

# PUBLICATION

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## Contracting Under Federal Procurement Requirements After Hurricane Harvey

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**As impacted public entities and non-profits begin the long road to recovery after Hurricane Harvey, it is critical that they do not overlook or ignore compliance with important regulatory requirements upon which federal funding may rest, including procurement standards. Entities that are potentially eligible for reimbursement through FEMA's Public Assistance or other federally funded programs must comply with these regulatory requirements; or they may face new challenges down the road when funding is denied or retroactively deobligated (taken back).**

The Office of Inspector General recently released a report urging FEMA to enforce compliance with FEMA's procurement rules more strictly. Hurricane Harvey may be FEMA's opportunity to do just that. It is critical that applicants for FEMA Public Assistance funding are aware of the regulatory procurement requirements of 2 C.F.R. Part 200 before contracting for recovery work that may be eligible for reimbursement by FEMA. Some of those requirements are highlighted below:

### General Procurement Requirements

An applicant must:

- Use its own documented procurement procedures;
- Maintain written standards of conduct covering conflicts of interest;
- Maintain records sufficient to detail the history of procurement;
- Only use time and materials contracts after a determination that no other form of contract is suitable and only if the contract includes a price ceiling;
- Maintain oversight to ensure that contractors perform in accordance with their contract;
- Award contracts to only responsible contractors; and
- Be responsible for the settlement of all contractual and administrative issues arising out of procurements.

### Competition

An applicant must:

- Conduct procurements in a manner providing full and open competition;
- Prohibit the use of geographical preferences;
- Have written procedures for procurement transactions;
- Ensure all pre-qualified vendor lists are current and include enough qualified sources;
- Have a code of conduct with standards prohibiting employees involved in procurement from soliciting or accepting gifts; and
- Use one of the "methods of procurement" outlined in the regulations and comply with the applicable rules.

### Competition – Don'ts

Some of the situations considered to restrict competition include, but are not limited to:

- Placing unreasonable requirements on firms in order for them to qualify to do business;
- Requiring unnecessary experience and excessive bonding;
- Non-competitive pricing practices between firms or between affiliated companies;
- Non-competitive contracts to consultants that are on retainer contracts;
- Organizational conflicts of interest;
- 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; and
- Any arbitrary action in the procurement process.

### **Other Considerations**

#### **An applicant must:**

- Take certain affirmative steps to assure that small and minority businesses, women's business enterprises and labor area surplus firms are used when possible;
- In most instances, obtain an independent estimate prior to receiving bids or proposals and conduct a cost or price analysis to assure price reasonableness; and
- Include specific provisions in any contract funded in whole or in part by federal funds.