

## **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) – 2 CFR pt. 200**

This checklist was created to assist FEMA recipients and subrecipients in complying with the federal requirements that procurements must meet in order for FEMA to reimburse eligible expenses. Importantly, this checklist is intended to provide general guidance only and does not provide a detailed explanation of the Federal procurement requirements – it is not intended to serve as legal advice and FEMA makes no guarantee that adherence to this checklist will result in full reimbursement of eligible expenses. To understand the requirements fully, the user should review the provisions of [2 C.F.R. § 200.317 – 326](#), which is the source of these requirements. FEMA’s in – depth guidance on these provisions can be found in its *Supplement to the Public Assistance Field Manual*. In addition, the user may review FEMA’s Field Manual, [Public Assistance Grantee and Subgrantee Procurement Requirements](#), which is available on the internet by searching for “FEMA Procurement Field Manual.” While the Field Manual was drafted to specifically address the Federal procurement standards that were in effect prior to 26 December 2014 ([44 C.F.R. § 13.36\(a\)-\(i\) – States, Local and Tribal Governments](#); and [2 C.F.R. § 215.40-48 – Institutions of Higher Education, Hospitals, and other Non-Profit Organizations](#)), many of the concepts are similar or identical in substance, and thus remains an excellent tool for navigating the current Federal procurement standards. If any questions arise, please contact your servicing attorney or legal counsel for assistance.

2 C.F.R. § 200.317 – 326 became effective on December 26, 2014. For disasters (and their associated projects) declared prior to that date, the relevant procurement standards can continue to be found in 44 C.F.R. § 13.36(a)-(i) (States, local and tribal governments) and 2 C.F.R. § 215.40-48 (Institutions of Higher Education, Hospitals, and Private Non-Profits).<sup>1</sup> As indicated above, while many of the concepts are similar or identical, there are some substantive differences between the old and the new standards. Accordingly, this checklist should not be used for procurements associated

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<sup>1</sup> This includes projects associated with declarations issued prior to 26 December 2014, regardless of project start date. For example, if a disaster was declared on 1 November 2014, but contracting for a project under that declaration did not begin until 1 April 2015, then a State (or state agency/instrumentality) would still utilize the old procurement standards found at 44 C.F.R. § 13.36(a); local and tribal governments would follow § 13.36(b)-(i); and Institutions of Higher Education, Hospitals, and Private Non-Profits would use 2 C.F.R. §§ 215.40-48.

with declarations issued prior to 26 December 2014. Instead, see procurement standards Checklists 13.36 and 215.<sup>2</sup>

**Instructions:** Each standard below is followed by a block 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.

The term “non-Federal entity” (NFE) below refers to the entity that is conducting the procurement action (i.e., the state, local, or tribal government or private-non-profit entity).

1. Does the procurement comply with the State’s own procurement laws, rules, and procedures? §200.317  **Yes**  **No**
2. Does the procurement comply with the requirement to make maximum 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)**
3. **Does the contract include the following clauses?**<sup>3</sup>
  - a. *If the contract amount exceeds \$150,000*<sup>4</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>5</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**<sup>6</sup> addressing prevailing wage rates? [Note that Public

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<sup>2</sup> 2 C.F.R. §200.110 provides prospective applicants with the option of exercising a “grace period,” which allows the prospective applicant to continue to use the old procurement standards at 13.36 or 215 for an additional two (2) fiscal years beginning on the first fiscal year after 26 December 2014. The fiscal year is based upon the prospective applicant’s own fiscal year. In order to utilize this exception, the prospective applicant is required to affirmatively elect its use through the documentation of this decision in its contract records.

<sup>3</sup> See [Appendix II of 2 CFR part 200](#). See also, PDAT Field Manual, section IV.H for a detailed discussion of these clauses. Sample clauses and templates can be found in the [Required Contract Clauses 2 CFR 200.326 and 2 CFR Part 200 Appendix II](#).

<sup>4</sup> \$150,000 is the current dollar threshold for the simplified acquisition threshold, as authorized by 41 U.S.C. § 1908.

<sup>5</sup> The EEO clause can be found at [41 C.F.R. § 60-1.4\(b\)](#).

<sup>6</sup> The clause may read as follows:

Compliance with the Copeland “Anti-Kickback” Act

Assistance and Hazard Mitigation Grant Program contracts do NOT require these clauses.]  Yes  No  N/A

- 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>7</sup>*  Yes  No  N/A
- f. Rights to Inventions Made Under a Contract or Agreement.<sup>8</sup>  N/A
- g. *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>9</sup>*  Yes  No  N/A
- h. *Does the contract include a **Suspension and Debarment clause**?<sup>10</sup>*  Yes  No<sup>11</sup>
- i. *Does the contract include an **Anti-Lobbying clause**?<sup>12</sup>*  Yes  No

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(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.

