



FEMA Procurement Requirements

Norma Houston
2018 CAGP Spring Conference



UNC
SCHOOL OF GOVERNMENT

Which 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)

Federal Uniform Rules

- Apply to most (but not all) categories of federal grant programs, including FEMA Public Assistance
- New rules supersede previous rules/OMB Circulars (A-102)
- Uniform rules now codified as 2 C.F.R. Part 200
- Procurement standards codified at 2 C.F.R. § 200.317 - § 200.326



Compliance Deadline

Grace period for implementing
new requirements ends

JUNE 30, 2018!



Legal Requirements Violated



Funding

- Obligated Funds
- Deobligate Funds
- No Change to Funding



Why Is This Important?

- DHS OIG audits
 - 2009-2014:
Disallowed \$387m
 - 2015:
Disallowed \$122m
- Noncompliance with federal procurement requirements most common reason for reimbursement denial

Most Common Violations:

1. Noncompetitive contracting
2. Contract provisions
3. M/WBE requirements
4. Cost-Plus contracts

TOP 10 GENERAL FEDERAL PROCUREMENT STANDARDS



General Federal Procurement Standards

1. Oversight

Maintain oversight to ensure contractors perform according to terms, conditions, and specifications of contract



2. Necessity

Avoid unnecessary/duplicative supplies and services; limit acquisitions to what is necessary to perform the scope of work (no “stockpiling”)



General Federal Procurement Standards

3. Standards of Conduct

- Written policy governing conflicts of interest and performance of employees engaged in contracting
- Must address conflicts of interest and gifts
- Must include disciplinary action for violations

4. Conflicts of Interest

Cannot be involved in contracting process if he or she has a *real or apparent* conflict of interest

5. Gifts

Cannot solicit or accept gifts or favors from contractors or subcontractors



General Federal Procurement Standards

6. Award to Responsible Contractors

- Award contracts only to *responsible* contractors; adhere to the lowest responsive, responsible bidder standard of award
- Remember – cannot award to federally debarred bidder

7. Records

Maintain records detailing the procurement process, including documentation of:

- Rationale for method of procurement used
- Contract type
- Contractor selection process
- Basis for contract price

DOCUMENT EVERYTHING!!!

Put the contract in writing!!!

General Federal Procurement Standards

8. Time and Materials (Cost-Plus) Contracts

Not allowed unless no other form of contract is suitable *and* contract includes a not-to-exceed amount



9. Settlement of Issues

The local government, *not* the federal government, is solely responsible for settling all contract disputes and claims. Federal government will not become involved in or defend contract claims.



General Federal Procurement Standards

10. Full and Open Competition

- Procurement process must be “full and open competition” consistent with state and federal bidding requirements
- Designers/contractors who help develop specs cannot bid on the contract
- Geographic preferences prohibited
- “Brand-name” specifications without equal alternatives prohibited
- Pre-positioned competitively bid contracts are permitted

TOP 10 DIFFERENCES BETWEEN



FEDERAL AND STATE LAW



Major Federal/State Differences

1. Bid Thresholds
2. Bidding Requirements
3. Service Contracts
4. Minority Solicitation Requirements
5. Time & Materials / Cost-Plus Contracts
6. Bidding Exceptions
7. Written Policies & Documentation
8. Contract Provisions
9. Conflicts of Interest
10. Procurement by non-profits

