

# Procurements under Grants

## *Requirements for Recipients and Subrecipients When Procuring Services and Supplies with Funding under Stafford Act Grant Programs*

DR-4393-NC

Keri Borzilleri

Attorney Advisor

FEMA Procurement Disaster Assistance Team (PDAT)

9/27/18



**FEMA**

# Considerations for Today

- Please ask questions as they arise during the presentation.
- This presentation is a high level, general overview of the Federal procurement standards applicable to disaster assistance awards under the Stafford Act.
- This presentation **is not intended to be, nor should it be considered as, legal advice.**



**FEMA**

# Agenda

- What Rules Apply to Procurement Under Grants?
- Who Do The Rules Impact?
- What Rules Apply to States and Non-State Entities?
- When Do The Rules Apply?
  - General Requirements
  - At Solicitation
- Why Comply?



**FEMA**

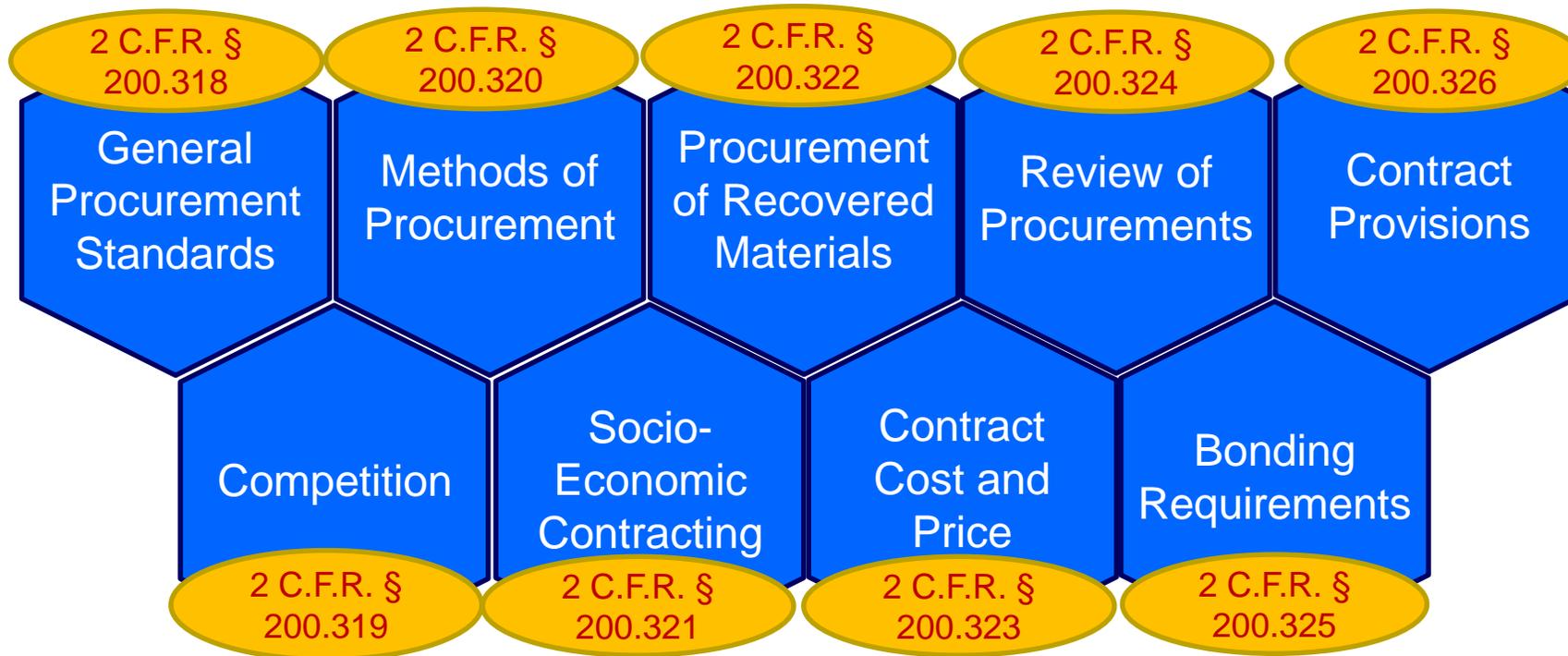
# What Rules Apply to Procurements Under Grants?

