

Procurement & Contracting for Disasters

Requirements for FEMA Reimbursement

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Procurement: Why does it Matter?

Procurement Definition: the action of obtaining goods and services from a third party

Non-compliant procurement is the most prevalent non-compliance issue that results in withheld funding and de-obligated grants

“Thirty plus (30%+) of DHS OIG audits generally have resulted in OIG recommending deobligations of all or part of project funding.”*

“FEMA should Recover \$216.2 Million Awarded to the Recovery School District”

Federal Procurement Requirements

- Federal Uniform Guidance procurement requirements apply to FEMA Public Assistance grant funds (2 CFR Part 200; §§200.317-326)
- Requirements apply to all **local governments and nonprofits** that use **federal funds** to pay for contract costs

Funding

Obligated Funds

Deobligate Funds

No Change to Funding



State Entity Procurement



- State Entities are Instrumentalities of the State such as individual agencies, but **do not** include local governments.
- State Universities, colleges and some hospitals fall under the state's jurisdiction and are also considered State Entities.
 - (I.e. UNC System Network, Broughton Hospital, Charlotte Mecklenburg Hospital Authority)
- State Entities must follow the state's contracting and procurement rules with limited additional Federal Provisions



Federal Requirements for States

1. Follow the same policies and procedures they use for procurements from their non- Federal funds;
2. Follow 2 C.F.R. § 200.322, Procurement of recovered materials,
 - i. Which requires state entities and local governments to comply with section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act;
3. Ensure that every purchase order or other contract includes any contract clauses required by 2 C.F.R. § 200.326, as well as include any additional FEMA recommended provisions.
4. Awards cannot be made to suspended or debarred contractors
5. Cost Reasonableness evaluations should still be performed.

2 C.F.R part 200 Major Changes

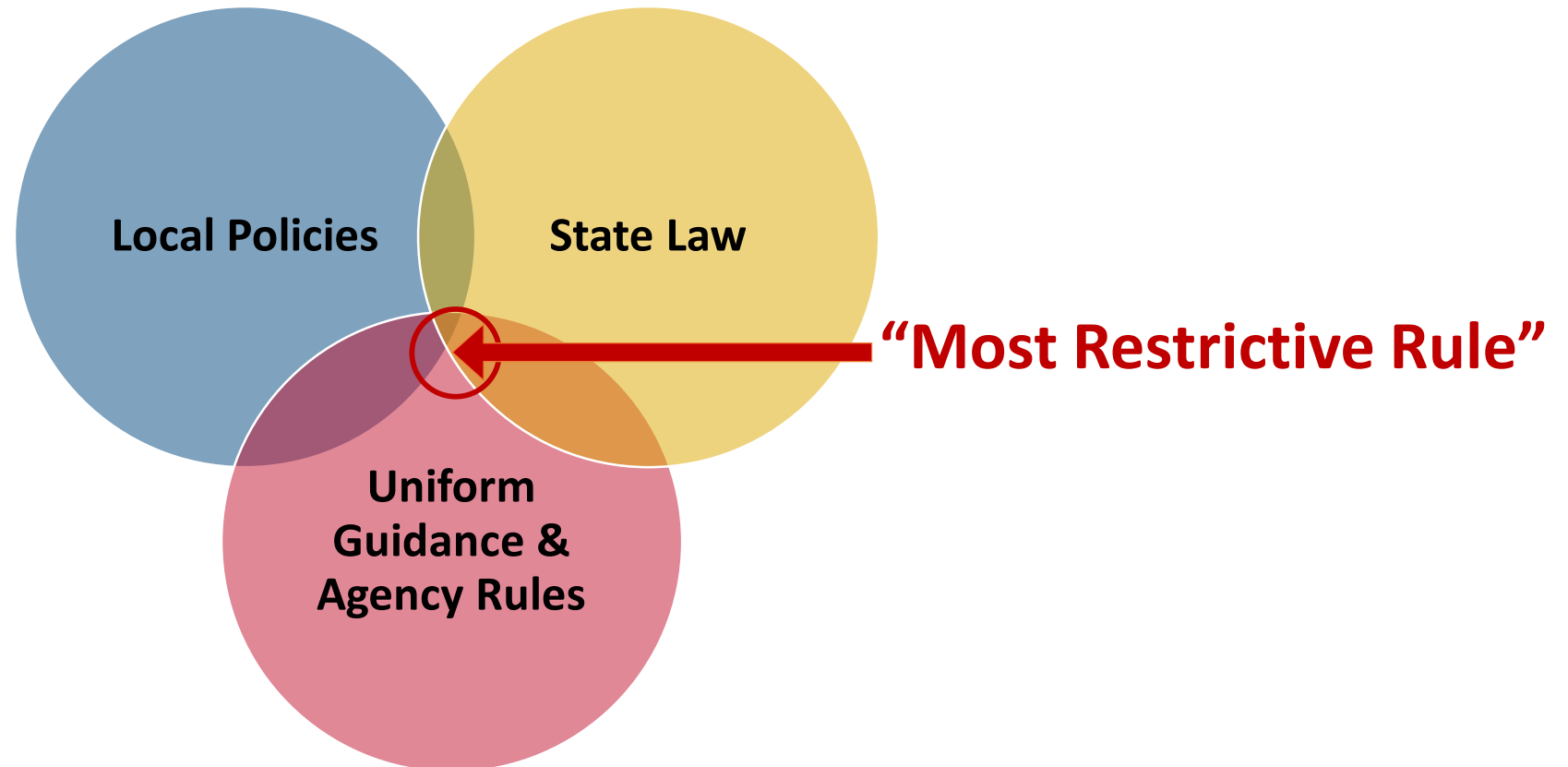
Consistency of Terminology: “obligation” replaced by either “financial obligation” or “responsibility” for different contexts; also definitions were made to be the same throughout all parts