<sup>7</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.

<sup>8</sup> As FEMA does not award grants or subgrants associated with research and development projects, this contract clause is inapplicable.

<sup>9</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>10</sup> See, PDAT Manual, pps. 99-100 for sample text.

<sup>11</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>12</sup> See PDAT Manual, pgs. 127-129. The clause may read substantially as follows:

- i. For contracts exceeding \$100,000, have bidders submitted an Anti-Lobbying Certification?  **Yes**  **No**  **N/A**
- j. *Does the contract include a clause requiring the contractor to maximize use of recovered/recycled materials?*  **Yes**  **No**  **N/A – work does not involve the use of materials (e.g., debris removal or other services)**

If a State agency is awarding the contract, stop here. If the contract is being awarded by a local or tribal government or private nonprofit entity, continue with the checklist.



#### 4. General requirements<sup>13</sup>

- a. *Does the procurement comply with the NFE's*<sup>14</sup> *own procurement laws, rules, and procedures?* §200.318(a)  **Yes**  **No**
- b. *Does the NFE 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)  **Yes**  **No**
- c. *Does the NFE have - §200.318(c)(1):*
  - i. *Written standards of conduct covering conflicts of interest and governing the actions of its employees engaged in the selection, award and administration of contracts?*  **Yes**  **No**
  - ii. *Any employee, officer, or agent participating in the selection, award, or administration of a contract supported by a Federal award that has an actual or apparent conflict of interest?*<sup>15</sup>  **Yes**  **No**

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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.

<sup>13</sup> [See, 2 C.F.R. § 200.318](#)

<sup>14</sup> Non-Federal Entity (NFE)

<sup>15</sup> Such a conflict of interest would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in or a tangible personal benefit from a firm considered for a contract.

- iii. Any employee, officer, or agent that has solicited and/or accepted gratuities, favors, or anything of monetary value from contractors or parties to subcontracts?<sup>16</sup>  Yes  No
- iv. Written standards of conduct that provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the non-Federal entity.  Yes  No
- d. *If the non-Federal entity has a parent, affiliate, or subsidiary organization that is not a state, local government, or Indian tribe, does the non-Federal entity have written standards of conduct covering organizational conflicts of interest?* § 200.318(c)(2)<sup>17</sup>  Yes  No  N/A
- e. The NFE must avoid acquisition of unnecessary or duplicative items. Has the NFE *considered* consolidating or breaking out procurements to obtain a more economical purchase? Where appropriate, has the NFE considered lease versus purchase alternatives? § 200.318(d)  Yes  No
- 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. *Is the NFE keeping 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)  Yes  No
- h. *Is the contract a time-and-materials contract?*<sup>18</sup> § 200.318(j)  Yes  No

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<sup>16</sup> However, NFEs may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value.

<sup>17</sup> Organizational conflicts of interest means that because of relationships with a parent company, affiliate, or subsidiary organization, the NFE is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization.

<sup>18</sup> Time and materials type contract means a contract whose cost to a non-Federal entity is the sum of: (i) The actual cost of materials; and (ii) Direct labor hours charged at fixed hourly rates that reflect wages, general and administrative expenses, and profit. Because this formula generates an open-ended contract price, a time-and-materials contract provides no positive profit incentive to the contractor for cost control or labor efficiency. Therefore, a time-and-materials contract must set a ceiling price that the contractor exceeds at its own risk. Further, the non-Federal entity awarding such a contract must assert a high degree of oversight in order to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls. **[Note that FEMA previously reimbursed costs under a time-and-materials contract for only the first 70 hours of work performed. See, FEMA PA Guide (2007 ed.), pg. 53. However, FEMA's new Public Assistance Guide, published on 1 January 2016, has eliminated this requirement and replaced it with a reasonable period of time standard. Please engage your FEMA Public Assistance POC for additional information]**

- i. If so, has the NFE documented why no other contract is suitable?  
 Yes     No
- ii. Does the contract include a ceiling price that the contractor exceeds at its own risk?  Yes  No
- i. *Is the NFE 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? §200.318(k)  Yes  No
- j. *Encouraged*, but not required standards at § 200.318(e), (f), and (g).<sup>19</sup>