- The Uniform Rules found at 2 C.F.R. §§ 200.317-326 provide the procurement standards.
- These rules apply to ALL Federal grants.
- The Uniform Rules are used for all Federal disasters declared on or after **December 26, 2014**.
- The old rules still apply to grants issued before this date and to all projects associated with these earlier disaster declarations.



**FEMA**

# Overview of Rules



FEMA

# Who Do the Rules Impact?

- **Recipient** = the Federal award administrator
  - Includes: States, Tribal Indian Governments.
- **Subrecipient** = the non-Federal entity that receives a subaward from a recipient entity to carry out part of a Federal program, and which is accountable to the recipient for the use of the funds provided.
  - Includes:
    - Local and Tribal Indian Governments (for declarations of the State);
    - Institutions of Higher Education (“IHE”), Hospitals, other Nonprofit Organizations (“PNP”), and Houses of Worship; and
    - State agencies or instrumentalities receiving funds from the pass-through entity.



**FEMA**

# What Rules Apply to States?

<b>State Non-Federal Entities (state agencies, instrumentalities of the state, and territories)</b>	<b>Other Non-Federal Entities (local governments, tribal governments, IHEs, hospitals, and other nonprofit organizations)</b>
<p>2 C.F.R. § 200.317</p>	<p>2 C.F.R. §§ 200.318 through 200.326</p>
<p><u>Synopsis:</u></p> <ul style="list-style-type: none"> <li>• (1) Must follow same policies and procedures it uses for procurements from its non-Federal funds;</li> <li>• (2) Comply with § 200.322 (procurement of recovered materials); and</li> <li>• (3) Include any clauses required by § 200.326 (contract provisions)</li> </ul>	<p><u>Synopsis:</u></p> <ul style="list-style-type: none"> <li>• (1) Must follow its own documented procurement procedures which reflect applicable state, local, and tribal laws and regulations; and</li> <li>• (2) Provided that the procurements conform to applicable federal law and the standards identified in 2 C.F.R. §§ 200.318 through 200.326</li> </ul>
<p><b>***Note: “State”</b> – means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, U.S. Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any agency or instrumentality thereof exclusive of local governments.***</p>	



# Hypothetical: States

The Federal procurement standard at 2 C.F.R. § 200.320(b) allows small purchase procedures for the acquisition of supplies or services below the simplified acquisition threshold (which is currently \$250,000). The State of X has a threshold of \$175,000 in its own version of small purchase procedures, and uses its own threshold and small purchase procedures to procure \$170,000 in supplies.

Is there an issue with the State's procurement?



**FEMA**

# What Rules Apply to Non-State Entities?

State	Other Non-Federal Entities (local governments, tribal governments, IHE, hospitals, houses of worship and other nonprofit organizations)
2 C.F.R. § 200.317	2 C.F.R. §§ 200.318 through 326
<p><u>Synopsis:</u></p> <p>Must follow same policies and procedures it uses for procurements from its non-Federal funds, comply with 200.322 (procurement of recovered materials), and ensure that every purchase order or other contract includes any clauses required by 200.326 (contract provisions)</p>	<p><u>Synopsis:</u></p> <p>Must follow their own documented procurement procedures which reflect applicable state, local, and tribal laws and regulations, provided that the procurements conform to applicable federal law and the standards identified in 2 C.F.R. §§ 200.318 through 326</p>
<p><u>Note:</u> The recipient and subrecipient must comply with all applicable federal laws, regulations, and executive orders</p>	



# Hypothetical: Non-State Entities

The Federal procurement standard at 2 C.F.R. § 200.320(b) allows small purchase procedures for the acquisition of supplies or services below the simplified acquisition threshold (which is currently \$250,000). The State of X has a threshold of \$300,000 in its own version of small purchase procedures. The City of Y uses the State's threshold and uses small purchase procedures to procure \$270,000 in supplies.

Is there an issue with the City's procurement?



