



Super Circular:

Background, General Suggestions
and Guidelines

Over the course of the last year, designated representatives of the FAMA/FEMSA GAC have held discussions with DHS' FEMA AFG office regarding the application in the field of the Super Circular to fire grant programs. Because the Super Circular governs procurement practices applying to grantees of all federal grant programs, many FAMA and FEMSA members sought further understanding and clarification of how the Super Circular could be applied to the AFG program.

Below is a summary outline of background issues, an introduction to the Super Circular's requirements, and insights into discussions held. Please note: This outline and its contents does not represent a legal analysis of the Super Circular, and should not be used in place of your company's legal counsel and proper interpretation of the Super Circular's requirements.

1. Background

- a. 2 CFR is not specific to the AFG program. It applies to all Federal grant programs.
- b. When Federal funds are being used, the following policy(s), according to 2 CFR must be followed by the recipients (the Fire Department that wrote and received the grant). This includes anything from a municipality to a fire district or a private fire department. They must have in place the following:
 - i. They must have and follow a written procurement policy
 - ii. The written procurement policy must also follow state and/or Federal procurement regulations
 - iii. Where a conflict exists, the recipient must follow the more stringent of the two
 - iv. States (including State Fire Training Academies where applicable) must follow the procurement regulations of the State

2. Why – Fair and reasonable (open) competition is one of if not the main drivers

- a. The idea of fair and reasonable competition is one of if not the main focal points in much of the regulator direction of the document
- b. The intent of this regulation is to ensure that, to the extent

- possible, all procurements will ensure “full and open” competition
- c. There is a general belief that if a contractor (in our case either a manufacturer or a dealer) helps a recipient to prepare a bid specification, the contractor in question has obtained an unfair competitive advantage and, therefore, should be excluded from the ability to participate in the bid. We realize this is a perceived advantage and in most cases is not accurate.
 - i. It is the recipient’s (the fire department) responsibility to exclude such contractors when these situations present themselves.
 - d. If it is determined that a recipient (fire department), after an AFG grant has been awarded, has conducted a procurement that did not allow for full and open competition, there are a number of potential administrative remedies that the awarding agency (FEMA in this case) may take to correct the situation. Options may include, but are not limited to:
 - i. Requiring the recipient to re-do the procurement action in such a manner that ensures full and open competition
 - ii. Require that the contractor that assisted with the preparation of the bid documents be excluded
 - iii. Disallow the cost to the recipient, thus requiring the recipient to incur the financial liability of that part of the procurement
 - iv. If it is believed that the recipient acted in a manner that includes waste, fraud or abuse, the matter may be referred to the Office of the Inspector General
 - e. Note - If the recipient (fire department) used documents or other sources to prepare the bid specification for which the contractor had no knowledge of, then 2CFR was followed and the contractor (either the dealer, the manufacturer or both) of the item which was specified may still be eligible to participate in the procurement process
 - f. The recipient must not do anything to arbitrarily limit who may be eligible to bid (the goal from the Government’s perspective is to make sure that the largest number of possible bidders are able to participate). It may, however, include within the specifications additional criteria as to how the bid will be reviewed.
 - g. Recipients are required to have a process in place to deal with disputes (i.e. bid protest). This process should be included as part of any bid document (does not mean as part of the specification, however)

3. Monitoring an AFG grant after award

- a. FEMA is required to “monitor” anyone receiving a grant to ensure compliance to the terms and conditions of the award and to ensure that the recipient is procuring the required goods and services in a timely manner.
- b. It is a requirement that the department keep all related documents and records related to the administration of the grant and to include in their record all procurement documents.
- c. A department may be asked as part of the monitoring process to produce the following:
 - i. Copy of the agency’s procurement policy
 - ii. Copy of the bid document
 - iii. Copy of the determination of award (i.e. explanation as to how a recipient will evaluate bid submissions and make a final determination for award).
 - iv. Contract or purchase order
 - v. Copy of invoice
 - vi. Proof of payment
- d. All procurement activities must take place within the “Period of Performance.” In most cases, the department may not contract for goods or services outside of the period of performance. However, there is a provision within the AFG Notice of Funding Opportunity (NOFO) which allows a potential recipient to petition FEMA to make an emergency purchase for something that they have applied for but not yet been awarded
- e. Note – to all - over the last few years there have been several incidents where departments have procured goods and services outside of the period of performance (before the start of the award) and then requested reimbursement under the award. This is not allowed and such costs would be deemed un-allowed.

4. Best Practices to help make sure that you do not run counter to 2 CFR

- a. Be familiar with the regulations. Even though it is primarily the responsibility of the department (recipient of the grant) to know the terms and conditions of their award, as well as the relevant regulations, the more you, the dealer or manufacturer, are knowledgeable about the 2 CFR regulations, the more you can be a resource and be able to

- participate in the process.
- b. Know which procurement options are available to the customer through their procurement policy (i.e. sealed bid, RFP, best value, co-op contract, etc.)
 - c. Where appropriate, have the customer consider an RFP. This method provides a tremendous amount of flexibility and allows for maximum engagement between the customer and the contractor.
 - d. The recipient should make every effort to prepare and draft its own bid specifications without the contribution or assistance from an outside contractor, unless that contractor is hired specifically to do so and will not be participating in the bid process. Note, however, that if an outside contractor is brought into the process, he/she cannot be an agent for the manufacturer or dealer).

5. Grant Closeout (FYI)

- a. The recipient is required to complete all performance requirements within the period of the performance of the award, and to include receipts of all purchased goods and services.
- b. The recipient must draw down funds, or seek reimbursement for all eligible expenses, within 90 days of the close of the period of performance, and complete all required documentation within the same 90 days.

6. Disposition of Grant Funded Equipment

- a. The awarding agency, in this case FEMA, retains a financial interest in all grant funded equipment with a current market value of \$5,000 or greater.
- b. The recipient is REQUIRED to request disposition instructions from the awarding agency (FEMA) in the event that they no longer have a need for the grant funded equipment.
 - i. This provision is critical and required as part of the terms and condition of the award.
 - ii. Example: a department was awarded a fire engine 10 years ago and no longer has a need for it or wishes to sell it or trade it in. The awarding agency would be entitled to the proportion of the proceeds less cost share. If the department were to sell the fire engine and proceed to buy other equipment, they would likely be required to repay FEMA less the proportion of cost share.
 - iii. In the above example, it is important for all of us to know the regulation, help ensure that our customers are compliant to the regulation, and confirm that the customer has received the proper disposition instructions from FEMA prior to completing any transaction that involves previous grant funded equipment.

ABOUT FAMA/FEMSA GAC

The mission of the Governmental Affairs Committee is to be the vehicle through which FAMA and FEMSA maintain and enhance their leadership role with strategic partners and governmental entities to promote issues related to the needs of first responders.