Termination: OMB removed the “for cause” termination provision but added other termination provisions providing greater flexibility to Federal awarding agencies to terminate awards”

Domestic Preferences for Procurement: “maximize the use of goods, products, and materials produced in the United States when procuring goods and services under federal awards”

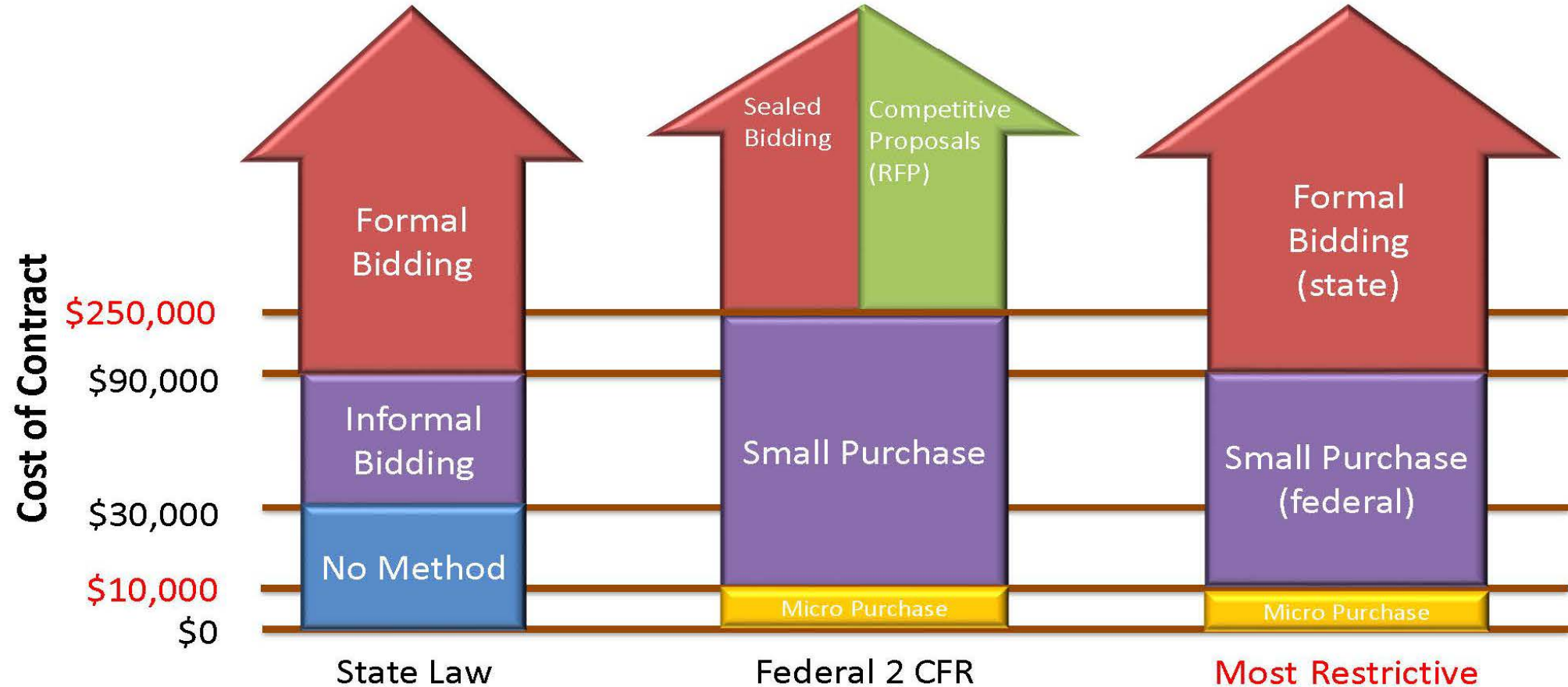
Which Set of Rules Do You Follow?