**FEMA**

# How Are The Rules Applied?

- The Federal procurement standards address only some of the procurement rules that possibly apply to a procurement.
- Where there is a difference between any of the standards, **the most restrictive standard applies.**
- A Non-Federal Entity's procurement may meet the requirements of applicable state, local, and tribal procurement laws and regulations, but not meet the Federal procurement standards, such a procurement would not be compliant with the Uniform Rules



**FEMA**

# When do the Federal Procurement Rules Apply?

- General Requirements
  - Do the entity's procurement policies or procedures comply with the federal procurement standards?
- At Solicitation
  - Do the solicitation documents (Requests for Proposals, Invitations for Bids) comply with the federal procurement standards?
  - Is the appropriate type of contract used?
  - Are there any restrictions to competition?
  - Does the contract contain the required contract provisions?



**FEMA**

# General Requirements

- All Non-State Entities should have written procedures for procurement transactions.
- These procedures must ensure that all solicitations incorporate clear and accurate descriptions of the technical requirements for the goods or services being procured.



**FEMA**

# General Procurement Standards 2 C.F.R.

## § 200.318

There are eleven general procurement standards; **eight** are mandatory.

1. **Contractor Oversight** – Must maintain oversight to ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders. §200.318(b)
2. **Necessity** – Must have procedures that avoid acquisition of unnecessary or duplicative supplies or services. § 200.318(d)
  - Consider breaking out procurements to obtain a more economical purchase and to allow for socio-economic firms to participate.



**FEMA**

# General Procurement Standards, continued...

3. **Standards of Conduct:** Must maintain written standards of conduct covering conflicts of interest and governing the performance of employees engaged in the selection, award, and administration of contracts. §200.318(c)
  - These standards must provide for disciplinary actions
  - Must cover “organizational conflicts of interest” if the non-Federal entity has a non-governmental parent, subsidiary, or affiliate.
4. **Conflict of Interest** – No employee, officer, or agent must participate in the selection, award, or administration of a contract supported by a Federal award if he or she has a real or apparent conflict of interest. §200.318(c)



# General Procurement Standards, continued...

5. **Gifts** – The officers, employees, and agents of the non-Federal entity must neither solicit nor accept gratuities, favors, or anything else of monetary value from contractors/subcontractors. §200.318(c)
6. **Awards to Responsible Contractors:** Must award contracts only to ***responsible*** contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement, and will give consideration to such matters as: § 200.318(h)
  - Contractor integrity
  - Compliance with public policy
  - Record of past performance
  - Financial and technical resources



# General Procurement Standards, continued...

7. **Records-** Must maintain records sufficient to detail the history of the procurement, which must include, but are not limited to, rationale for the method of procurement; selection of contract type; contractor selection; and the basis for the contract price 2 C.F.R. § 200.318(i)
8. **Settlement of Issues** – Must alone be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual issues. §200.318(k).

The Uniform Rules also “encourage” various standards (use of federal excess property, intergovernmental agreements, and value engineering). § 200.318(e), (f), and (g).



**FEMA**

# Competition 2 C.F.R. § 200.319

- All procurement transactions must be conducted in a manner providing **full and open competition**.
- To eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, or invitations for bids or requests for proposals **must be excluded from participating for such procurements**.
- No geographic preferences: Use of **state or local geographic preferences** in evaluating bids or proposals is **prohibited!**
  - Does not apply to licensing requirements
  - Does not apply to A&E contracts



**FEMA**

# 7 Situations Restrictive of Competition

<b>Restrictive of Competition</b>	<b>Requiring Unnecessary Experience</b>
	<b>Excessive Bonding Requirements</b>
	<b>Brand Name</b>
	<b>Noncompetitive Pricing Practices</b>
	<b>Organizational Conflict of Interests</b>
	<b>Noncompetitive Contracts to Contractors on Retainer</b>
	<b>Any arbitrary action in the procurement process.</b>
<b>(2 C.F.R. § 200.319(a))</b>	



**FEMA**

# Pre-Qualified Lists

- A Non-State Entity may use pre-qualified lists of persons, firms, or products, subject to certain conditions:
  - Sufficient competition among the contractors on the pre-qualified list; and
  - May not preclude potential bidders or offerors from qualifying during the solicitation period.
  - **THIS IS NOT A CONTRACT**



**FEMA**

# Advanced/Pre-Positioned Contracts

- A Non-State Entity may award and use a pre-positioned contract, if:
  - All Federal procurement standards have been met; and
  - The scope of work is adequate to encompass the anticipated work
  - **THIS IS A CONTRACT**



**FEMA**

# Hypothetical: Existing Contract

Powerful storms impact the City of P, resulting in torrential rainfall, flooding and damaging much of the city's infrastructure. Eight miles of underground natural gas pipelines were damaged, although the resulting damage did not result in emergency / exigent circumstances sufficient to meet the non-competitive procurement exception. Instead, City of P plans on using a contractor under an existing contract to repair and replace the eight miles of damaged pipelines for \$3 million.

