

# BAKER DONELSON

## PROCUREMENT CHECKLIST - COMPLIANCE WITH 2 C.F.R. PART 200

This Checklist was created by FEMA and modified by Baker Donelson to provide additional guidance. The assigned Contract Manager or other Designee should use this Checklist as a guide to review each procurement and resulting contract that is, or may be, funded in whole or in part using federal financial assistance (e.g., grants or cooperative agreements). Successful completion of this Checklist will help to ensure compliance with the procurement standards of the government-wide *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards*, at 2 C.F.R. §§ 200.317 through 200.326.

**Instructions:** Each standard below is followed by a check box for “Yes”, “No”, or in some cases, “Not Applicable”. **Red font** is used to indicate the response which, if checked, indicates that the contract does not comply with federal requirements.

### 1. General requirement

- a. Does \_\_\_\_\_ maintain documented procurement policies and procedures which reflect applicable State and local laws and regulations? § 200.318(a)  Yes  No
  - i. Does the procurement comply with those policies and procedures?  Yes  No
- b. \_\_\_\_\_ must maintain contract oversight to ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders. §200.318(b)  Compliant  Not compliant
- c. Does \_\_\_\_\_ maintain written standards of conduct covering conflicts of interest (including organizational conflicts of interest) and governing the performance of employees engaged in the selection, award, and administration of contracts? § 200.318(c)  Yes  No
  - i. Does any employee, officer, or agent participating in the selection, award, or administration of a contract supported by a Federal award have an actual or apparent conflict of interest?<sup>1</sup>  Yes  No
  - ii. Has any employee, officer, or agent participating in the selection, award, or administration of a contract supported by a Federal award solicited

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<sup>1</sup> Such a conflict would arise when:

- (i) The employee, officer or agent,
- (ii) Any member of his immediate family,
- (iii) His or her partner, or
- (iv) An organization which employs, or is about to employ, any of the above, has a financial or other interest in the firm selected for award.

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and/or accepted gratuities, favors, or anything of monetary value from contractors or parties to subcontracts?  Yes  No

- d. It is \_\_\_\_\_ policy to avoid acquisition of unnecessary or duplicative items. Has \_\_\_\_\_ considered consolidating or breaking out procurements to obtain a more economical purchase? Where appropriate, has \_\_\_\_\_ considered lease versus purchase alternatives? § 200.318(d)  
 Yes  No
- e. For construction contracts, has \_\_\_\_\_ considered using value engineering clauses for projects sufficient in size to offer reasonable opportunities for cost reductions?<sup>2</sup> § 200.318(g)  Yes  No  Not Applicable
- f. Is the contract being awarded to a responsible contractor possessing the ability to perform successfully under the terms and conditions of the proposed procurement, giving consideration to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources? § 200.318(h)  Yes  No
- g. \_\_\_\_\_ policy requires maintenance of records sufficient to detail the history of the procurement, including, but not limited to, records documenting the rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price. § 200.318(i). Are these procedures in place for this contract?  Yes  No
- h. Is the contract a time-and-materials or time-and-equipment contract? § 200.318(j)  Yes  No
- i. If so, has \_\_\_\_\_ documented why no other contract is suitable (see document entitled *Determination Regarding Suitability for Time and Materials/Equipment Contract*)? § 200.318(j)(1)  Yes  No
- ii. If so, does the contract include a ceiling price that the contractor exceeds at its own risk? § 200.318(j)(1)  Yes  No
- iii. If so, does \_\_\_\_\_ have in place procedures to assert a high degree of contractor oversight in order to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls? § 200.318(j)(2)  Yes  No
- i. Is \_\_\_\_\_ alone responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements?<sup>3</sup> §200.318(k)  Yes  No

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<sup>2</sup> Value engineering is a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lower cost.

