

Time & Materials and Other Sole Source Procurement

FEMA, following Federal procurement regulations generally requires one of three types of procurement methods.

- First, small purchase procedures, which are relatively simple, informal purchases of services, supplies, or other property that do not cost more than the simplified acquisition threshold, which is currently \$150,000. When small purchase procedures are used, a local agency must obtain price or rate quotations from an adequate number of qualified sources, generally at least 3 offerors.
- The second method is sealed bidding. With sealed bidding, the local agency publicly solicits bids and a firm, fixed price contract is awarded to the responsible bidder whose bid, conforming with the terms and conditions, is the lowest in price. Usually, sealed bidding is the preferred method for construction contracts.
- The third technique of competitive proposals is normally conducted with multiple bidders submitting proposals, and either a fixed-price or cost-reimbursement contract is awarded. This method is generally only used for architectural and engineering contracts.

In addition to these three competitive methods, the regulations do permit a local agency to make Procurement through the noncompetitive proposal method.

A local agency can only use this method, however, in cases where the award of a contract is infeasible under small purchase procedures, sealed bidding, or competitive proposals and where one of following four alternative conditions applies:

1. The item is available only from a single source;
2. A public exigency¹ or emergency will not permit a delay resulting from competitive bidding;
3. The awarding agency (either FEMA or the state) authorizes noncompetitive proposals; or
4. After the solicitation of a number of sources, competition is determined inadequate.

The regulations also require the local agency to perform a price or cost analysis in

¹ Although the terms “exigency” and “emergency” are often used interchangeably, they do not have the same precise meaning within Federal regulation. An “emergency” is a sudden, unexpected and usually dangerous situation that calls for prompt action to address an immediate threat to life safety, public health or damage to improved property. An “exigency” is something that is necessary in a particular situation that requires immediate action. An emergency may also be an exigency, however, an exigency may not necessarily be an emergency. For instance a washed out road may not be an emergency because it does not pose an immediate threat to life safety, public health or damage to improved property. However the washed out road may be an exigency because it prevents emergency vehicle access to an otherwise inaccessible area of a community. However, if there is another road which provides access to the same community, even though it may be a longer route, the exigency may not exist because there is another means of ingress and egress.

connection with every procurement action, including contract change orders.

Cost analysis is the process of verification of proposed cost data, projections of that data, and evaluation of the individual elements of cost and profit.

Cost analysis is required for sole source Procurement, including contract modifications or change orders, unless price reasonableness can be established on the basis of a catalog or market price of a commercial product sold in substantial quantities to general public or based on prices set by law or regulation.

Cost analysis must include the negotiation of profit as a separate element of the price.

A price analysis is used in all other instances to determine the reasonableness of the proposed contract price.

Once a contract is awarded, a local agency may need to make changes to that contract to react to newly encountered circumstances, fix inaccurate or defective specifications, or modify the work to ensure the contract meets the local agency's requirements.

A contract "change" is any addition, subtraction, or modification of work under a contract during contract performance.

In spite the necessity to make contract changes, a local agency may not make "cardinal changes" to a contract to circumvent the requirements of 2 CFR §200.319 for full and open competition.

A cardinal change is a significant change in a contract for property, goods or services, that cause a major alteration of the original work or the specified method of work, or causes a revision of contract work so extensive or significant that the contractor is required to perform very different work from that originally specified in the contract.

One significant justification for sole source change orders occurs when there would be a substantial duplication of costs because of a changing of the original contractor.

However, the mere existence of a prior or current working relationship with a contractor in itself is not sufficient justification for issuing a sole source change order. There must be duplicative cost factors which must be well documented to justify such a contract.

A change order which specifies a cardinal change becomes a sole source award, and FEMA will evaluate these change orders to determine if the conditions required for a sole source or noncompetitive procurement at were met.

Time and material and sole source Procurement require extensive documentation to justify these contracts and both types of contracts are very closely scrutinized by FEMA and the Department of Homeland Security Office of the Inspector General in their

audits, which may not occur until years after these contracts are let.