“The non-Federal entity must use its 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 this part.**” 2 CFR § 200.318(a)



“Most Restrictive Rule”

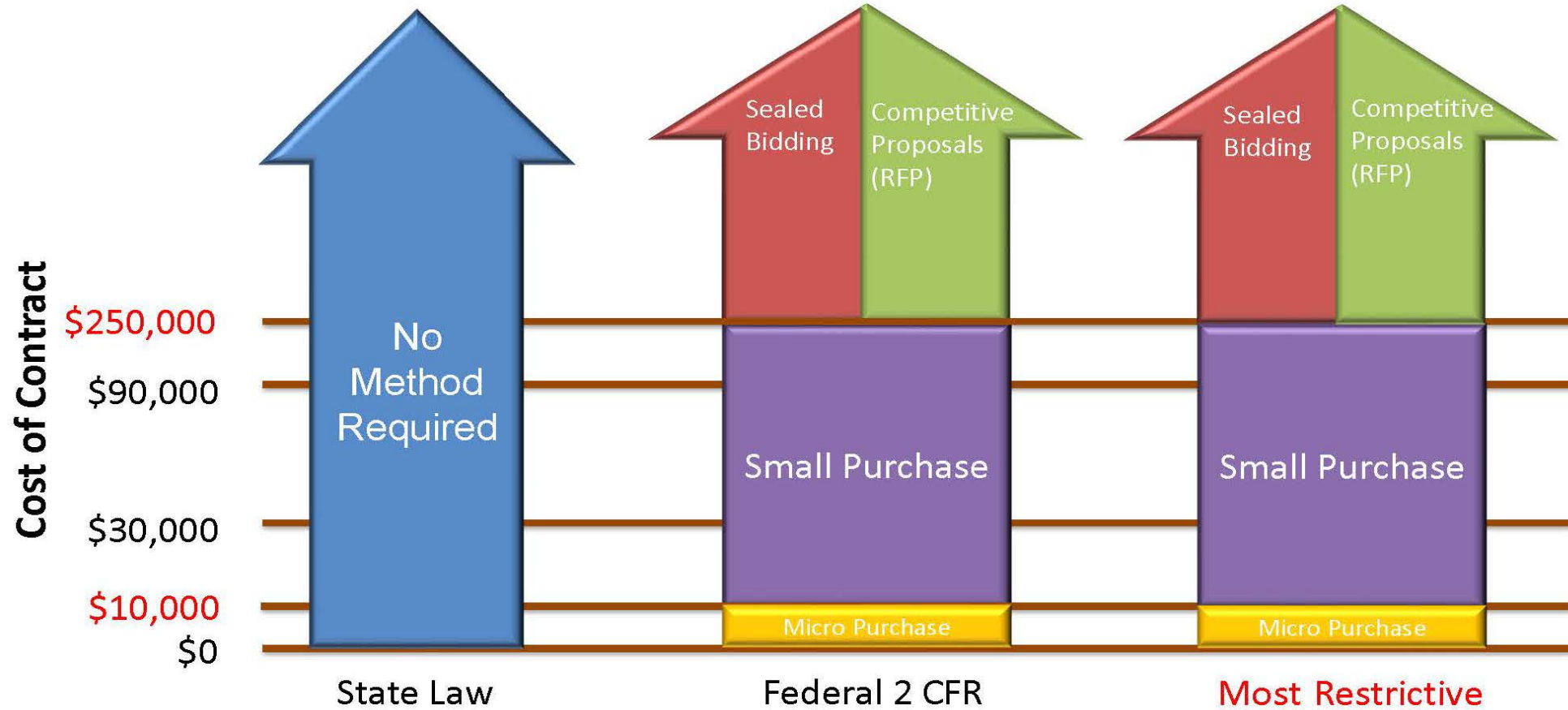
Purchase Contracts



Even when generally following federal rules, some specific state requirements may still apply and vice versa.

“Most Restrictive Rule”