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### 2. Competition:

- a. All procurement transactions must be conducted in a manner providing **full and open competition** consistent with the standards of this section. Does the procurement involve any of the following?<sup>4</sup> § 200.319(a)
- i. Placing unreasonable requirements on firms in order for them to qualify to do business?  Yes  No
  - ii. Requiring unnecessary experience and excessive bonding?  Yes  No
  - iii. Noncompetitive pricing practices between firms or between affiliated companies?<sup>5</sup>  Yes  No
  - iv. Noncompetitive contracts to consultants that are on retainer contracts?<sup>6</sup>  Yes  No
  - v. Organizational conflicts of interest?  Yes  No
  - vi. Specifying only a “brand name” product instead of allowing “an equal” product to be offered and describing the performance or other relevant requirements of the procurement?  Yes  No
  - vii. Any arbitrary action in the procurement process?  Yes  No
- b. Was the contractor that is bidding on the contract also involved with developing or drafting the specifications, requirements, statement of work, invitation for bids or request for proposals? (If so, that contractor must be excluded from competing for such procurements.) § 200.319(a)  Yes  No  N/A
- c. Does the contract include a state or local geographic preference for local contractors?<sup>7</sup> § 200.319(b)  Yes  No
- d. Consistent with \_\_\_\_\_ Standard of Conduct and Procurement Policy, confirm the solicitation:

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<sup>3</sup> These issues include, but are not limited to source evaluation, protests, disputes, and claims.

<sup>4</sup> This list is non-exclusive and only serves as an example of some of the types of situations that are considered to be restrictive of competition.

<sup>5</sup> For example, bid suppression or bid rigging.

<sup>6</sup> For example, out-of-scope disaster work added to the consultant’s work on retainer.

<sup>7</sup> Geographic preferences are generally not allowed under FEMA grants. However, when contracting for architectural and engineering (A/E) services, geographic location may be a selection criterion provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

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- i. Incorporates a clear and accurate description of the technical requirements for the material, product, or service to be procured. § 200.319(c)(1)  Yes  No
- ii. Identifies all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals. § 200.319(c)(2)  Yes  No
- e. Is \_\_\_\_\_ using a prequalified list of persons, firms, or products which are used in acquiring goods and services: § 200.319(d)  Yes  No
  - i. If so, is the list current?  Yes  No
  - ii. If so, does the list include enough qualified sources to ensure maximum open and free competition?  Yes  No
  - iii. If so, were any potential bidders precluded from qualifying during the solicitation period?  Yes  No

### 3. Method of Procurement

- a. Confirm that one of the following acceptable methods of procurement was used; § 200.320:
  - i. **Micro-purchase** (i.e., purchases below \$3,500, see, § 200.67 Micro-purchases). § 200.320(a)  Yes  No
    - 1. [Note: Micro-purchases may be awarded without soliciting competitive quotations if \_\_\_\_\_ considers the price to be reasonable.]
    - 2. To the extent practicable, is \_\_\_\_\_ distributing micro-purchases equitably among qualified suppliers?  Yes  No  
 N/A – not practicable
  - ii. **Small purchase procedures** § 200.320(b)  Yes  No
    - 1. [Note: Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than the federal small purchase threshold (i.e., \$150,000).]
    - 2. Did \_\_\_\_\_ obtain price or rate quotations from at least three qualified sources?  Yes  No

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- iii. **Sealed bids** § 200.320(c)<sup>8</sup>  Yes  No
1. [Note: Bids are publicly solicited and a firm fixed price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. Sealed bidding is the preferred method for procuring construction]
  2. Are *all* of the following conditions to use sealed bidding present? § 200.320(c)(1)  Yes  No
    - a. A complete, adequate, and realistic specification or purchase description is available.  Yes  No
    - b. Two or more responsible bidders are willing and able to compete effectively for the business.  Yes  No
    - c. The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.  Yes  No
  3. If sealed bids are used, the following requirements apply: § 200.320(c)(2)
    - a. Was the solicitation publicly advertised?  Yes  No  
 N/A – required only for local and tribal governments
    - b. Did \_\_\_\_\_ solicit bids from an adequate number<sup>9</sup> of known suppliers, providing them sufficient response time prior to the date set for opening the bids?  Yes  No
    - c. Did the invitation for bids include any specifications and pertinent attachments, and define the items or services in order for the bidder to properly respond?  Yes  No

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<sup>8</sup> Sealed bidding is generally used where price is the most important evaluation factor for the entity. Accordingly, a contract award under the sealed bidding method of procurement is made to the bidder submitting *the lowest priced, responsive and responsible bid*. “Responsive” refers to whether the bidder meets all the material requirements of the solicitation, while “responsibility” is described at § 200.318(h).

<sup>9</sup> FEMA has not defined an “adequate number” of known sources under the sealed bidding method. While left undefined, \_\_\_\_\_ is likely to meet this requirement through the application of “full and open competition.”