1. BID THRESHOLDS

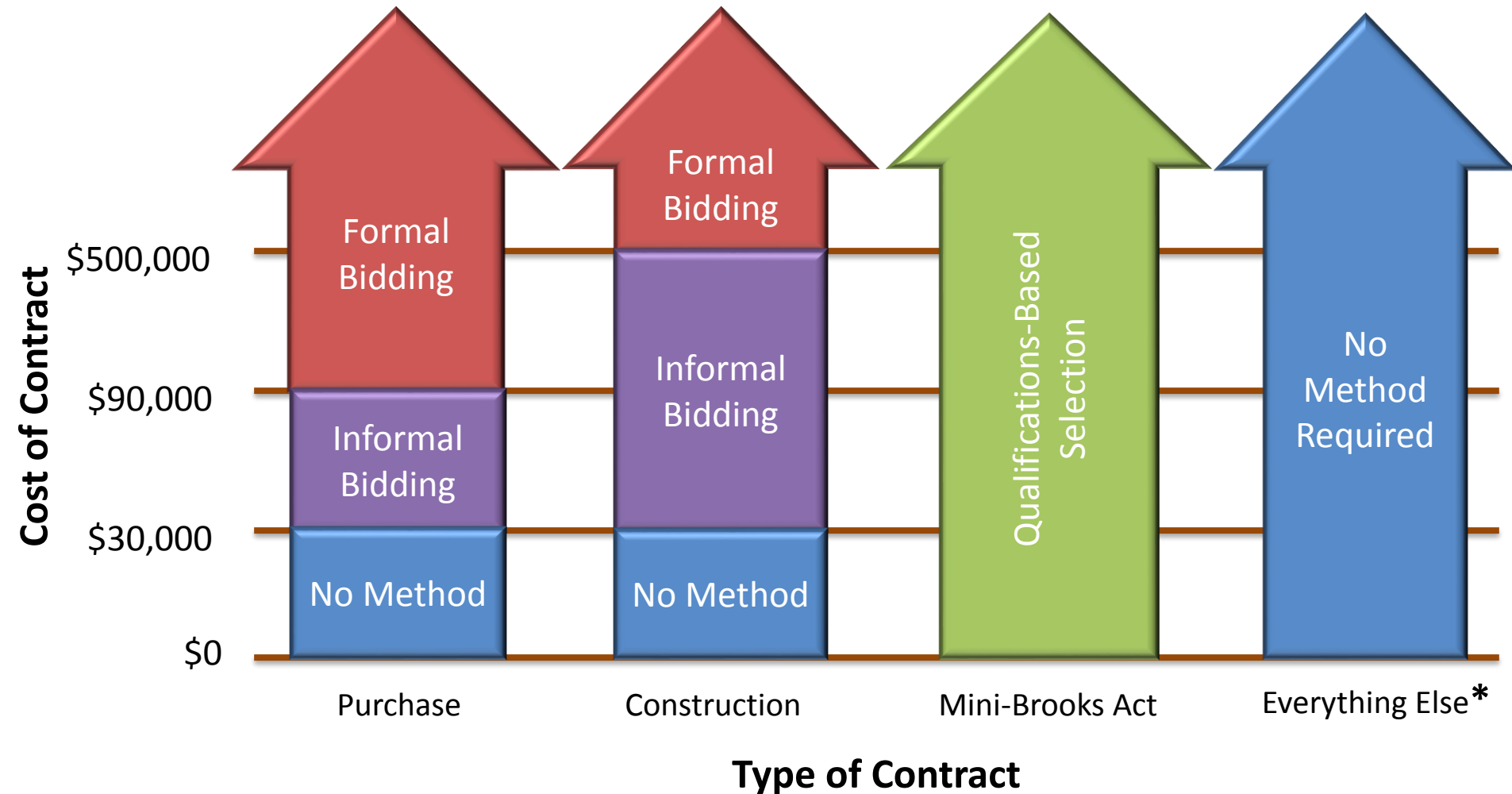
**2. BIDDING
REQUIREMENTS**



**3. SERVICE
CONTRACTS**

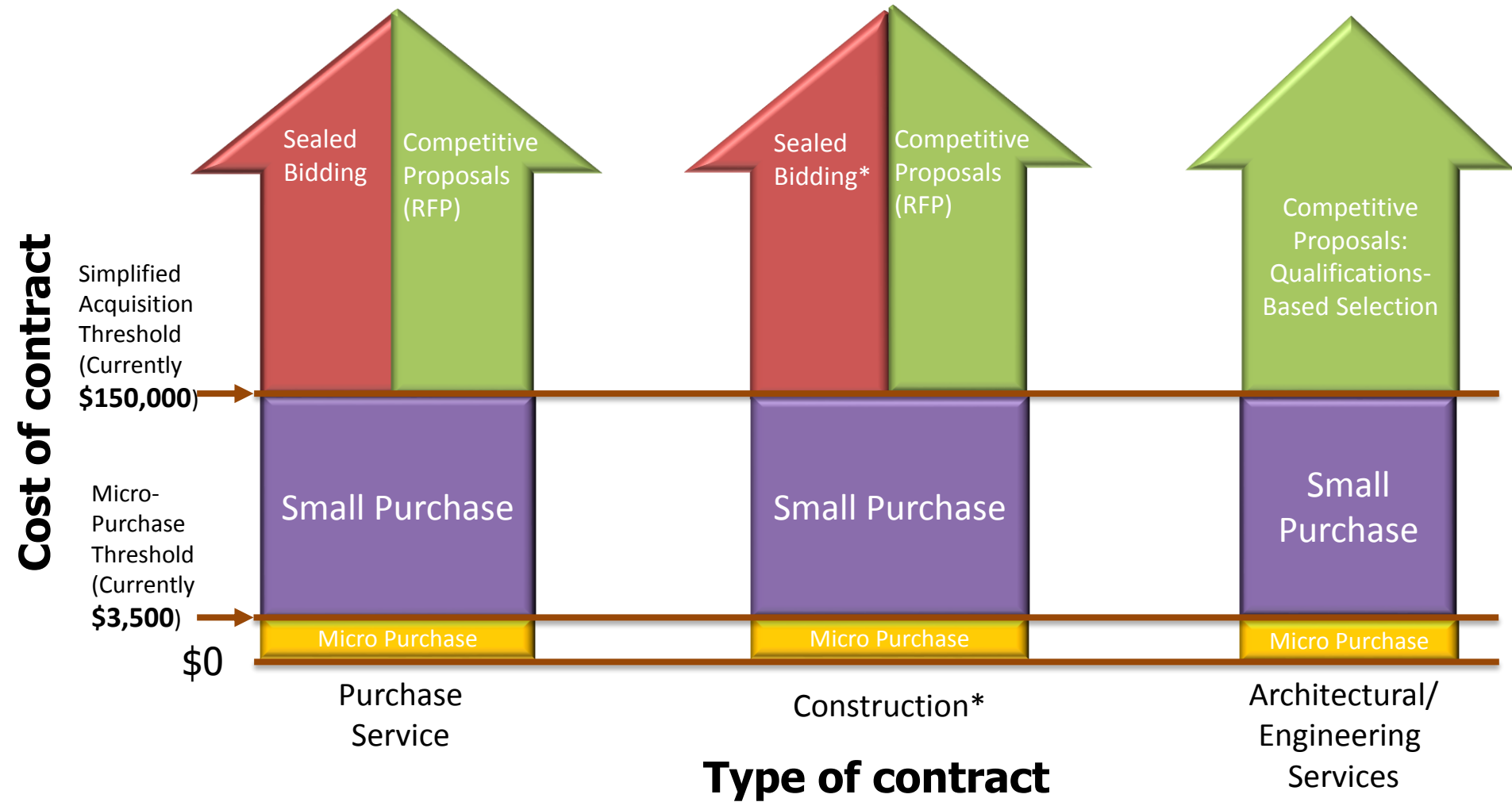


Procurement Methods – State Law



* Optional: May use **request for proposals** for service contracts or information technology purchases or services.