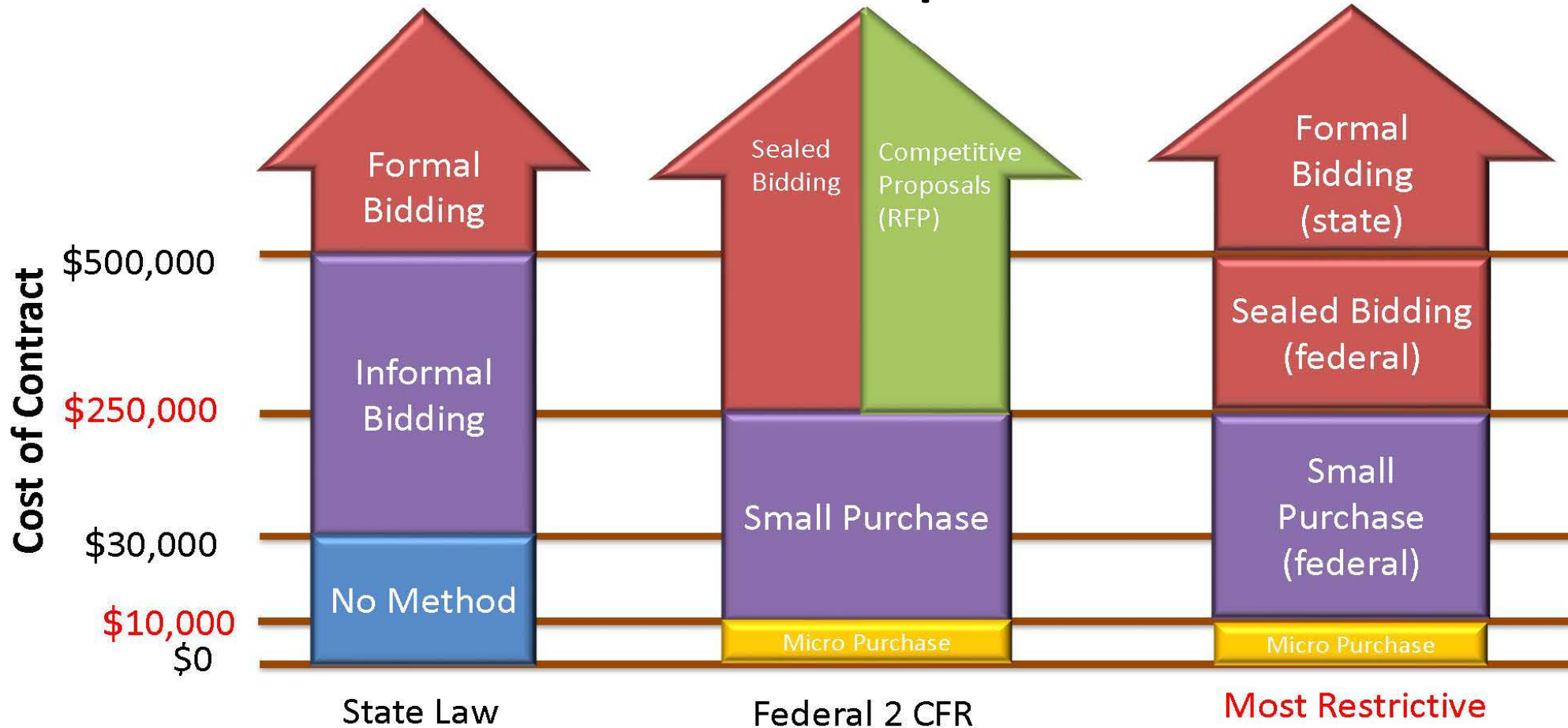
Service Contracts



Even when generally following federal rules, some specific state requirements may still apply and vice versa.

“Most Restrictive Rule”

