

Procurement Integrity Guidance for the FEMA Assistance to Firefighters Grants Program

ISSUE

FEMA is developing guidance regarding procurement requirements under the Assistance to Firefighters Grant program, which is creating confusion among fire departments and industry.

BACKGROUND

The Federal Emergency Management Agency (FEMA) recently began conducting workshops for fire departments around the country to provide guidance regarding the Fiscal Year 2009 Assistance to Firefighters Grant (AFG) program. The FEMA briefings to fire departments include discussions of “procurement integrity” and “conflict of interest” rules relating to grant applications to the AFG program and resulting procurements.

FEMA is stepping up enforcement of these federal rules in light of reports of misconduct and mismanagement in fire equipment procurements generally, and federal investigations into misconduct related to AFG grants. Formal program guidance is expected to be released by FEMA in March or April 2009, followed by an application period and grant awards later in the year.

EXPECTED FEMA GUIDANCE, FEDERAL REGULATORY REQUIREMENTS, AND INDUSTRY CONCERNS

Based on FEMA workshops and conversations with FEMA AFG officials, below is a summary of the guidance issues that are under consideration by the agency and concerns that have been expressed by industry. This summary is subject to change with the release of the final FEMA guidance. This summary is not intended to be exhaustive, and interested persons should become familiar with relevant federal regulations and the formal 2009 AFG guidance when it is released to fully understand the program requirements.

- Long-standing federal regulations impose specific requirements on FEMA grant recipients who use federal funds to purchase goods and services. Fire departments and equipment vendors should make themselves familiar with these requirements, which are located at Title 44, Code of Federal Regulations, Section 13.36 and is available at <http://frwebgate.access.gpo.gov/cgi-bin/get-cfr.cgi?TITLE=44&PART=13&SECTION=36&TYPE=TEXT>. Industry agrees that there is a need for clear conflict of interest rules to ensure fire departments manage their procurements effectively.

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- State and local governments receiving federal grant funds must utilize the same procedures they use for procurements with non-federal funds, provided those procedures conform to federal requirements. While FEMA provides guidance on the federal requirements, state and local authorities ultimately manage the procurements funded by federal grants under state and local laws and procedures. FEMA typically does not seek to review or intervene in the local procurement process following a federal grant award. Therefore, contrary to some of the AFG workshop discussions, FEMA will not likely intervene to declare particular vendors to be “qualified” or “disqualified”, and will continue to leave management of procurements (including enforcement of federal rules) primarily in the hands of local authorities.
- The obligation to comply with the federal procurement rules lies with the fire department receiving a grant, and not with vendors or other third parties. FEMA has made changes to its workshop presentations to reflect this principle. This fact does not relieve vendors of their general responsibility to do business in an ethical manner.
- FEMA should recognize that a vendor’s provision of specifications (directly or indirectly) to a fire department is a necessary part of the grant application and procurement process – not a disqualifying event. FEMA should expressly encourage fire departments seeking a grant to seek out product specification and pricing information from a wide range of vendors – with the message that an educated consumer is the best consumer. Vendors should not be disqualified from an opportunity because they communicate with customers about their products. FEMA has made changes to its workshop presentations to reflect this principle, and additional guidance is expected.
- Under current federal regulations, fire departments must maintain rules to prevent conflicts of interests in procurements. For example, a fire department employee who has a financial relationship with a vendor may not participate in a federal grant application or procurement process that may benefit that vendor. Fire departments should establish rules requiring that department members with a financial interest in a procurement recuse themselves from that procurement. While conflict of interest rules are clearly appropriate, industry is concerned that FEMA may be advising departments to refrain from doing business with vendors whose employees serve on their department, even where no actual conflict exists and appropriate recusals are put in place. Excluding vendors from submitting bids for such procurements where no actual conflict of interest exists could serve to (1) reduce industry competition for FEMA-funded procurements, (2) create confusion and discourage departments from participating in the grant program, and (3) discourage members of the industry from volunteering in their community fire departments.
- Under the federal regulations, fire departments are required to maximize competition in grant-funded procurements, by drafting product specifications in the most general form possible, and FEMA is expected to reiterate this requirement. This includes avoiding proprietary specifications and unnecessary requirements that serve primarily to restrict participation by particular vendors. While fire departments are encouraged to seek out product information from vendors, departments must ensure they don’t use a particular vendor’s specifications in procurement documents in a way that unduly limits competition. The fire department must ensure that it considers the broadest range of vendor offerings when evaluating bids and making procurement decisions for equipment funded by a FEMA grant.
- That said, the requirement for competition should not preclude a fire department from setting reasonable performance requirements and considering additional relevant factors and when selecting a vendor, including price, standardization, life cycle costs, product support, safety features, etc. Consistent with local procurement procedures and the federal regulations, a fire department should be permitted to note in its solicitation document that in addition to the general specifications, such additional factors may be considered in evaluating bids. In fact, the federal regulations require grantees to provide clear and accurate descriptions of desired products or services, and to identify all minimum requirements and all other factors to be used in evaluating bids or proposals.

- FEMA is expected to advise departments that vendors and their representatives should not take a direct role in a fire department's drafting of FEMA grant applications or subsequent procurement specifications. Such activities create an impermissible conflict of interest, or at least an appearance of a conflict. That said, vendors should be permitted to support departments by providing product information or general information on the FEMA grant application process. In summary, fire departments and vendors should be careful to ensure that any assistance provided by vendors with respect to grant applications does not create the appearance of a conflict of interest or an actual conflict.
- In any event, fire departments will be expected to maximize competition in their procurements for equipment funded by a federal grant. In situations where a vendor has provided some form of assistance to a fire department with respect to the federal grant process in the past, exclusion of that vendor from the resulting procurement should not necessarily be required provided the fire department screens out conflicts of interest, carries out a competitive procurement process and a contract is awarded on the merits. In other words, an appearance of a conflict of interest may be mitigated by a fully competitive procurement process.
- Under the federal regulations, fire departments receiving a FEMA grant may not solicit or accept gifts from contractors or potential contractors.