A review of the existing contract indicates that disaster-related repairs were anticipated; however, that section of the contract limits such repair work to no more than one mile and includes a not-to-exceed clause of \$500,000.

Under this scenario, can the City of P use its existing contract to repair the damaged pipeline?



**FEMA**

# Procurement Methods

## 1. **Micro-Purchase Procedures** (§200.320(a))

- The acquisition of supplies or services, the aggregate dollar amount of which does not exceed the micro-purchase threshold - \$ 10,000
- To the extent practicable, must distribute micro-purchases equitably among qualified suppliers
- May be awarded without soliciting competitive quotations if the non-Federal entity considers the price to be reasonable

## 2. **Small Purchase Procedures** (§200.320(b))

- Are those relatively simple and informal procurement methods for securing services, supplies, or other property that does not cost more than the simplified acquisition threshold - \$ 250,000
- Price or rate quotations are to be obtained from an “adequate number” of qualified sources



**FEMA**

# Procurement Methods, continued...

## 3. Sealed Bidding (§200.320(c))

- Lowest priced, responsive, responsible, bidder WINS.
- The preferred method for construction when sealed bidding is “feasible,” which is when certain conditions are present
- Bids must be solicited from an “adequate number of known suppliers,” providing them sufficient response time before date for the opening of bids
- Bids will be opened at the time and place prescribed in the invitation for bids
- Local and tribal governments:
  - must publicly advertise the invitation for bids
  - bids must be opened publicly
- Other procedural requirements at § 200.320(c)(2)



**FEMA**

# Procurement Methods, continued...

## 4. **Competitive Proposals** (§200.320(d))

- Used when conditions are not appropriate for the use of sealed bids
- The appropriate method when more than one source is expected to submit an offer and either a fixed-price or cost-reimbursement type contract is awarded
- Awards will be made to the responsible firm whose proposal is most advantageous to the program, with **price** and other factors considered
- Requests for proposals **must be publicized** and identify all evaluation factors and their relative importance
- Proposals must be solicited from an adequate number of qualified sources
- Must have written method for conducting technical evaluations of the proposals received and for selection of the contractor



# Procurement Methods

## 5. Noncompetitive Proposals (§200.320(f))

- Procurement through solicitation of a proposal from only one source and may be used only when one or more of the following circumstances apply
- **One Source:** The item is available only from a single source
- **Exigency/Emergency:** An exigency or emergency will not permit a delay resulting from competitive solicitation
- **Awarding Agency Approval:** The Federal awarding agency or pass-through entity expressly authorizes noncompetitive proposals in response to a written request from the non-Federal entity
- **Inadequate Competition:** After the solicitation of a number of sources, competition is determined inadequate



**FEMA**

# Sole Sourcing in Exigency/Emergency Explained

- **Emergency** - an unexpected and unusually dangerous situation that calls for immediate action or an urgent need for assistance or relief
  - E.g. threat to life, public health or safety, improved property, and/or some other form of dangerous situation
- **Exigency** - something that is necessary in a particular situation that requires or demands immediate aid or action.
- **Use of the exception is limited:** it is only permissible *during the period of actual exigent or emergency circumstances.*
  - Once that period ceases to exist, the applicant is expected to transition to a more appropriate type of contract using full and open competition
- **Documentation required:** in order to justify using the emergency or exigency exception, the non-State entity must include a justification in its contract file.



**FEMA**

# Hypothetical: Noncompetitive Procurement

The State of C suffered a devastating 7.2 magnitude earthquake. Several major bridges in the City of S, for which the State Department of Transportation (DOT) is responsible, were damaged. Additionally, several city surface streets were damaged. Due to the extensive damage throughout the State of C, the governor waives all state procurement requirements. DOT and the City of S immediately award sole source contracts to contractors that have previously worked on state and city projects and performed well.

Are these contract awards permissible under the Governor's waiver? If not, what rules apply, and what additional facts would be useful?



