



April 22, 2008

R. David Paulison
Administrator
Federal Emergency Management Agency
Department of Homeland Security
500 C Street, SW
Washington, DC 20472

Dear Chief Paulison:

I am writing on behalf of the Disaster Recovery Contractors Association and our membership to request clarification of a Federal Emergency Management Agency (FEMA) regulation which may impact upon State and local governments, and the private sector businesses they often depend upon to clean up and restore their cities after a disaster.

The regulation we would like clarified, 44 CFR §13.36 (b)(5), reads as follows:

"To foster greater economy and efficiency, grantees and subgrantees are encouraged to enter into State and local intergovernmental agreements for procurement or use of common goods and services."

First, we would like to commend FEMA for encouraging procedures to promote economy and efficiency in disasters, which can hasten a community's recovery while protecting the taxpayers from wasteful spending. When victims and communities can recover from a disaster quicker due to economies and efficiencies encouraged by the regulations and policies, the government is fulfilling its proper role of helping victims while protecting taxpayer funds.

We would also like to note that the language of the regulation does not seem to place undue restrictions on when state and local governments can take advantage of procurement or use of common goods and services, which is how the economies and efficiencies are gained. Obviously, the hope is that state and local governments agree to the procurement and use of common goods and services prior to a disaster. However, it appears the regulation does not foreclose such opportunities after a disaster strikes when such efficiencies may be much more critical, particularly when health and safety or even life-threatening situations require an immediate response. The policy rightfully allows procurement of common goods and services during both pre-event and post-disaster situations.

Further, we would point out that the regulation does not place unwarranted restrictions on how states or local governments procure or use common goods and services beyond an agreement. In other words, the regulation does not dictate the sequence in which the procurement or use is accomplished; it allows for governments to utilize already procured contracts for common goods and services from other jurisdictions. We would submit that the required agreement between the governments has been satisfied by individual states which have considered the use of piggyback

contracts and have duly enacted laws governing their implementation between governmental units.

Our specific question regarding the regulation relates to "piggyback contracts." As you know, piggyback contracts are allowable by law in many states and are not specifically forbidden by Federal law or FEMA regulation.¹ FEMA's recent guidance on this issue is contradictory. In Public Assistance (PA) Guide 322, June 2007, FEMA states that a piggyback contract is, "a concept of expanding a previously awarded contract" and that this type of contract is not eligible.² However, in the PA Debris Management Guide, FEMA 325, July 2007, it says FEMA "does not favor "piggyback contracts," and that they are, "an *option* to be avoided" (emphasis added).³ In fact, FEMA PA Debris Management Guide, FEMA 325 includes a section on prohibited contracts which does not mention piggyback contracts, giving further evidence that these contracts are eligible and allowed.⁴ The two guidance documents also differ on whether a piggyback contract satisfies the competitive procurement requirements of 44 CFR §13.36.

If piggyback contracts were an expansion of a previously awarded contract, our membership would agree it does not meet the requirements of 44 CFR §13.36. The incorrect definition of piggyback contracts and the inconsistent guidance may explain the bias against this type of contracting in the PA program policy and the determination that these contracts are ineligible despite the direct conflict with 44 CFR §13.36.

A piggyback contract is a legal contract, if allowed by state and local law, in which one jurisdiction or purchasing entity utilizes the contract of another jurisdiction with the exact same terms, prices and contract requirements. This is not an expansion of a previously awarded contract as suggested by the guidance. *In fact, FEMA has utilized this contracting tool with other Federal agencies for its own procurements.*

It appears from a plain reading of 44 CFR §13.36 (b)(5) that piggyback contracts are allowed. The regulation, while encouraging the procurement and use of common goods and services, does not prohibit piggyback contracts. One could reason that if FEMA intended to clearly rule out the use of this procurement method, it would have been specifically included in this regulation, since many states and the Federal government already use piggyback contracts. The regulation does not mandate the sequence of procurement or how the procurement must be structured. The emphasis of the regulation, it appears, is centered on common goods and services, rather than the specific procurement method employed. Since piggyback contracts procure common goods and services, it appears this procurement method falls within the meaning of 44 CFR §13.36 (b)(5).

¹ According to the National Association of State Procurement Officials, as of 2003, 42 states allowed cooperative purchasing (piggyback contracts are one type of cooperative purchase agreements) among local governments and 30 states allow cooperative purchasing with the Federal government. National Association of State Procurement Officials, *Strength in Numbers: An Introduction to Cooperative Procurements*, February 2006, at <http://www.naspo.org/cooperative/Cooperative%20Purchasing%20Introduction.pdf>.

² FEMA Public Assistance Guide, FEMA 322, June 2007, at 52. Significantly, the FEMA Applicant Handbook, FEMA 323, September 1999, does not address piggyback contracts.

³ FEMA Public Assistance Debris Management Guide, FEMA 325, July 2007, at 19.

⁴ *Ibid* at 19.

We would respectfully request FEMA's comment on the use of piggyback contracts in relation to this regulation and change FEMA PA Guide 322 to reflect the intent of 44 CFR and continue to encourage governments to procure goods and services through intergovernmental agreements. This form of contracting is used by State, regional governmental entities, counties and local governments everyday to ensure their effectiveness as public officials. FEMA's needs to clarify the discrepancies in the guidance for the good of the local governments that use them on a daily basis.

Finally, we would like to draw your attention to the fact that our members are reporting that FEMA personnel in state and local workshops are calling piggyback contracts illegal. We believe this is a mischaracterization of a piggyback contract and it is unnecessarily causing confusion and fear among state and local officials, particularly when their state law allows such procurements. We hope this issue could be resolved so FEMA, state and local government officials can concentrate on the important coordination issues they need to consider going into hurricane season.

Thank you for your attention to this matter on behalf of our membership and the hundreds of private sector companies that work side by side with governments to help their community's recovery. Please feel free to contact me at (202) 629-0332 extension 706 if you would like any further information.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Craig', with a stylized flourish at the end.

Daniel A. Craig
President