5. **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>20</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>21</sup>  Yes  No
  - iv. Noncompetitive contracts to consultants that are on retainer contracts?<sup>22</sup>  Yes  No
  - v. Organizational conflicts of interest?<sup>23</sup>  Yes  No

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<sup>19</sup> §200.318(e) – to foster greater economy and efficiency, the NFE is encouraged to enter into state and local intergovernmental agreements or inter-entity agreements where appropriate for procurement or use of common or shared goods and services (this section provides the authority for state schedule and mutual aid agreements, for example); §200.318(f) – NFEs are encouraged to use Federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs; and §200.318(g) – NFEs are encouraged to use value engineering clauses in contracts for construction projects (value engineering is a systematic and creative analysis of each contract item or task to encourage the contractor to develop more cost effective means to produce or procure requirements.).

<sup>20</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>21</sup> For example, bid suppression or bid rigging.

<sup>22</sup> For example, out-of-scope disaster work added to the consultant's work on retainer.

<sup>23</sup> See, fn 18.

- 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>24</sup> § 200.319(b)  **Yes**  **No**
- d. Do the NFE’s written procurement procedures ensure that all solicitations comply with the following: § 200.319(c)
  - i. Incorporate 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. Identify 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. If the NFE is using a prequalified list of persons, firms, or products which are used in acquiring goods and services: § 200.319(d)  N/A
  - i. Is the list current?  **Yes**  **No**
  - ii. Does the list include enough qualified sources to ensure maximum open and free competition?  **Yes**  **No**
  - iii. Were any potential bidders precluded from qualifying during the solicitation period?<sup>25</sup>  **Yes**  **No**

## 6. **Method of Procurement**

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<sup>24</sup> Geographic preferences are generally not allowed under FEMA grants. The only exception is that 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.

<sup>25</sup> Pre-qualified lists are **NOT** contracts. Accordingly, once the decision to solicit and award a contract is made, the NFE may issue the solicitation directly to the contractors on the pre-qualified list, but must also allow any interested contractor (not on the pre-qualified list) to submit its qualifications, and if deemed qualified, allow that contractor to submit a bid or proposal in response to the solicitation. Contract award will then be made to one of the contractors submitting a bid or proposal, IAW the evaluation/award criteria identified in the solicitation.

- a. Is the NFE using one of the following acceptable methods of procurement?  
§ 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 the non-Federal entity considers the price to be reasonable.]
    - 2. To the extent practicable, is the NFE 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 **lesser** of either (1) the federal small purchase threshold (i.e., \$150,000), or (2) whatever amount State or local procurement rules set as the small purchase threshold – *if more restrictive than the federal threshold.*]
    - 2. Did the NFE obtain price or rate quotations from an adequate number of qualified sources?<sup>26</sup>  **Yes**  **No**
  - iii. **Sealed bids** § 200.320(c)<sup>27</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**

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<sup>26</sup> FEMA has determined that for simplified purchase procedures, an adequate number of qualified sources is considered to be three (3). See, [FEMA Recovery Fact Sheet 9580.212 – Public Assistance Grant Contracting Frequently Asked Questions \(FAQ\)](#), FAC No. 3 and the PDAT Field Manual.

<sup>27</sup> Sealed bidding is generally used where price is the most important evaluation factor for the NFE. Accordingly, 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 Invitation for Bid (IFB), while “Responsibility” is described at § 200.318(h).



- 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. Did the NFE solicit bids from an adequate number<sup>28</sup> of known suppliers, providing them sufficient response time prior to the date set for opening the bids?  **Yes**  **No**
  - b. If the NFE is a local or tribal government, was the invitation for bids publically advertised?  **Yes**  **No**  **N/A**
  - 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**
  - d. Did the NFE open all bids at the time and place prescribed in the invitation for bids?  **Yes**  **No**
  - e. For local and tribal governments, were the bids opened publicly?  **Yes**  **No**  **N/A**
  - f. Did the NFE 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>29</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

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<sup>28</sup> Unlike, for simplified purchase procedures, FEMA has not defined an “adequate number” of known sources under the sealed bidding method. While left undefined, a NFE is likely to meet this requirement through the application of “full and open competition.” (See fn. 27)

<sup>29</sup> Whereas contract awards under sealed bidding are focused on selecting the lowest responsive responsible bid, NFEs 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 is more expensive but reflects a better overall value to the NFE (e.g. “best value” contracting).

awarded. It is generally used when conditions are not appropriate for the use of sealed bids.]

