

March 27, 2020

TO: Purchasing Offices
Departments, Institutions, Agencies
Commonwealth of Virginia

FROM: J. Peter Stamps 
Director, DGS/Division of Purchases and Supply

SUBJECT: FEMA Reimbursement guidance regarding COVID-19 Emergency

The following is guidance from VDEM concerning procurement rules to seek FEMA reimbursement (where applicable) regarding the Novel Coronavirus (COVID-19) emergency.

Background

- On March 12, 2020 Governor Northam declared a state of emergency (EO51) due to the Novel Coronavirus (COVID-19). A copy of the executive order can be found at [EO 51 \(2020\)](#).
- On March 13, 2020 all agency procurement officers received communication from DGS regarding the use of Chapter 9 of the Commonwealth's Agency Procurement and Surplus Property Manual (APSPM), which describes emergency procurement procedures for state agencies to follow when purchasing necessary items during this emergency.
- On the same day, the President declared a Nationwide Emergency Declaration. As a result, the Department of Homeland Security's Federal Emergency Management Agency (FEMA) is making funds available to reimburse non-federal agencies for eligible costs incurred during periods of exigent or emergency circumstances.

To ensure that agencies are in compliance with federal regulations (2CFR 200 – Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards) VDEM and DGS is sharing information with you to include with your purchasing processes.

- In addition to the Virginia Public Procurement Act (Va. Code §§ 2.2-4300 *et seq.*) and the Commonwealth's procurement policies and procedures, all FEMA grant programs are subject to the Federal procurement standards found at 2 C.F.R. §§ 200.317 – 200.326. In order to adhere to these requirements, VDEM is asking agencies to do the following:

1.) ***For emergency procurements already processed under EO 51*** - go back and complete the procurement file by adding these documents

- Procurements under \$100,000 - provide Federal Provisions as outlined in the attached Required Provisions-Quick Reference Guide and Required/Suggested Contract Language document to vendor-retain sent email as verification
- Procurement over \$100,000 – vendors will need to sign provision No. 3 -retain signed copy for file

2.) ***Moving Forward*** - Emergency Procurements under EO 51:

- DGS eVA Team adding required Emergency language to eVA to be reflected on all purchase orders - covers requirements
- Procurement over \$100,000 - vendors will need to sign provision No. 3 – retain signed copy for file

3.) ***Best Practices for Emergency Procurement File*** (see VDEM Checklist attached for an example):

- Justification for Emergency Procurement
- Emergency Purchase Authorization
- Copy of Executive Order (EO 51)
- eVA Purchase Order (General T&C's, Special T&C's, Federal Provisions)
- etc. - see checklist

4.) Attached is the following:

- Required Provisions-Quick Reference Guide and Required/Suggested Contract Language document

Contact your [DGS/DPS Procurement Management Account Executive](#) with any questions or concerns.

Required Provisions – Quick Reference Guide

KEY
Required in all contracts (including the 3 types below)
Required based on contract value
Required in certain construction contracts
Required in certain funding contracts

Provision No.	Required Provision	When Required
1.	Debarment and Suspension	All contracts
2.	Procurement of Recovered Materials	All contracts involving the use of materials
3.	Byrd Anti-Lobbying Amendment	All contracts <i>EXACT language must be in contract</i> (Certification also required with contracts over \$100k)
4.	Termination for cause or convenience	Contracts over \$10K
5.	Contract Work Hours and Safety Standards Act	Contracts over \$100K involving mechanics or laborers
6.	Clean Air Act and Federal Water Pollution Control Act	Contracts over \$150K
7.	Legal/contractual/administrative remedies for breach of contract	Contracts over \$250K
8.	Equal Employment Opportunity	Construction contracts <i>EXACT language must be in contract</i>
9.	Davis Bacon Act	Construction contracts (does not apply to public assistance (PA) grants)
10.	Copeland Anti-Kickback Act	Construction contracts over \$2K (does not apply to public assistance (PA) grants)
11.	Rights to inventions made under a contract or agreement	Funding agreements

*All procurements and contracts must also adhere to the Virginia Public Procurement Act. 2 C.F.R. § 200.317.