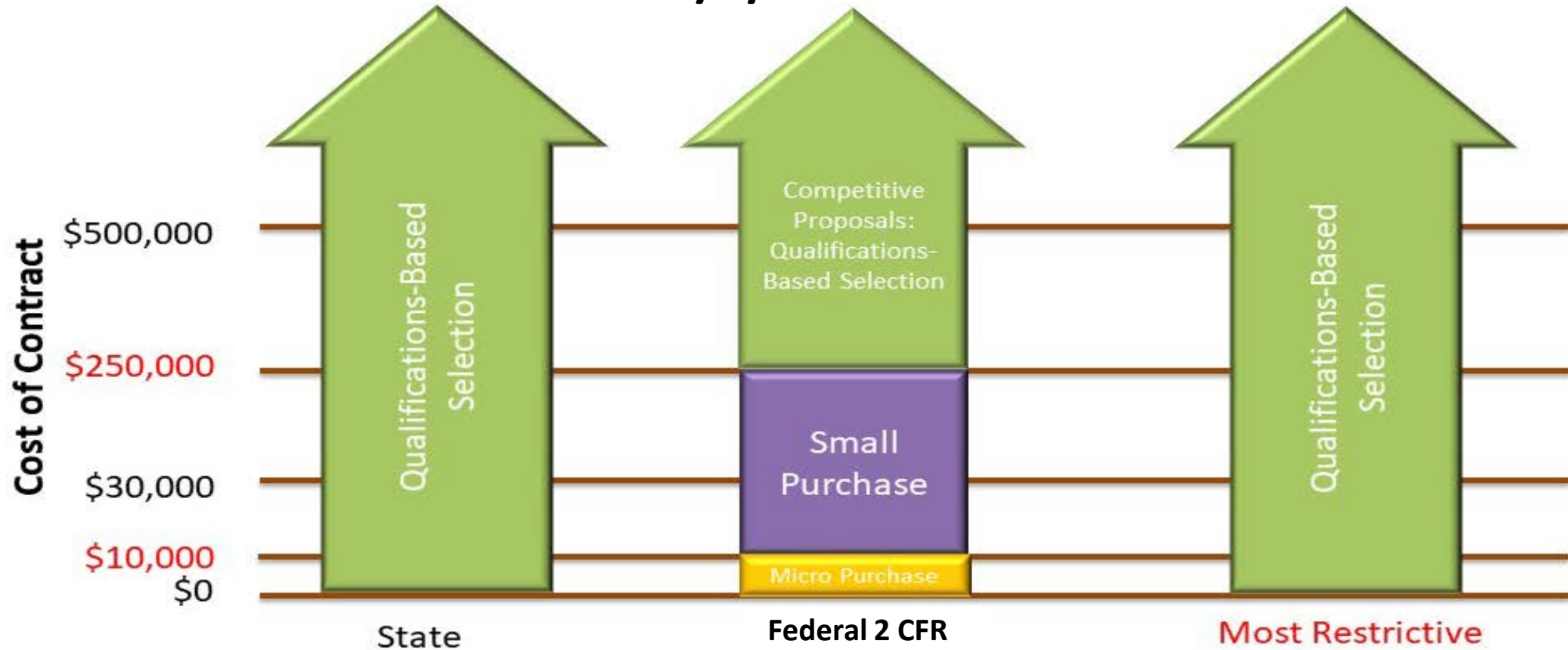
Construction and Repair Contracts



Even when generally following federal rules, some specific state requirements may still apply and vice versa.