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- d. Did \_\_\_\_\_ open all bids at the time and place prescribed in the invitation for bids?<sup>10</sup>  Yes  No
- e. Were the bids publicly opened?  Yes  No  N/A – required only for local and tribal governments
- f. Did \_\_\_\_\_ award a firm fixed price contract award in writing to the lowest responsive and responsible bidder?  Yes  No
- g. If any bids were rejected, was there a sound documented reason supporting the rejection?  Yes  No  N/A
- iv. **Procurement by competitive proposals**<sup>11</sup> § 200.320(d)  Yes  No
1. [Note: The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids.]
  2. Did \_\_\_\_\_ publicize the Requests For Proposals (RFPs) and identify all evaluation factors and their relative importance?  Yes  No
  3. Did \_\_\_\_\_ solicit proposals from an adequate number of qualified sources?<sup>12</sup>  Yes  No
  4. Did \_\_\_\_\_ have a written method for conducting technical evaluations of the proposals received and for selecting recipients?  Yes  No
  5. Did \_\_\_\_\_ award the contract to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered?  Yes  No
  6. [Note regarding architectural/engineering (A/E) professional services: \_\_\_\_\_ may use competitive proposal

<sup>10</sup> FEMA guidance states that only local and tribal governments must publicly open bids.

<sup>11</sup> Whereas contract awards under sealed bidding are focused on selecting the lowest responsive responsible bid, under the competitive procurement method, \_\_\_\_\_ may prioritize non-price factors, such as technical capability or past performance, over price and therefore award a contract to a contractor whose proposal not the lowest priced offer but reflects a better overall value to \_\_\_\_\_ (e.g. “best value” contracting).

<sup>12</sup> FEMA has not defined an “adequate number” of qualified sources under the competitive procurement method. While left undefined, \_\_\_\_\_ is likely to meet this requirement through the application of “full and open competition.”

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procedures for qualifications-based procurement of A/E professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. **The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms that are a potential source to perform the proposed effort.]**

v. **Noncompetitive proposals** § 200.320(f)  Yes  No

1. [Note: Procurement by noncompetitive proposals is an acceptable method of procurement under certain circumstances, where solicitation of a proposal occurs from only one source or a limited number of sources.]

2. Do one or more of the following circumstances apply?  
 Yes  No

a. The item is available only from a single source.  
 Yes  No

b. The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation.<sup>13</sup>  
 Yes  No

c. The Federal awarding agency or pass-through entity expressly authorized noncompetitive proposals in response to \_\_\_\_\_ written request.  Yes  No

d. After solicitation of a number of sources, competition is determined inadequate.<sup>14</sup>  Yes  No

e. Consistent with \_\_\_\_\_ Standard of Conduct and Procurement Policy, for any contract with an estimated

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<sup>13</sup> An "exigency" or "emergency" is a situation that calls for immediate action that will not permit a delay resulting from competitive solicitation. Use of the public exigency or emergency exception is only permissible during the actual exigent or emergency circumstances. Once the exigent or emergency circumstances cease to exist, \_\_\_\_\_ is expected to transition to a more appropriate method of contracting using full and open competition. Failure to properly transition to a more appropriate method of contracting at the cessation of the exigent or emergency circumstance has frequently been identified by the OIG as problematic, resulting in frequent recommendations to de-obligate or disallow all or a portion of incurred costs.

<sup>14</sup> Before utilizing this exception, \_\_\_\_\_ should review the solicitation and how it was publicized to ensure that it was not inadvertently drafted in a manner to reduce or eliminate competition, which resulted in the receipt of one or no proposals. If this is found to be the case, \_\_\_\_\_ should revise the solicitation and re-publicize the solicitation in order to resolve the competitive concerns.

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value of more than the Simplified Acquisition Threshold which, pursuant to 41 U.S.C. § 403(1), is currently listed as \$150,000, Legal Counsel and **Select One** approved the non-competitive proposals method as appropriate.  Yes  No

### 4. Contracting with Small and Minority Businesses, Women's Business Enterprises, and Labor Surplus Area Firms

- a. Has \_\_\_\_\_ taken at least the following affirmative steps to assure that minority businesses, women's business enterprises, and labor surplus area firms are used when possible? § 200.321  Yes  No  N/A (must document)
- i. Placing qualified small and minority businesses and women's business enterprises on solicitation lists?  Yes  No  N/A (must document)
- ii. Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources?  Yes  No  N/A – no potential sources (must document)
- iii. Dividing total requirements, *when economically feasible*, into smaller tasks or quantities to permit maximum participation by small and minority businesses, and women's business enterprises?  Yes  No  N/A – not economically feasible (must document)
- iv. Establishing delivery schedules, *where the requirement permits*, which encourage participation by small and minority businesses, and women's business enterprises?  Yes  No  N/A – the requirement does not permit (must document)
- v. Using the services and assistance, *as appropriate*, of such organizations as the Small Business Administration and the Minority Business Development Agency of the Department of Commerce  Yes  No  N/A – not appropriate (must document)
- vi. Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed above?  Yes  No  N/A – no subcontracts will be let (must document)

