants
- PDAT Resources when Procuring with Federal Grant Funds
- Code of Federal Regulations
- Sam.gov

Templates:

- Contract Provisions Template

Top 10 Procurement Mistakes Leading to Audits and Potential Loss of FEMA

English

Release Date	Release Number
October 7, 2017	DR-4337-FL FS 010

Release Date: October 7, 2017

1. Engaging in a noncompetitive procurement (i.e., sole-sourcing) without carefully documenting how the situation has created an urgent need to perform the work sooner than a competitive procurement process would allow.

2. Continuing work under a sole-source contract after the urgent need (see #1) has ended, instead of transitioning to a competitively procured contract.

3. Piggybacking onto another jurisdiction's contract in a situation that doesn't allow noncompetitive procurement (see #1) or where the other contract is materially different in terms of scope or requirements. Piggybacking is rarely allowable.

4. Awarding a "time-and-material" contract without a ceiling price that the contractor exceeds at its own risk and documenting why no other contract type is suitable.

5. Awarding a "cost-plus-percentage-of-cost" or "percentage-of-construction-cost" contract.

6. Not including the required contract clauses (available online at the below website under "PDAT Resources" menu).

7. Including a geographic preference in a solicitation (i.e., giving an advantage to or limiting competition of an award to local firms).

8. Not making and documenting efforts to solicit small businesses, minority businesses and woman's business enterprises.

9. Conducting a procurement exceeding $150,000 without conducting a detailed cost or price analysis.

10. Not carefully documenting all steps of a procurement to create a record if questions arise potentially years later.

For further information on FEMA grant procurement requirements, including contract review checklists, detailed guidance on the above topics, and online webinar training classes, please visit https://www.fema.gov/procurement-disaster-assistance-team.

To read a detailed checklist for reviewing procurements under grants by non-federal entities (states, local and tribal governments, institutions of higher education, hospitals, and private non-profit organizations, please visit https://www.fema.gov/media-library-data/1479225376216-2bdb7d3ba1a512495....

Maryville, Mo., 6-20-2007 -- North Western Missouri County officials attend a Public Assistance applicant briefing in Nodaway County. Applicant briefing meetings introduce local officials to the aid they can apply for from federal and state governments. Marvin Nauman/FEMA photo

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Florida Region 4

Last updated March 18, 2021

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Disasters & Assistance

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Emergency Management

An Exception to the Rules During Emergency or Exigent Circumstances

English

When a disaster strikes, communities must often act quickly to protect life, public health or safety, and property. In such instances, going through a competitive procurement may be impractical and even worsen the potential threat. When faced with emergency or exigent circumstances, the rules allow non-state entities to sole-source or award a contract without engaging in full and open competition.

Non-state entities may use their own judgment when determining whether these conditions have been met but must document the rationale in the procurement record.

Non-state entities may use the emergency or exigency exception to full and open competition if it is determined that a public exigency or emergency will not permit a delay resulting from competitive solicitation.

Emergency vs. Exigent Circumstances

FEMA defines both exigent and emergency circumstances as situations that demand immediate aid or action. The differences between the two are outlined below:

Emergency

In the case of an emergency, there is a threat to life, public health or safety, improved property, or some other form of dangerous situation that requires immediate action to alleviate the threat. Emergency

Exigency

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 procurements would prevent the urgent action

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conditions are generally more short-lived than exigency circumstances.

required to address the situation. Thus, a noncompetitive procurement may be appropriate.

Emergency Circumstances 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 non-competitive contracts to address threats to life, improved property, and public health and safety.

Exigent Circumstances Example

> A tornado impacts a city in June and causes widespread and catastrophic damage, including to a city school. The city wants to repair the school by the beginning of the school year in September. Awarding a contract using a sealed bidding process would require at least 90 days, and the repair work would be another 60 days, extending 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 is an "exigent circumstance" because use of a sealed bidding process would cause an unacceptable delay, affecting children's education and the city's economy if parents must stay home with the children. Thus, procurement by non-competitive methods was necessary.

Steps to Take During Emergency or Exigent Circumstances

- **Write a justification to describe the emergency or exigent circumstances**: Explain why sole-sourcing is necessary based on the specific conditions and circumstances that demonstrate why immediate or urgent action is needed. Include the specific steps taken to determine why full and open competition could not have been used. A separate justification is required for every sole-sourced contract.
- **Provide a brief description of the goods or services**: Justify the need for the specific good or service being contracted to address the emergency or exigency circumstance.
- **Estimate the expected dollar amount of the goods or services**: A cost or price analysis is required for all procurement transactions above $250,000.
- **Describe any known conflicts of interests** and efforts made to identify possible conflicts of interests. If no efforts were made, explain why.

- **Define and justify the period of emergency or exigency for the specific situation**: The period of emergency or exigent circumstances may vary per incident.
- **Transition to a competitively bid contract as soon as the emergency or exigent period ends**: Failure to plan for transition to a competitively bid contract cannot be the basis for continued use of the emergency or exigency exception.

Additional Rules that Apply When Sole-Sourcing

Sole-sourcing may be allowed for non-state entities during emergency or exigent circumstances, but they must still follow federal procurement regulations:

1. Contracts must include the required contract clauses.
2. Contract must include the federal bonding requirements if the contract is for construction or facility improvement.
3. Contract must be awarded to a responsible contractor.
4. Non-state applicant must complete a cost or price analysis to determine that the cost or price of the contract is fair and reasonable.
5. Contract must not be a cost-plus-percentage-of-cost contract type.
6. When using a time-and-materials contract, non-state applicants must comply with the applicable rules.
7. Document any known conflicts of interest and any efforts that were made to identify possible conflicts of interest before the sole-sourced contract was awarded.

View a fact sheet on emergency and exigent circumstances.

Last updated July 22, 2020

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