“Most Restrictive Rule”

A/E/S Contracts



Even when generally following federal rules, some specific state requirements may still apply and vice versa.

Methods of Procurement



Micro-Purchase

- May use the micro-purchases procurement method for the acquisition of property or services.
- Price must be fair and reasonable.
- May not split purchases purposefully to remain under the micro-purchase threshold.

**2 CFR § 200.320(a)(1)*

**No comparable State Statute*

Small Purchase

- May use the small purchase procurement method when securing services or property.
- Must obtain price or rate quotations from no less than three (3) qualified sources.
- May not split a larger procurement merely to bring the cost of a procurement under the simplified acquisition threshold.

**2 CFR § 200.320(a)(2)*

**N.C.G.S. 143-131*

Sealed Bid

- Preferred method for procuring construction if a complete, adequate, and realistic specification or purchase description is available.
- Must document two (2) or more responsible bidders are willing and able to compete effectively for the business.
- Suggested Firm Fixed Price or Lump Sum contracts
- Must select the successful bidder principally on the basis of price.

**2 CFR § 200.320(b)(1)*

**N.C.G.S. 143-129*



Competitive Proposal

- Use this method when conditions are not appropriate for the use of sealed bids:
- Cannot base the contract award exclusively on price or price-related factors due to the nature of the service or property to be acquired.
- Requirements are hard to define
- More development work is required
- Technical capability & past performance considerations are dominant factors.

**2 CFR § 200.320(b)(2)*

**No comparable State Statute*

Noncompetitive Proposals

- Not generally allowable.
- Only acceptable under certain circumstances, where solicitation of a proposal occurs from only one source or a limited number of sources:
- Item or service is available from only one source & no other property or services will satisfy the Applicant's requirements
 - Unique capability → innovative capability not available from another source.
 - Patents → patent precludes competition
 - Change Orders → Change to existing, eligible contract.
- Public Exigency or Emergency:
 - Public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation.

**2 CFR § 200.320(f)*

**N.C.G.S. 143-129(e)(6) &(e)(2)*

**EMERGENCY
SERVICE**



Questions?



Procurement Styles

Invitation for Bid

- **Purpose:** Main focus is cost, buyer does not need suggestions for work
- **Advantage:** Price driven, simple evaluation method
Comparable to a Request for Quote

Request For Qualification

- **Purpose:** To determine the qualifications of a firm, and their ability to provide a service
- **Advantage:** Does not factor in costs. Price negotiations should be done after selection

Request for Proposal

- **Purpose:** Asks the vendors to provide a solution to a problem, evaluates many factors before making a choice
- **Advantage:** Method to compare vendors offers and capabilities

Basic Federal Procurement Requirements

1. Ensure full & open competition
2. Document procurement process
 - Written procurement policies required
 - Provide bid tabulation, evaluation and selection criteria
3. Award contract to lowest responsive responsible bidder
 - If low bidder not selected, must *justify* why (i.e. deemed not responsive to questions after trying to clarify)
4. Cost-plus contracts prohibited; Time & Materials contracts limited
 - Bonds required for construction contracts costing \$250,000 or more
6. Include all federal contract provisions
7. Solicit MWBE/HUB participation
8. Avoid conflicts of interest and accepting gifts from contractors
 - Written conflicts of interest policies required
9. Geographic preferences prohibited
10. Costs must be reasonable
 - Independent cost-price analysis required for contracts costing \$250,000 or more

Resource

[FEMA PA Procurement Guidance](#)