### 5. Contract cost and price

- a. If the contract amount (including contract modifications) exceeds \$150,000, did \_\_\_\_\_ make an independent estimate before receiving bids or proposals? § 200.323(a)  Yes  No  N/A



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- b. If the contract amount (including contract modifications) exceeds \$150,000, did perform a cost or price analysis?<sup>15</sup> § 200.323(a)  Yes  No  
 N/A
- c. Did \_\_\_\_\_ negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed?<sup>16</sup> § 200.323(b)  Yes  No  N/A
- d. Is the contract a “cost plus a percentage of cost” or “percentage of construction cost” contract?<sup>17</sup> [Note: This form of contract is prohibited under the Federal procurement standards and is ineligible for FEMA reimbursement] § 200.323(d)  
 Yes  No
6. **Bonding requirements for construction or facility improvement contracts exceeding \$150,000**
- a. For construction or facility improvement contracts or subcontracts in excess of \$150,000, does the procurement include the following?  Yes  No  N/A
- i. A bid guarantee from each bidder equivalent to five percent of the bid price?  Yes  No  N/A
1. The “bid guarantee” must consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of the bid, execute such contractual documents as may be required within the time specified.

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<sup>15</sup> The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, \_\_\_\_\_ must make an independent estimate before receiving bids or proposals. A cost analysis must be performed when the offeror is required to submit the elements of his estimated cost, e.g., under professional, consulting, and architectural engineering services contracts. A cost analysis will be necessary when adequate price competition is lacking, and for sole source procurements, including contract modifications or change orders, unless price reasonableness can be established on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public or based on prices set by law or regulation. A price analysis will be used in all other instances to determine the reasonableness of the proposed contract price.

<sup>16</sup> To establish a fair and reasonable profit, consideration will be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

<sup>17</sup> This type of contract is separate and distinct from cost plus fixed fee, cost plus incentive fee, and cost plus award fee type contracts, which are permissible and used to incentivize contractors to perform to a higher standard of quality, lower cost, or faster performance. Cost plus percentage of cost contracts on the other hand provide none of these incentives; instead, there is a reverse incentive for the contractor to increase its costs as the higher its costs go, the more profit it earns, as its potential earnings are uncapped. The following characteristics are suggestive of a prohibited cost plus percentage of cost contract: (1) payment is on a predetermined percentage rate; (2) the predetermined percentage rate is applied to actual performance costs; (3) the contractor's entitlement is uncertain at the time of contracting; and (4) the contractor's entitlement increases commensurately with increased performance costs.

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ii. A performance bond on the part of the contractor for 100 percent of the contract price?  Yes  No  N/A

1. A “performance bond” is one executed in connection with a contract to secure fulfillment of all the contractor’s obligations under such contract.

iii. A payment bond on the part of the contractor for 100 percent of the contract price.  Yes  No  N/A

1. A “payment bond” is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

### 7. Does the contract include the following clauses?

a. If the contract amount exceeds \$150,000<sup>18</sup>, does it address **administrative, contractual, or legal remedies** in instances where contractors violate or breach contract terms, and provide for sanctions and penalties?  Yes  No  N/A

b. If the contract amount exceeds \$10,000, does it address **termination for cause and for convenience, including the manner by which it will be effected and the basis for settlement?**  Yes  No  N/A

c. If the contract is for construction, does it include the required **Equal Employment Opportunity clause**?<sup>19</sup>  Yes  No  N/A

d. For construction contracts exceeding \$2,000 awarded under a Federal grant, does the contract include a **Davis-Bacon Act** clause and **Copeland “Anti- Kickback” Act clause** addressing prevailing wage rates?<sup>20</sup> [Note that these provisions are not required for contracts funded by FEMA’s Public Assistance or Hazard Mitigation Grant Programs.]  Yes  No  N/A

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<sup>18</sup> \$150,000 is the current dollar threshold for the simplified acquisition threshold, as authorized by 41 U.S.C. § 1908.