It is also important to note that the term “emergency” for the purposes of Public Assistance is separate and distinct from the term “emergency work” as used for Public Assistance. “Emergency work” means Public Assistance Category A (debris removal) or Category B (emergency protective measures) that is required because of an immediate threat to life safety, public health or improved property. However, just because the agency is performing “emergency work” does not relieve the agency from the requirement of 2 CFR §200.319 for full and open competition, since not all emergency work is so time sensitive to the point where full and open competition is “infeasible.”

Some categories of permanent work, (Categories C - G) may qualify as exigencies even though they may not be “emergencies.”

The Relationship of Infeasibility and Emergency or Exigency

A period of “infeasibility” may not be the same as the period of emergency or exigency. To be able to make a procurement through noncompetitive proposals, the contract must be “infeasible” under small purchase procedures, sealed bids, or competitive proposals. It may be that while it is infeasible in the short-term to make a competitive procurement because of an emergency or exigency that does not permit delay, it may be possible for the agency to initiate a competitive procurement to transition the work into a contract that meets the full and open competition requirements of 2 CFR §200.319. Federal regulations are concerned with minimizing the overall cost rather than providing a convenience for the local agency.

Competition Is Inadequate After the Bid Solicitation

An agency may make a noncompetitive procurement when, after the solicitation of a number of sources, the agency finds that there is insufficient competition. If the agency solicits bids and there is only one bidder, or no bidders. FEMA normally requires at least three bids to establish sufficient competition. However, the agency must fully document that it made sufficient efforts to advertise or solicit a sufficient number of bidders, without setting unduly restrictive specifications or took other actions to restrict competition among bidders. Without full and complete documentation, FEMA may determine that the agency did not take sufficient steps to solicit an adequate number of proposals. If the reason for an insufficient number of bidders is an overly restrictive specification or delivery requirement, then the agency needs to evaluate if it should cancel the solicitation and change the specifications to provide more bids. If the agency chooses moves ahead with the award, then the agency must document why the specifications or delivery requirements were necessary and could not be changed.

Time & Materials or Sole Source Procurement Checklist

Item/Service/Project: _____ Date: _____

Amount: \$ _____ Vendor: _____

Estimated Delivery: _____ Buyer: _____

Check all conditions that apply to this procurement

- ☐ This purchase is not eligible for a small purchase method because it exceeds \$150,000.
- ☐ This purchase is not appropriate for sealed bids because there exists an emergency or public exigency and:
 - ☐ The item is available only from a single source. (Document in Annex I)
 - ☐ A public exigency or emergency will not permit a delay resulting from competitive bidding (Document in Annex II)
 - ☐ The awarding agency (either FEMA or the state) has authorized noncompetitive proposals (Document in Annex III)
 - ☐ After the solicitation of a number of sources, competition was determined to be inadequate (Document in Annex IV)
- ☐ This purchase is not appropriate for the competitive proposal method because it is not for architectural or engineering services.
- ☐ For this procurement, and each sub-part of this procurement, the agency has conducted a cost analysis documented with a Cost Analysis Worksheet.
- ☐ For this procurement, the cost analysis included a negotiation of profit as a separate element of the price as shown in the Cost Analysis Worksheet.
- ☐ For this procurement a cost analysis was not done because the agency was able to establish price reasonableness on the basis of a catalog or market price of a commercial product sold in substantial quantities to general public or based on prices set by law or regulation. (Attach current documentation to support this.)
- ☐ The justification for awarding this procurement as a sole source contract is because there would be a substantial duplication of costs because of a changing of the original contractor, as shown in the Cost Analysis Worksheet

Provide full documentation for each of the above items in the appropriate annexes.

Disclaimer: The use of this form cannot guarantee compliance with Federal procurement regulations as set forth in 2 CFR Part 200. Consult with an attorney familiar with these regulations to ensure local agency compliance.