Required/Suggested Contract Language

1. Debarment and Suspension Clause (2 C.F.R. PART 200 APPENDIX II(h)) *Required in all contracts*

Suggested provision:

- (1) This contract is a covered transaction for purposes of 2 C.F.R. pt. 180 and 2 C.F.R. pt. 3000. As such, the contractor is required to verify that none of the contractor's principals (defined at 2 C.F.R. § 180.995) or its affiliates (defined at 2 C.F.R. § 180.905) are excluded (defined at 2 C.F.R. § 180.940) or disqualified (defined at 2 C.F.R. § 180.935).
- (2) The contractor must comply with 2 C.F.R. pt. 180, subpart C and 2 C.F.R. pt. 3000, subpart C, and must include a requirement to comply with these regulations in any lower tier covered transaction it enters into.
- (3) This certification is a material representation of fact relied upon by **(insert name of agency)**. If it is later determined that the contractor did not comply with 2 C.F.R. pt. 180, subpart C and 2 C.F.R. pt. 3000, subpart C, in addition to remedies available to **(insert name of agency)**, the Federal Government may pursue available remedies, including but not limited to suspension and/or debarment.
- (4) The agency, bidder, or proposer agrees to comply with the requirements of 2 C.F.R. pt. 180, subpart C and 2 C.F.R. pt. 3000, subpart C while this offer is valid and throughout the period of any contract that may arise from this offer. The bidder or proposer further agrees to include a provision requiring such compliance in its lower tier covered transactions.

2. Procurement of Recovered Materials Clause (2 C.F.R. § 200.322) *Required in all contracts*

Suggested Provision:

- (1) In the performance of this contract, the Contractor shall make maximum use of products containing recovered materials that are EPA-designated items unless the product cannot be acquired—
 - a. Competitively within a timeframe providing for compliance with the contract performance schedule;
 - b. Meeting contract performance requirements; or
 - c. At a reasonable price.

- (2) Information about this requirement, along with the list of EPA- designated items, is available at EPA's Comprehensive Procurement Guidelines web site, <https://www.epa.gov/smm/comprehensive-procurement-guideline-cpg-program>.
- (3) The Contractor also agrees to comply with all other applicable requirements of Section 6002 of the Solid Waste Disposal Act."

3. Byrd Anti-Lobbying Clause (2 C.F.R. PART 200 APPENDIX II(I))
Required in all contracts

REQUIRED provision (exact language is to be used):

(1) **Contractors** who apply or bid for an award of \$100,000 or more shall file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, officer or employee of Congress, or an employee of a Member of Congress in connection with obtaining any Federal contract, grant, or any other award covered by 31 U.S.C. § 1352. Each tier shall also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the recipient who in turn will forward the certification(s) to the awarding agency.

(2) Required Certification. If applicable, contractors must sign and submit to the agency the following certification:

The undersigned certifies, to the best of his or her knowledge and belief, that:

(3)

1 No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

2 If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit

Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

- 3 The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

The Contractor, certifies or affirms the truthfulness and accuracy of each statement of its certification and disclosure, if any. In addition, the Contractor understands and agrees that the provisions of 31 U.S.C. Chap. 38, Administrative Remedies for False Claims and Statements, apply to this certification and disclosure, if any.

Signature of Contractor's Authorized Official

Name and Title of Contractor's Authorized Official

4. Termination for Cause and Convenience (2 C.F.R. PART 200 APPENDIX II(B))
Required in all contracts over \$10K

Every contract for more than \$10,000 must address termination for cause and termination for convenience including the manner by which the contract will be effected and the basis for settlement.

5. Contract Work Hours and Safety Standards Act (29 C.F.R. 5.5(b))
Required in all contracts over \$100K utilizing mechanics or laborers (as defined in 40 U.S.C. §§ 3701)

Suggested provision (from 29 C.F.R. § 5.5(b)):

- (1) *Overtime requirements.* No **contractor or subcontractor** contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any such laborer or mechanic in any workweek in which he or she

is employed on such work to work in excess of forty hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of forty hours in such workweek.