Having written Procurement Policies

- Ensure Consistency
- Improve documentation efforts
- Increase speed and efficiency in which procurements can be done

[Sample Policies](#)



Time/Materials and Cost-Plus Contracts



*Acceptable**

Time & Materials

- Only allowed under very specific conditions:
- For a reasonable time during circumstances where clear scope of work (SOW) cannot be defined
- When no other possible alternative exists
- Must set a ceiling price that the contractor exceeds at its own risk (“not-to-exceed” contract price)
- Work must be bid when SOW can be defined



*Not
Acceptable*

Cost Plus

- Also called “Cost Plus Percentage of Cost” contracts
- **Never** allowed under any circumstances under Federal law



Required Contract Provision

	Required Provision	Contract Criteria	Sample Language?
1.	Legal/contractual/administrative remedies for breach of contract	> Simplified Acquisition Threshold (\$250k)	No. It is based on applicant's procedures.
2.	Termination for cause or convenience	> \$10k	No. It is based on applicant's procedures.
3.	Equal Employment Opportunity	Construction work	Yes. 41 CFR Part 60-1.4(b)
4.	Davis Bacon Act	Construction work	Not applicable to PA grants
5.	Copeland Anti-Kickback Act	Construction work > \$2k	Not applicable to PA grants
6.	Contract Work Hours and Safety Standards Act	> \$100k + mechanics or laborers	Yes. 29 CFR 5.5(b)
7.	Rights to inventions made under a contract or agreement	Funding agreement	Not applicable to PA grants
8.	Clean Air Act and Federal Water Pollution Control Act	>\$150k	Yes
9.	Debarment and Suspension	All	Yes
10.	Byrd Anti-Lobbying Amendment	All (>\$100k: Certification)	Yes. Clause and certification
11.	Procurement of Recovered Materials	Applicant is a state or political subdivision of a state. Work involves the use of materials.	Yes

Recommended Provisions	Contract Criteria	Sample Language
Access to Records	All	Yes
Contract Changes or Modification	All	No, depends on nature of the contract
DHS Seal, Logo, and Flags	All	Yes
Compliance with Federal Law, Regulation and Executive Orders	All	Yes
No Obligation by Federal Government	All	Yes
Program Fraud and False or Fraudulent Statements or Related Acts	All	Yes

Contract Provisions

MWBE Participation

- Applies to **all** Contracts regardless of type above micro-purchase threshold (\$10,000)
- Requires 6 specific solicitation steps (Federal Uniform Guidance steps similar to state HUB good faith efforts for construction contracts)
- Local government must document their compliance with MWBE solicitation requirements
- State HUB requirements also apply to construction contracts involving a building

To assist with this requirement, always post your RFP's on:



[NC Dept. of Administration's HUB Bid Posting Site](#)

