

FREQUENTLY ASKED QUESTIONS: SOLE SOURCING IN EXIGENCY OR EMERGENCY CIRCUMSTANCES

What is the exigency or emergency exception?

The Federal procurement standards allow procurement by noncompetitive proposals (commonly known as sole sourcing) under certain circumstances, including when a local or tribal government or private non-profit (non-State applicant) determines that the public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation. FEMA defines an “*emergency*” as an unexpected and unusually dangerous situation that calls for immediate action or an urgent need for assistance or relief. FEMA defines an “*exigency*” as something that is necessary in a particular situation that requires or demands immediate aid or action. An emergency will typically involve a threat to life, public health or safety, improved property, and/or some other form of dangerous situation, whereas an exigency is not necessarily so limited.

When can I use the exigency or emergency exception?

Use of the public exigency or emergency exception *is only permissible during the actual exigent or emergency circumstances*. Once the exigent or emergency circumstances cease to exist, the local or tribal government or private non-profit is expected to transition to a more appropriate method of contracting using full and open competition.

How should I document this in my contract file?

In order to justify using the emergency or exigency exception, the non-State applicant must include a justification in its contract file. Attachment A provides a template for justification for a noncompetitive procurement. For a debris removal requirement, the non-State applicant could alternatively obtain and provide documentation from its public health authority explaining any public health threat posed by debris from the disaster, the location of such threat, and include the anticipated duration of such threat.

Do any of the Federal procurement standards still apply if I am sole sourcing my contract under emergency or exigent circumstances?

Yes, for non-State applicants (local or tribal governments or private non-profits), you still must comply with the following requirements:

1. Your contract must include the required contract clauses (2 CFR 200.326 & Appendix II);
2. Your contract must include the Federal bonding requirements, if the contract is for construction or facility improvement (2 CFR 200.325);
3. You must award to a responsible contractor (2CFR 200.318(h));
4. You must complete a cost or price analysis to determine that the cost or price of the contract is fair and reasonable; (2 CFR 200.323(a) and (b))
5. You may not use cost-plus-percentage-of-cost contracting (2 CFR 200.323(c)).

What if I want to use a pre-awarded or pre-existing contract in an exigency or emergency that may not comply with the Federal procurement standards?

If your pre-awarded or pre-existing contract is not in compliance with the Federal procurement standards (e.g. you did not fully and openly compete the requirement or follow the six affirmative socioeconomic contracting steps), you may likely still use your contract for the duration of the exigency or emergency. FEMA recommends that you review the list above and assess whether you can modify your pre-awarded or pre-existing contract or add additional documentation to your contract file to address the pre-awarded or pre-existing contract's non-compliance issues.

What if I have further questions?

Additional questions on this topic may be directed to Kristof Hermans at Kristof.Hermans@dps.texas.gov and Melinda Dunn at melinda.dunn@fema.dhs.gov. However, you should consult your attorneys throughout this entire process.

ATTACHMENT A

Justification for Non-Competitive Procurement Template

1. Insert a brief description of the product or service you are procuring, including the expected amount of the procurement.
2. Identify which of the four circumstances listed in 2 C.F.R. § 200.320(f) you are relying on for your non-competitive procurement.
3. Explain why it is necessary to contract non-competitively.
 - A justification based on public exigency or emergency should explain the nature of the public exigency or emergency, including why procurement other than through noncompetitive proposals would cause unacceptable delay in addressing the public exigency or emergency. Failure to plan does not justify noncompetitive procurement based on public exigency or emergency.
 - Where a public health threat is at issue, obtain a letter from a public health authority documenting the threat and duration.
4. State how long you will need to use the non-competitive procurement, and the impact it will have on your community if you are not able use the non-competitive procurement for that amount of time (e.g., how long do you anticipate the exigency or emergency will continue; how long will it take to identify your requirements and award a competed procurement; or how long would it take another contractor to reach the same level of competence).
5. Describe the results of any market survey or research conducted to help you determine whether you could have used full and open competition consistent with applicable law (or, if you did not conduct a market survey or research, explain why not).
6. Describe the results of any conflicts of interest and organizational conflict of interest reviews you conducted (or, if you did not complete a conflict of interest and organizational conflict of interest review, explain why not).
7. Include any other points you think are necessary for the justification.