

# PUBLICATION

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## Contracting Under Federal Procurement Requirements After Hurricane Ida

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As impacted public entities and non-profits begin the long road to recovery after Hurricane Ida, it is critical that they comply with important regulatory requirements for federal disaster assistance funding, including procurement requirements. If these requirements are ignored or overlooked, entities that are potentially eligible for reimbursement through the Federal Emergency Management Agency (FEMA) Public Assistance program or other federally funded programs may face additional, avoidable challenges down the road. These can include denials of assistance or retroactive deobligation (claw back) of funding.

The Office of Inspector General recently released a [report](#) urging FEMA to enforce compliance with FEMA's procurement rules more strictly. Hurricane Ida 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 FEMA reimbursement. 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;
- Conduct either a price or cost analysis for each procurement above the Simplified Acquisition Threshold, which is currently \$250,000;
- 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 only to 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;
- 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, the following:

- 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;
- Using state, local, or tribal geographical preferences in the evaluation of bids or proposals;
- Non-competitive contracts to consultants that are on retainer contracts;
- Organizational conflicts of interest;
- Allowing contractors that develop or draft specifications, requirements, statements of work, invitations for bid or requests for proposals to compete for and be awarded the subsequent contract for that work;
- 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-owned 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 – the regulations were updated in November 2020 to include two new required provisions.

### Emergency Contracting

Finally, we realize that many entities that are, or eventually may be, applicants under the FEMA Public Assistance program may be engaging in emergency contracting out of necessity to handle immediate needs and protect the public health and safety. FEMA does recognize there are times when entities are not able to complete full competitive procurement of goods or services due to "exigent or emergency circumstances." FEMA has [specific guidance](#) applicable to these types of situations and it is important to understand that there are continuing requirements that must be followed to support eventual reimbursement of the incurred costs. Some of the applicable requirements can be addressed and risks of non-compliance mitigated even after the initial contract is awarded and work has begun.

Recognizing that entities impacted by Hurricane Ida may face exigent or emergency circumstances when carrying out a FEMA award, the FEMA Procurement Disaster Assistance Team is offering a series of live virtual trainings on emergency procurement and other very helpful topics related to procurement. Interested entities can view the schedule and register [here](#).

Please contact [Michelle F. Zaltsberg](#), [Wendy Huff Ellard](#), or any member of [Baker Donelson's Disaster Recovery and Government Services Team](#) with any questions or for further information.

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