- (2) *Violation; liability for unpaid wages; liquidated damages.* In the event of any violation of the clause set forth in paragraph (b)(1) of this section the contractor and any subcontractor responsible therefor shall be liable for the unpaid wages. In addition, such contractor and subcontractor shall be liable to the United States (in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory), for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic, including watchmen and guards, employed in violation of the clause set forth in paragraph (b)(1) of this section, in the sum of \$27 for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of forty hours without payment of the overtime wages required by the clause set forth in paragraph (b)(1) of this section.
- (3) *Withholding for unpaid wages and liquidated damages.* The **(write in the name of the Federal agency or the loan or grant recipient)** shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld, from any moneys payable on account of work performed by the contractor or subcontractor under any such contract or any other Federal contract with the same prime contractor, or any other federally-assisted contract subject to the Contract Work Hours and Safety Standards Act, which is held by the same prime contractor, such sums as may be determined to be necessary to satisfy any liabilities of such contractor or subcontractor for unpaid wages and liquidated damages as provided in the clause set forth in paragraph (b)(2) of this section.
- (4) *Subcontracts.* The contractor or subcontractor shall insert in any subcontracts the clauses set forth in paragraph (b)(1) through (4) of this section and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for compliance by any subcontractor or lower tier subcontractor with the clauses set forth in paragraphs (b)(1) through (4) of this section.

6. Clean Air Act and the Federal Water Pollution Control Act Clauses (2 C.F.R. PART 200 APPENDIX ii(G))
Required in all contracts over \$150K

Suggested provision:

- (1) The contractor agrees to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act, as amended, 42 U.S.C. § 7401 et seq.
- (2) The contractor agrees to report each violation to the **(name of agency or applicant entering into the contract)** and understands and agrees that the **(name of the agency or**

applicant entering into the contract) will, in turn, report each violation as required to assure notification to the Federal Emergency Management Agency, and the appropriate Environmental Protection Agency Regional Office.

- (3) The contractor agrees to include these requirements in each subcontract exceeding \$150,000 financed in whole or in part with Federal assistance provided by FEMA.
- (4) The contractor agrees to comply with all applicable standards, orders, or regulations issued pursuant to the Federal Water Pollution Control Act, as amended, 33 U.S.C. 1251 et seq.
- (5) The contractor agrees to report each violation to the (**name of the agency or applicant entering into the contract**) and understands and agrees that the (**name of the agency applicant entering into the contract**) will, in turn, report each violation as required to assure notification to the Federal Emergency Management Agency, and the appropriate Environmental Protection Agency Regional Office.
- (6) The contractor agrees to include these requirements in each subcontract exceeding \$150,000 financed in whole or in part with Federal assistance provided by FEMA.

7. Legal/Contractual/Administrative Remedies for Breach (2 C.F.R. Part 200, Appendix II(A))
Required in all contracts over \$250K

All contracts greater than \$250,000 must address administrative, contractual or legal remedies for contractors' breach or violation of the agreement, and provide for sanctions and penalties as appropriate pursuant to contractor's policies.

8. Equal Employment Opportunity Clause (2 C.F.R. PART 200 APPENDIX II(C))
Required in all construction contracts (as defined in 41 C.F.R. § 60-1.3)

REQUIRED provision (exact language is to be used):

During the performance of this contract, the contractor agrees as follows:

- (1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex,

sexual orientation, gender identity, or national origin. Such action shall include, but not be limited to the following:

Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided setting forth the provisions of this nondiscrimination clause.

- (2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin.
- (3) The contractor will not discharge or in any other manner discriminate against any employee or applicant for employment because such employee or applicant has inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant. This provision shall not apply to instances in which an employee who has access to the compensation information of other employees or applicants as a part of such employee's essential job functions discloses the compensation of such other employees or applicants to individuals who do not otherwise have access to such information, unless such disclosure is in response to a formal complaint or charge, in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the employer, or is consistent with the contractor's legal duty to furnish information.
- (4) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice to be provided advising the said labor union or workers' representatives of the contractor's commitments under this section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.
- (5) The contractor will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.
- (6) The contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the administering agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.
- (7) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of the said rules, regulations, or orders, this contract may be canceled, terminated, or suspended in whole or in part and the contractor may be declared ineligible

for further Government contracts or federally assisted construction contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

- (8) The contractor will include the portion of the sentence immediately preceding paragraph (1) and the provisions of paragraphs (1) through (8) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the administering agency may direct as a means of enforcing such provisions, including sanctions for noncompliance:

Provided, however, that in the event a contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the administering agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

The applicant further agrees that it will be bound by the above equal opportunity clause with respect to its own employment practices when it participates in federally assisted construction work: *Provided*, That if the applicant so participating is a State or local government, the above equal opportunity clause is not applicable to any agency, instrumentality or subdivision of such government which does not participate in work on or under the contract.