Conflicts of Interest

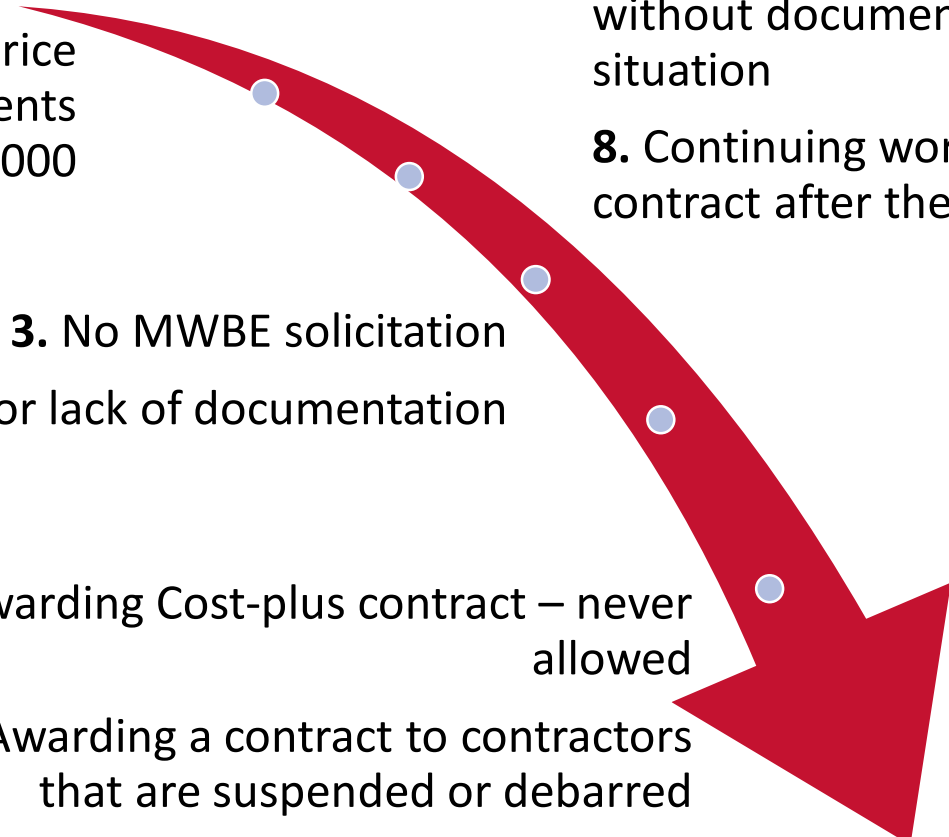
- No employee, officer, or agent may participate in the selection, award or administration of a contract supported by a federal award if he or she has a real or apparent conflict of interest
 - Real Conflict of Interest: Actual financial interest in the outcome of a solicitation
 - Apparent Conflict of Interest: A situation or relationship that created the appearance of a financial or tangible interest in a solicitation
- Organizational Conflict of Interest: occurs when or because of relationships with a parent company, affiliate, or subsidiary organization



Conflicts of Interest Continued

	Federal (2 C.F.R. § 200.318(c)(1))	State (G.S. 14-234(a)(1))
Who is covered	Officers, employees, and agents of recipient and subrecipient	Officers, employees
Who else is covered	Spouse, immediate family, partners, current or soon-to-be employer	Spouse
What kind of interest	Real or apparent financial or other interest or personal tangible benefit	Direct benefit
Exceptions	Financial interest that is not substantial	<ol style="list-style-type: none"> 1. Banks & utilities 2. Friendly condemnation 3. Spouse employment 4. Public assistance 5. Small jurisdictions
Penalties	<ol style="list-style-type: none"> 1. Loss of federal funds 2. Disciplinary action 3. Other remedies for noncompliance listed at 2 C.F.R. § 200.338 	<ol style="list-style-type: none"> 1. Class 1 misdemeanor 2. Void Contract

FEMA Top 10 Procurement Mistakes

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1. Restricting full & open competition
 2. Not performing detailed price or cost analysis for procurements above \$250,000
 3. No MWBE solicitation
 4. Inadequate or lack of documentation
 5. Awarding Cost-plus contract – never allowed
 6. Awarding a contract to contractors that are suspended or debarred
 7. Engaging in a sole-sourcing procurement without documenting emergency or exigent situation
 8. Continuing work under a sole-source contract after the urgent need
 9. Time and materials contract w/o justification and not-to-exceed cap
 10. Not Including Federal contract clauses

Bonus Mistakes

**Piggybacking & Geographic preferences*

Special Considerations

- **Piggybacking:** when you use an existing contract to acquire the same commodities or services at the same or lower price from another public entity contract.
- Existing cooperative purchasing agreements are **not** recommended for disaster event costs per 2 C.F.R. § 200.319





FEMA & NC Resources



[NCEM Public Assistance – About Us and Resources](#)

[FEMA Policies and Guidance – General Guidance and Eligibility](#)



[UNC Local Government Purchasing & Contracting Web Site](#)

[FEMA Procurement Disaster Assistance Team \(PDAT\)](#)

[Federal and State Procurement Comparison Chart](#)

[Field Manual for PDAT](#)



Questions?





Thank you

Please reach out to your NCEM Public Assistance Grants Manager, Team Lead or PA Leadership for additional assistance.