**FEMA**

# Socioeconomic Contracting

- A Non-State Entity must take **all necessary affirmative steps** to assure that minority businesses, women's business enterprises, and labor surplus area firms are used when possible. § 200.321
- affirmative steps must include at least the following **6 steps**:
  1. Placing qualified small and minority businesses and women's business enterprises on solicitation lists
  2. Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources
  3. 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
  4. Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority businesses, and women's business enterprises



**FEMA**

# Socioeconomic Contracting continued...

5. 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
  6. Requiring the prime contractor, if subcontracts are to be let, to take the five previous, affirmative steps
- **Remember:** The OIG frequently cites a **Non-State Entity's failure** to employ the required procedures to take affirmative steps to ensure small/minority/women-owned firms are considered.



**FEMA**

# Hypothetical: Socioeconomic Contracting

Severe storms and flooding impacts the State of Y, and waters cause a dam breach which floods the City. With most of the City underwater, the City needs to conduct rescue of most of its 30,000 citizens, which are stuck in their homes with floodwaters rising. The City, however, lacks the needed boats and takes an hour to call ten companies in nearby towns to meet the requirement. It awards three time and materials contracts to companies able to meet the requirement immediately. The City does not take the six affirmative steps.

Is this a violation of 2 C.F.R. § 200.321?



**FEMA**

# Cost or Price Analysis

- A Non-State Entity must perform a price or cost analysis in connection with every procurement action above the simplified acquisition threshold, including contract modifications (§ 200.323)
- The method and degree of analysis is dependent on the facts and circumstances surrounding the particular procurement but, as a starting point, the Non-State Entity must make independent estimates before receiving bids or proposals
- A Non-State Entity ***shall*** 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



# Document Review

- **Review of Technical Specifications:**

- A Non-State Entity must make available the technical specifications for a proposed procurement upon request by FEMA or the pass-through entity (§ 200.324(a))

- **Pre-Procurement Review of Other Procurement Documents:**

- A Non-State Entity must make available upon request for FEMA or pass-through entity pre-procurement review of other procurement documents in certain circumstances (§200.324(b))
- A Non-State Entity is exempt from the pre-procurement review if FEMA or the pass-through entity determines that its procurement systems comply with the standards under 2 C.F.R. pt. 200



**FEMA**

# Procurement of Recovered Materials

- A non-Federal entity that is a **state agency or agency of a political subdivision of a state and its contractors** must comply with section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (2 C.F.R. § 200.322)



**FEMA**

# Bonding Requirements

- A Non-State Entity must follow its own bonding requirements for construction or facility improvement projects **under** the simplified acquisition threshold (§200.325)
- For construction or facility improvement projects **above** the simplified acquisition threshold (§200.325(a)-(c)):
  - A Non-State Entity may use its own bonding policy and requirements provided that FEMA or the pass-through entity has made a determination that the Federal interest is adequately protected
  - If no such determination has been made, the bonding requirements are:
    - A bid guarantee from each bidder equivalent to 5% of the bid price
    - A performance and payment bond on the part of the contractor for 100% of the contract price



# Contracts



**FEMA**

# Contract Type: Time and Materials Contract

- A contract whose cost to a Non-State Entity is the sum of: (1) the actual cost of materials; and (2) direct labor hours charged at fixed hourly rates that reflect wages, general and administrative expenses, and profit
- May use T&M contracts in the following circumstances:
  - only after a determination that no other contract is suitable, AND
  - the contract includes a ceiling price that the contractor exceeds at its own risk. §200.318(j).
- Must maintain a high degree of contractor oversight
- Use only for a reasonable amount of time (usually until the scope of work becomes clear)



# Contract Type: Cost Plus Percentage of Cost – Prohibited!

- A Non-State Entity must **not** use a cost-plus-percentage-of-cost or cost-plus-percentage-of-construction-cost method of contracting. § 200.323(d)
- Criteria evidencing this type of contract
  - Payment is on a predetermined percentage rate
  - The predetermined percentage rate is applied to actual performance costs
  - The contractor's entitlement is uncertain at the time of contracting
  - The contractor's entitlement increases commensurately with increased performance costs



# Required Contract Provisions

- A non-Federal entity's contracts are required to contain certain provisions – some are based on sound contracting practices and others are required by federal law, executive order, and regulations (2 C.F.R. § 200.326)
- These required provisions are provided in Appendix II to Part 200—  
Contract Provisions for Non-Federal Contracts Under Federal Awards