Procurement Methods – Federal Law



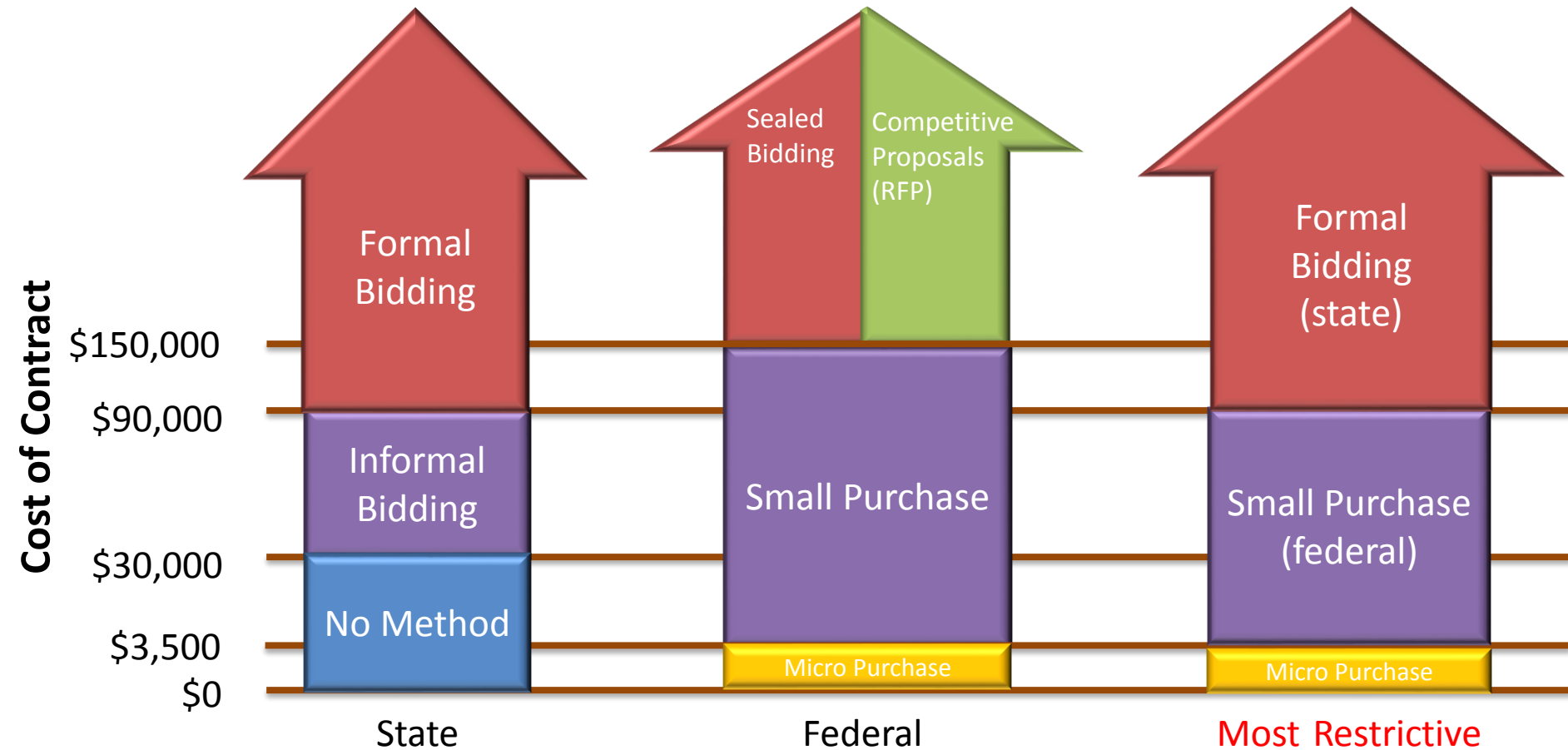
* **Sealed bidding** is preferred method for construction; may use **competitive proposals** when sealed bidding not appropriate

Which Set of Rules Do I Follow?

- Remember the “Most Restrictive Rule”
- If rules are different but neither is more restrictive than the other, follow federal rules
- Even when generally following federal rules, some specific state requirements may still apply
. . . and vice versa