2. Did the NFE publicize the Requests For Proposals (RFPs) and identify all evaluation factors and their relative importance?  Yes  No
3. Did the NFE solicit proposals from an adequate number of qualified sources?<sup>30</sup>  Yes  No
4. Did the NFE have a written method for conducting technical evaluations of the proposals received and for selecting recipients?  Yes  No
5. Did the NFE 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: The NFE may use competitive proposal 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)<sup>31</sup>  Yes  No

1. [Note: Procurement by noncompetitive proposals is procurement through solicitation of a proposal from only one (or an improperly limited number of) source(s)]
2. Do one or more of the following circumstances apply?  Yes  No
  - a. The item is available only from a single source  Yes  No

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<sup>30</sup> Unlike, for simplified purchase procedures, FEMA has not defined an “adequate number” of qualified sources under the competitive procurement method. While left undefined, a NFE is likely to meet this requirement through the application of “full and open competition.”

<sup>31</sup> § 200.320(e) is reserved.

- b. The public exigency or emergency<sup>32</sup> for the requirement will not permit a delay resulting from competitive solicitation  **Yes**  **No**
- c. The Federal awarding agency or pass-through entity expressly authorizes noncompetitive proposals in response to a written request from the non-Federal entity  **Yes**  **No**
- d. After solicitation of a number of sources, competition is determined inadequate.<sup>33</sup>  **Yes**  **No**

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

- a. Has the NFE taken the following affirmative steps<sup>34</sup> to assure that minority businesses, women's business enterprises, and labor surplus area firms are used when possible?<sup>35</sup> § 200.321  **Yes**  **No**  **N/A (document)**
  - i. Placing qualified small and minority businesses and women's business enterprises on solicitation lists?  **Yes**  **No**  **N/A (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 (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?<sup>36</sup>  **Yes**  **No**  **N/A – not economically feasible (document)**

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<sup>32</sup> For an explanation of what “emergency” and exigency” mean, see PDAT Field Manual, pg. 68.

<sup>33</sup> Before utilizing this exception, Applicants should review their solicitation and the publicizing of their solicitation 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, the Applicant should revise the solicitation and re-publicize the solicitation in order to resolve the competitive concerns.

<sup>34</sup> The following affirmative steps are non-exclusive; while these steps must be taken, additional steps, as determined by the NFE, local, state, or tribal government regulations or procedures, may also be taken.

<sup>35</sup> Collectively referred to as “socioeconomic contractors” or “socioeconomic contracting,” this requirement does not impose an obligation to set aside either the solicitation or award of a contract to these types of firms; this requirement only imposes an obligation to carry out and document the six identified affirmative steps. Failure to do so has been frequently identified as a justification to de-obligate funding by the Department of Homeland Security (DHS), Office of Inspector General (OIG).

<sup>36</sup> This is not the same as breaking a single project down into smaller components in order to circumvent the micro-purchase or small purchase thresholds to utilize their streamlined acquisition procedures (e.g. “project splitting.”)

- 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 (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 (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 (document)**

8. **Contract cost and price**<sup>37</sup>

- a. *If the contract amount (including contract modifications) exceeds \$150,000, did the NFE perform a cost or price analysis?* § 200.323(a)  **Yes**  **No**  **N/A**
- b. Did the NFE 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?* § 200.323(b)  **Yes**  **No**  **N/A**
- c. Is the contract a “cost plus a percentage of cost” or “percentage of construction cost” contract?<sup>38</sup> [Note: This form of contract is prohibited under the Federal procurement standards and is ineligible for FEMA reimbursement]  **Yes**  **No**

9. **Bonding requirements for construction or facility improvement contracts exceeding \$150,000**

- a. [Note: *For construction or facility improvement contracts or subcontracts exceeding the Simplified Acquisition Threshold (i.e., \$150,000), the Federal awarding agency or pass-through entity may accept the bonding policy and*

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<sup>37</sup> See, [Pricing Guide for Recipients and Subrecipients Under the Uniform Rules](#) for guidance on cost or price analysis.

<sup>38</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.

requirements of the non-Federal entity provided that the Federal awarding agency or pass-through entity has made a determination that the Federal interest is adequately protected.]

- b. If such a determination (see above) has not been made, 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.
- 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.

**END OF CHECKLIST<sup>39</sup>**

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<sup>39</sup> All FEMA PDAT Reference Materials can be found at the following website: [www.fema.gov/procurement-disaster-assistance-team](http://www.fema.gov/procurement-disaster-assistance-team)