**FEMA**

# Required Contract Provisions

- All the requirements are in Appendix II to Part 200, and include:
  - Legal/contractual/administrative **remedies for breach of contract** - contracts over simplified acquisition threshold
  - **Termination** for cause or convenience –contracts over \$10,000.
  - **Equal Employment Opportunity** Clause – federally assisted construction contracts.
  - Davis-Bacon/Copeland “**Anti-Kickback**” Acts – construction (Inapplicable to PA Program)
  - **Contract Work Hours and Safety Standards Act** - contracts above \$100,000 for the employment of mechanics or laborers.
  - **Clean Air Act and Federal Water Pollution Control Act** – contracts above \$150,000.



**FEMA**

# Required Contract Provisions, continued...

- **Rights to Inventions Made Under a Contract or Agreement** – Inapplicable to PA Program
- **Debarment and Suspension** – Restricts awards, subawards, and contracts with parties that are debarred, suspended, or excluded from or ineligible for participation in Federal assistance programs and activities.
- **Byrd Anti-Lobbying Amendment** – contracts above \$100,000. Also requires that contractors that apply or bid for an award file the required certification regarding lobbying.
- Procurement of **recovered materials** – applies to states, state agency or agency of a political subdivision of a state and its contractors. § 200.322.



**FEMA**

# Required Contract Provisions, continued...

- **Additional FEMA Recommendations:**
  - Contract Changes
  - Access to Records
  - DHS Seal, Logo, and Flags
  - Compliance with Federal Law, Regulations and Executive Orders
  - No Obligation by Federal Government
  - Program Fraud and False or Fraudulent Statements or Related Acts



**FEMA**

# Procurement Do's

- Engage in full & open competition;
- Conduct a responsibility determination;
- Take all the necessary affirmative steps for socioeconomic contracting;
- Always make an independent estimate, and perform the cost or price analysis when circumstances require;
- Comply with the bonding requirements;
- Document, document, document!



**FEMA**

# Procurement Don'ts

- Don't restrict competition;
- Don't award to contractors listed as debarred or suspended on [www.sam.gov](http://www.sam.gov);
- Don't enter into a Cost-Plus-Percentage of Costs contract;
- Don't include geographic preferences in your procurements;
- Don't enter into a Time and Materials contract without a ceiling price, or if another contract type is available



**FEMA**

# Why Comply?



**FEMA**

# Remedies for Non-Compliance with the Federal Procurement Standards:

(2 C.F.R. § 200.338)

(a) Temporarily withhold cash payments pending correction of the deficiency by the non-Federal entity or more severe enforcement action by the Federal awarding agency or pass-through entity	(b) Disallow all or part of the cost of the activity or action not in compliance
(c) Wholly or partly suspend or terminate the Federal award	(d) Initiate suspension or debarment proceedings
(e) Withhold further awards for the program	(f) Take other remedies that may be legally available



**FEMA**

# Suspension & Debarment

- Non-Federal Entities and contractors are subject to the non-procurement debarment and suspension regulations implementing Executive Orders 12549 and 12689, 2 C.F.R. pt. 180 (2 C.F.R. § 200.212).
- Non-Federal Entities must not make any award or permit any award at any tier to parties listed on the government-wide exclusions in the System for Award Management (“SAM”), which can be found at [www.sam.gov](http://www.sam.gov).
- The rules for assistance exclusion are also governed by DHS implementing regulations at 2 C.F.R. pt. 3000.



**FEMA**

# DHS OIG Audits

- DHS OIG audits of FEMA disaster grants FYs 09-14:
  - 82 recommendations to disallow \$387.3 million in costs
- DHS OIG audits of FEMA disaster grants FY 15:
  - 15 recommendations to disallow \$122,213,672
- Common Findings:
  - Noncompetitive contracting practices
  - Failure to include required contract provisions
  - Failure to employ required procedures to ensure small/minority/women-owned firms are used
  - Cost-plus-percentage-of-cost contracting



**FEMA**

# Questions?

Additional Resources can be found at:

[www.fema.gov/procurement-disaster-assistance-team](http://www.fema.gov/procurement-disaster-assistance-team)



**FEMA**



**FEMA**