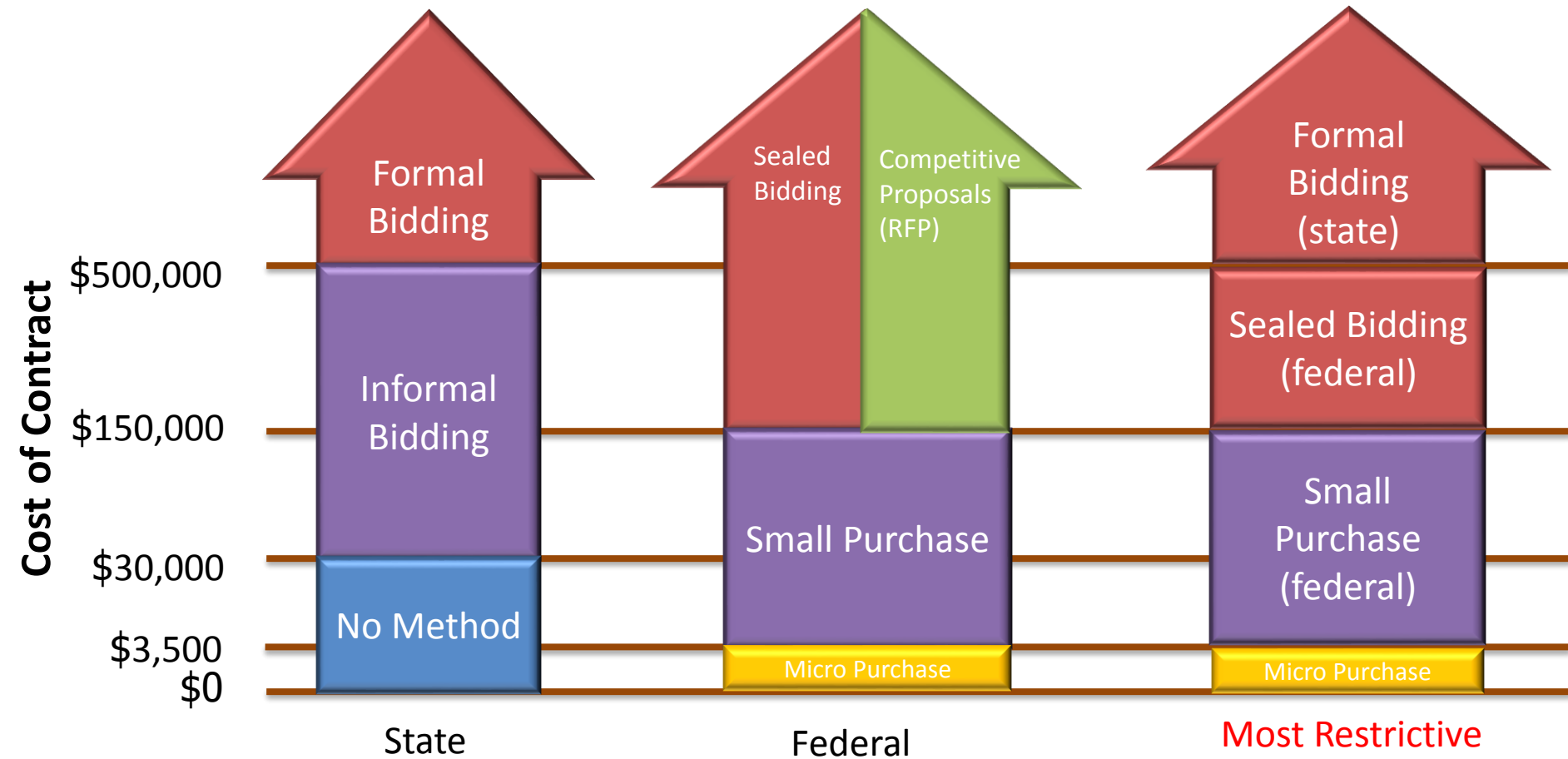


Purchase AND Service Contracts



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

Construction and Repair Contracts



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

4. MINORITY SOLICITATION REQUIREMENTS



HUB Participation

- Is a *goal*, not a quota
- Focuses on opportunity to *compete* on bids
- Lowest responsive, responsible bidder standard still applies
- Non-discrimination requirements still apply



Follow Federal AND State Law

Federal

- ✓ Applies to **All** Contracts regardless of type and cost
- ✓ Requires 6 specific solicitation steps

State

- ✓ Local government engages in outreach efforts for all building construction contracts costing \$30,000 and above
- ✓ Require bidders to engage in good faith efforts for all building construction contracts costing \$300,000 and above

5. TIME & MATERIALS / COST-PLUS CONTRACTS



This One's Easy . . .



- Contracts must be for a fixed-price (lump sum, not-to-exceed, etc.)
- Time & Materials may be allowed in exigent circumstances within first 70 hours *and* contract includes not-to-exceed

6. BIDDING EXCEPTIONS



Follow Federal Law Generally . . .

Noncompetitive contracts allowed when:

- ✓ **Item only available from one source** - similar to state “sole source” exception; state procedural requirements apply
- ✓ **Public exigency** - similar to state emergency exception but within limited time frame
- ✓ **Awarding agency authorizes noncompetitive contract** - purchase and construction contracts must still fall within allowed state exception
- ✓ **Competition inadequate after attempts at solicitation** - state law requires readvertising for construction contracts in formal bidding range
- ✓ **GSA Contract Purchase or Interlocal Agreement**

State Exceptions **Not** Allowed Under Federal Law

- ✗ Piggybacking – **NO! NO! NO!**
- ✗ Group Purchasing Programs
- ✗ State contract (state contract must have been bid in compliance with federal requirements applicable to local governments – if so, then allowed)

7. WRITTEN POLICIES & DOCUMENTATION



Federal Law Requires:

1. Written procurement policies that are consistent with state and federal law
 - Must include statement that local government will comply with all federal laws and regulations applicable to federal grant funds
 - Not required to reprint entire federal code in local policy; compliance statement is sufficient:
 - “Contracts funded with federal grant funds must be procured in a manner that conforms with all applicable Federal laws, policies, and standards.”