<sup>19</sup> The text of the clause may be found at 41 C.F.R. Part 60-1.4(b).

<sup>20</sup> Where applicable, FEMA requires the following clause:

Compliance with the Copeland “Anti-Kickback” Act.

(1) Contractor. The contractor shall comply with 18 U.S.C. § 874, 40 U.S.C. § 3145, and the requirements of 29 C.F.R. pt. 3 as may be applicable, which are incorporated by reference into this contract.

(2) Subcontracts. The contractor or subcontractor shall insert in any subcontracts the clause above and such other clauses as the FEMA may by appropriate instructions require, and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for the compliance by any subcontractor or lower tier subcontractor with all of these contract clauses.

(3) Breach. A breach of the contract clauses above may be grounds for termination of the contract, and for debarment as a contractor and subcontractor as provided in 29 C.F.R. § 5.12.

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- e. If the contract amount exceeds \$100,000 and involves the employment of mechanics or laborers, does the contract include a **Contract Work Hours and Safety Standards clause**?<sup>21</sup>  Yes  No  N/A
- f. If the contract or subgrant amount exceeds \$150,000, does the contract include clauses addressing the **Clean Air Act and the Federal Water Pollution Control Act**?<sup>22</sup>  Yes  No  N/A
- g. Does the contract include a **Suspension and Debarment clause**?  Yes  No<sup>23</sup>
- h. Does the contract include an **Anti-Lobbying clause**?<sup>24</sup>  Yes  No
- i. For contracts exceeding \$100,000, have bidders submitted an Anti-Lobbying Certification?  Yes  No  N/A
- i. Does the contract include a clause requiring the contractor to maximize use of **recovered/recycled materials**? § 200.317, § 200.322.  Yes  No  N/A – **work does not involve the use of materials (e.g., debris removal or other services)**
- j. Does the contract include a changes clause that describes how, if at all, changes can be made by either party to alter the method, price, or schedule of the work

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<sup>21</sup> Must include a provision for compliance with 40 U.S.C. 3702 and 3704, as supplemented by Department of Labor regulations (29 CFR Part 5). Under 40 U.S.C. 3702 of the Act, each contractor must be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than one and a half times the basic rate of pay for all hours worked in excess of 40 hours in the work week. The requirements of 40 U.S.C. 3704 are applicable to construction work and provide that no laborer or mechanic must be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation. The text of the required clause is provided at 29 C.F.R. § 5.5(b).

<sup>22</sup> The clause may read as follows:

Contractor agrees to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401-7671q) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251-1387), and will report violations to FEMA and the Regional Office of the Environmental Protection Agency (EPA).

<sup>23</sup> A prospective contractor that is listed on the government-wide Excluded Parties List System in the System for Award Management ([www.SAM.gov](http://www.SAM.gov)) as suspended or debarred, **CANNOT** be awarded a contract funded with Federal assistance.

<sup>24</sup> The clause may read substantially as follows:

Byrd Anti-Lobbying Amendment, 31 U.S.C. § 1352 (as amended). Contractors who apply or bid for an award of \$100,000 or more shall file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant, or any other award covered by 31 U.S.C. § 1352. Each tier shall also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the recipient.

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without breaching the contract?  Yes  No – this provision is recommended, but not required

- k. Does the contract include a provision that all contractors and their successors, transferees, assignees, and subcontractors acknowledge and agree to comply with applicable provisions governing Department of Homeland Security and FEMA **access to records**, accounts, documents, information, facilities, and staff?  Yes  No
- l. Does the contract include a provision prohibiting the contractor from using Department of Homeland Security **seals, logos, and flags** without specific FEMA pre-approval?  Yes  No
- m. Does the contract include an acknowledgement that FEMA financial assistance will be used to fund the contract along with the requirement that the contractor will **comply with all applicable federal law, regulations, executive orders, and FEMA policies, procedures, and directives**?  Yes  No
- n. Does the contract include a provision stating that **the Federal Government is not a party to the contract** and is not subject to any obligations or liabilities to \_\_\_\_\_, contractor, or any other party pertaining to any matter resulting from the contract?  Yes  No
- o. Does the contract include a provision that the contractor acknowledges that 31 U.S.C. Chapter 38 (**Administrative Remedies for False Claims and Statements**) applies to the its actions pertaining to the contract?  Yes  No

END OF CHECKLIST