

# PUBLICATION

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## OIG Pushing FEMA to Get Tougher on Procurement Compliance

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**The Department of Homeland Security Office of Inspector General (OIG) recently released their report "FEMA Can Do More to Improve Public Assistance Grantees' and Subgrantees' Compliance with Federal Procurement Rules." OIG thinks that FEMA has been "Mr. Nice Guy" and is pressuring FEMA to take back all funding to federal grant recipients who have failed to comply with federal grant regulations.**

FEMA told the OIG that it was not in the public interest to take back (deobligate) all disaster grant funds from local government and non-profit recipients where procurement violations existed as long as expenditures were reasonable. Nonetheless, grantees and subgrantees would be wise to carefully review their internal procurement policies and the federal regulations (now codified at 2 C.F.R. Part 200). Compliance with state or local procurement rules is not enough if you want the federal government to pay some of your disaster recovery costs. Remember that federal disaster assistance is delivered through a federal grant and is subject to all the requirements and procedures of federal grants. Noncompliance with procurement regulations may turn out to be extremely expensive.

What exactly did OIG say? In the report, OIG admonishes FEMA for allowing 91.3 percent of the \$352.3 million in contract costs that OIG questioned in the audited sample. The report exposed a significant rift between OIG and FEMA on how best to enforce the procurement regulations that apply to states, tribal and local governments, and certain types of private non-profit organizations that receive federal disaster assistance under FEMA's Public Assistance program.

The challenge faced by FEMA is that most tribal and local governments, and most eligible non-profit entities, do not have much familiarity with administering federal grants or with the federal procurement rules that every federal grant recipient and sub-recipient is supposed to follow. Moreover, when disaster strikes, they must make major procurement decisions quickly for debris removal; for emergency work protecting against imminent threats to life, public safety and property; and (though usually in less of a hurry) to repair or replace damaged facilities. Not surprisingly, and not infrequently, recipients make mistakes in complying with the detailed procurement requirements. The most frequent violations are failure to use competitive processes to advertise and select contractors, failure to perform a "cost or price analysis" when conducting procurements and failure to take affirmative steps to provide opportunities to minority firms and women's business enterprises.

When finding procurement violations, FEMA's standard practice has been and remains to disallow only that portion of contract costs which exceed the cost found by FEMA to be reasonable. By contrast, OIG typically recommends to FEMA that FEMA disallow all costs identified as not fully compliant with federal regulations. OIG complained that FEMA's reasonableness analyses are "inherently subjective and typically result in reasonable costs" and ignore the fact that "the goals of proper procurement relate to more than just reasonable cost." OIG recommends that FEMA:

1. Implement policies and procedures for more clearly defining and documenting the exigent or emergency circumstances and time periods for declared disasters (procurement rules are often

suspended during the initial "emergency" hours after a disaster, but it is sometimes unclear when the period begins and ends);

2. Review and assess all legally sanctioned remedies to enforce procurement regulations; and
3. Explore using funds disallowed due to procurement noncompliance to assist communities in future disasters and expanding grant management and training programs that focus on procurement compliance.

FEMA held firm in its response to the OIG, stating that FEMA would continue to improve compliance with procurement regulations through education and outreach, particularly in the immediate aftermath of disasters. But FEMA will be studying the effectiveness of its current enforcement policy. Bottom line: Don't tempt fate. Eligible public assistance applicants should review their procurement standards and processes for compliance with federal regulatory requirements.

To discuss the content of this alert or any other issues related to disaster recovery, please contact Michelle F. Zaltsberg, Ernest B. Abbott or any of the members of our Disaster Recovery and Government Services Team.