Federal Law Requires:

2. Written conflict of interest policy governing financial conflicts of interest in contract award and gift bans
3. Documentation of procurement steps and required activities, including basis for contractor selection and price

**PUT ALL CONTRACTS IN WRITING!
ORAL CONTRACTS NOT VALID!**

If you didn't
document
you didn't
do it.



8. CONTRACT PROVISIONS



Can you do another draft of this? There's still a couple of sentences people might actually understand...

Federal Law Requires Provisions On:

1. Remedies for breach
2. Termination for cause and convenience
3. EEO
4. Work Hours and Safety Standards
5. Clean Air Act and Federal Water Pollution Control Act
6. Debarment and Suspension
7. Byrd Anti-Lobbying
8. Recovered Materials
9. Changes and modifications to contract
10. Access to records
11. Use of DHS logo, seal, and flag
12. Compliance with federal law, regulations, and executive orders
13. Federal government hold-harmless
14. Fraud and False Statements

Give Your Attorney Something To Do!

- Required provisions must be included in all contracts
- Sample language available from FEMA PDAT at <https://www.fema.gov/media-library-data/1483976790556-96bfcf3bf2c64e94d6f63dd4169a7d2c/RequiredContractClauses2C.F.R.200.326and2C.F.R.Part200AppendixII10917.pdf>



9. CONFLICTS OF INTEREST



Conflicts of Interest

	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

Gifts & Favors

	Federal (2 C.F.R. § 200.318(c)(1))	State (G.S. 133-32)
Prohibited giver	Current or future contractor or vendor	Past (w/in 1 year), present, or future contractor or vendor
Prohibited receiver	All officers, employees, agents of recipients and subrecipients	Officers and employees involved in: <ol style="list-style-type: none"> 1. Preparing plans 2. Awarding or administering contracts 3. Inspecting or supervising construction
Exceptions	Unsolicited gift of nominal value	<ol style="list-style-type: none"> 1. Honoraria 2. Nominal advertising items 3. Meals at banquets 4. Professional groups 5. Family and friends
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 	Class 1 misdemeanor

Federal Rules Apply to Nonprofits!

- Same rules that apply to local governments **also** apply to nonprofits
- Not all nonprofit activities/facilities will be eligible even if performed in “partnership” with local government
- Best to have written MOA or contract between local government and nonprofit to verify that nonprofit is acting on behalf of local government



THINGS TO DO WHEN YOU GET BACK TO THE OFFICE



Be Prepared . . .

- ✓ Add “compliance statement” to your local purchasing policies
- ✓ Review conflict of interest/gift ban policies
- ✓ Ensure procedures are in place to fully document procurement processes
- ✓ Work with your attorney to develop federal contract templates
- ✓ Review legal relationships with nonprofit partners (is an MOU or contract in place?)
- ✓ Bid prepositioned contracts (debris removal, etc.)