The applicant agrees that it will assist and cooperate actively with the administering agency and the Secretary of Labor in obtaining the compliance of contractors and subcontractors with the equal opportunity clause and the rules, regulations, and relevant orders of the Secretary of Labor, that it will furnish the administering agency and the Secretary of Labor such information as they may require for the supervision of such compliance, and that it will otherwise assist the administering agency in the discharge of the agency's primary responsibility for securing compliance.

The applicant further agrees that it will refrain from entering into any contract or contract modification subject to Executive Order 11246 of September 24, 1965, with a contractor debarred from, or who has not demonstrated eligibility for, Government contracts and federally assisted construction contracts pursuant to the Executive Order and will carry out such sanctions and penalties for violation of the equal opportunity clause as may be imposed upon contractors and subcontractors by the administering agency or the Secretary of Labor pursuant to Part II, Subpart D of the Executive Order. In addition, the applicant agrees that if it fails or refuses to comply with these undertakings, the administering agency may take any or all of the following actions: Cancel, terminate, or suspend in whole or in part this grant (contract, loan, insurance, guarantee); refrain from extending any further assistance to the

applicant under the program with respect to which the failure or refund occurred until satisfactory assurance of future compliance has been received from such applicant; and refer the case to the Department of Justice for appropriate legal proceedings.

9. Davis-Bacon Act Clause ((2 C.F.R. PART 200 APPENDIX II(D))
Required for certain construction contracts over \$2K

The Davis-Bacon Act only applies to the Emergency Management Preparedness Grant Program, Homeland Security Grant Program, Nonprofit Security Grant Program, Tribal Homeland Security Grant Program, Port Security Grant Program, and Transit Security Grant Program. **It DOES NOT apply to other FEMA grant and cooperative agreement programs, including the Public Assistance Program.**

Suggested provision:

- (1) All transactions regarding this contract shall be done in compliance with the Davis-Bacon Act (40 U.S.C. 3141- 3144, and 3146-3148) and the requirements of 29 C.F.R. pt. 5 as may be applicable. The contractor shall comply with 40 U.S.C. 3141-3144, and 3146-3148 and the requirements of 29 C.F.R. pt. 5 as applicable.
- (2) Contractors are required to pay wages to laborers and mechanics at a rate not less than the prevailing wages specified in a wage determination made by the Secretary of Labor.

10. Copeland Anti-Kickback Act (40 U.S.C. 3145)
Required in all construction contracts over \$2K (does not apply to PA grants)

Suggested provision:

- (1) Contractor. The contractor shall comply with 18 U.S.C. §874, 40 U.S.C. § 3145, and the requirements of 29 C.F.R. pt. 3 as may be applicable, which are incorporated by reference into this contract.
- (2) Subcontracts. The contractor or subcontractor shall insert in any subcontracts the clause above and such other clauses as FEMA may by appropriate instructions require, and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for the compliance by any subcontractor or lower tier subcontractor with all of these contract clauses.
- (3) Breach. A breach of the contract clauses above may be grounds for

termination of the contract, and for debarment as a contractor and subcontractor as provided in 29 C.F.R. § 5.12.

***DOES NOT apply to the FEMA Public Assistance Program.**

11. Rights to Inventions Made Under a Contract or Agreement Clause (2 C.F.R. PART 200 APPENDIX II(F))
Required in federally funded contracts with nonprofits and small businesses for experimental, developmental, or research work

Suggested provision:

The contractor will comply with the requirements of 37 C.F.R. Part 401 (Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements), and any implementing regulations issued by FEMA.