RESOURCES

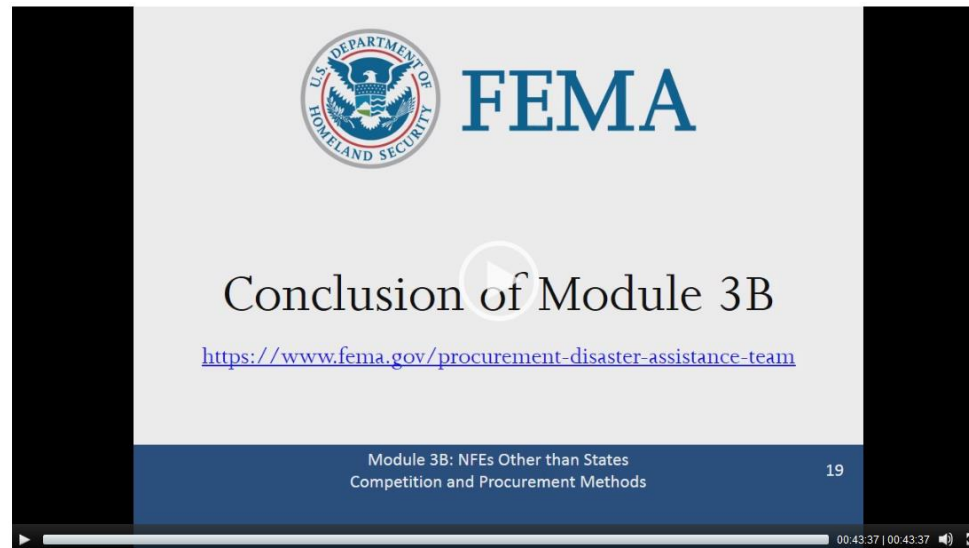


FEMA PDAT

FEMA Procurement Disaster Assistance Team

www.fema.gov/procurement-disaster-assistance-team

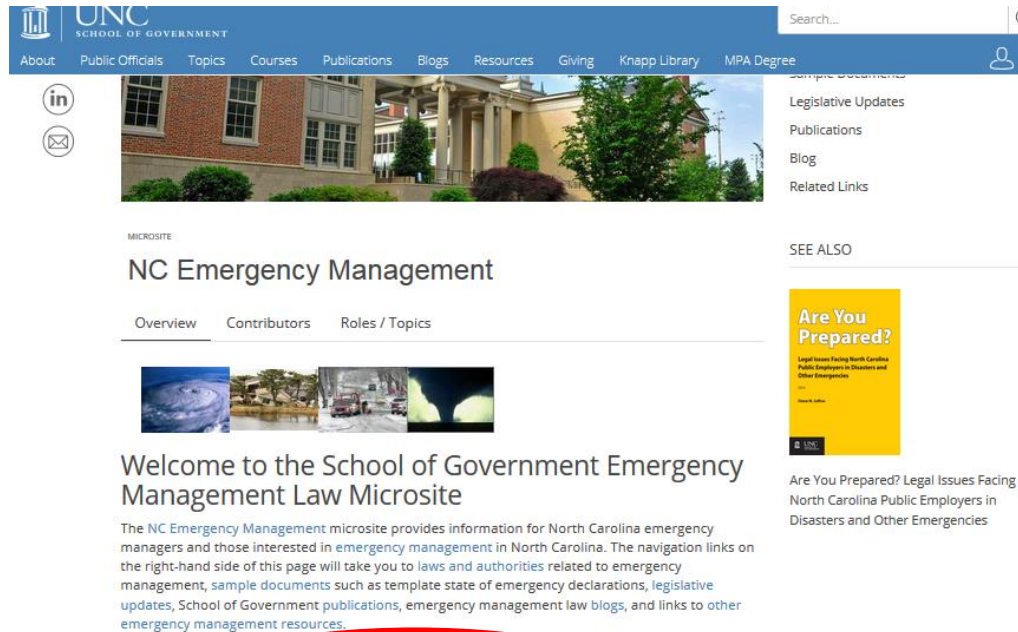
Procurement Under Grants 2.0 Webinar Module 3B: NFEs
Other than States – Competition and Procurement Methods



The Federal Emergency Management Agency (FEMA) Procurement Disaster Assistance Team (PDAT) has put together a series of webinar modules on the rules for procurement under grants. There are eight (8) modules in this series. This webinar series

SOG Emergency Management Website

www.sog.unc.edu/ncem



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Welcome to the School of Government Emergency Management Law Microsite

The NC Emergency Management microsite provides information for North Carolina emergency managers and those interested in emergency management in North Carolina. The navigation links on the right-hand side of this page will take you to laws and authorities related to emergency management, sample documents such as template state of emergency declarations, legislative updates, School of Government publications, emergency management law blogs, and links to other emergency management resources.

Disaster Recovery Resources for Local Governments

- **SOG faculty with expertise** in various subjects related to disaster recovery, [click here](#).
- **Sample documents** such as state of emergency declarations and debris removal contracts are available at the "Sample Documents" link.
- **FEMA procurement guidelines** and contracting check-list are available at the "Sample Documents" link.
- **FEMA Procurement Disaster Assistance Team (PDAT)** resources (including procurement guidelines, contract provisions, etc.), [click here](#)
- **Business disaster assistance** resources (SBTDC and other partner organizations), [click here](#)
- UNC-Chapel Hill's Hurricane Matthew disaster relief efforts, [click here](#)
- NC Association of County Commissioners Hurricane Matthew recovery information, [click here](#)
- NC League of Municipalities Emergency Preparedness resources, [click here](#)

SEE ALSO



Are You Prepared? Legal Issues Facing North Carolina Public Employers in Disasters and Other Emergencies

Good Luck!



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