

# Construction Manager at Risk (CMAR) Contracting

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Although numerous state laws authorize the use of the Construction Manager at Risk (CMAR) contracting when completing construction projects, FEMA grant award recipients and subrecipients, or non-federal entities (NFEs), should exercise caution when using this delivery method to ensure compliance with the federal procurement standards at [2 C.F.R. §§ 200.317 – 200.327](#). This Fact Sheet provides guidance regarding the general use of CMAR and highlights frequent procurement compliance concerns.

## Primary Delivery Methods for Construction Work

NFEs may need to contract for construction work when carrying out their FEMA award. When doing so, they may wish to use the one of the primary delivery methods for construction projects described below and further outlined in [Chapter 13: Beyond the Basics](#) of the Procurement Disaster Assistance Team (PDAT) Field Manual.

- **Design-bid-build** is the traditional, linear approach where an NFE contracts separately with an architectural/engineering (A/E) firm for design services and then with a construction firm based on a completed design. There is no contractual relationship between the design and construction firms.
- **Design-build** is an approach that entails an NFE contracting with one firm to provide both design and construction services.
- **CMAR** is an approach when the NFE procures the construction firm, or the CMAR contract, early in the design and planning process, but separately from the design firm. **NOTE:** The CMAR approach is sometimes referred to as Construction Manager/General Contractor (CM/GC), which is an acceptable contracting method allowing for the use of a single procurement to secure pre-construction and construction services.



## What is CMAR?

Under a typical CMAR delivery method, a recipient or subrecipient hires a construction firm or construction manager early in the design and planning process to later oversee the project's construction. The construction manager advises the design firm during the project's design and planning phases and often acts as the general contractor during the construction phase to select, schedule, and sequence subcontractors to complete the required construction work.

The method is known as construction manager "at risk" because the recipient or subrecipient and construction manager negotiate a guaranteed maximum price (GMP) during the design phase, the construction manager will be responsible for any costs that exceed that amount. While CMAR can be a complex process and the specifics of the delivery method will vary by jurisdiction, if done properly, it can yield time and cost efficiencies by obtaining construction manager input during the design phase and beginning aspects of a construction project before the full design is complete.

## Compliance with the Federal Procurement Standards

The federal procurement standards for the acquisition of property or services under grants in the U.S. Code of Federal Regulations (C.F.R.) at 2 C.F.R. §§ 200.317 – 200.327 do not specifically address the use of CMAR. While state laws may authorize the use of CMAR, this does not waive the federal procurement standards. When using the CMAR delivery method, state entities, which include state and territorial agencies and instrumentalities, must ensure compliance with 2 C.F.R. §§ 200.317, 200.321, 200.322, 200.323, and 200.327. NFEs other than states, which include local and tribal governments, as well as non-profit organizations, must follow the standards at 2 C.F.R. §§ 200.318 – 200.327. Certain CMAR procedures may be inconsistent with the federal rules (or standards) and, in turn, place the FEMA award funding at risk. Non-state entities should consider the complexities posed by CMAR before selecting it as a project delivery method.

## Frequent Compliance Concerns with CMAR Contracting



When an NFE uses CMAR contracting under a FEMA award, it is important that each action remain compliant under the federal procurement rules. The below examples are not an exhaustive list of CMAR considerations and are meant only to highlight frequent CMAR procurement compliance issues. All federal procurement rules, including those not discussed herein, remain applicable regardless of the construction project delivery method used by a FEMA award recipient or subrecipient. For additional information please visit the [PDAT Webpage](#).

### **Conflicts of Interests ([2 C.F.R. § 200.318\(c\)](#))**

Under the federal procurement rules, no employee, officer, or agent may participate in the [selection, award, or administration](#) of a contract supported by a federal award if he or she has a real or apparent conflict of interest. This prohibition is designed to ensure, at a minimum, that employees involved in the award and administration of contracts are free of undisclosed personal or organizational conflicts of interest—both in fact and appearance.

If a non-state entity has a parent, affiliate, or subsidiary organization that is not a state, local government, or tribe, the non-state entity must also maintain written standards of conduct covering [organizational conflicts of interest](#). Organizational conflicts of interest mean that because of relationships with a parent company, affiliate, or subsidiary organization, the non-state entity is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization.

### **Responsible Contractors ([2 C.F.R. § 200.318\(h\)](#))**

Non-state entities must only award contracts to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Similarly, construction managers procured under CMAR and operating as general contractors must ensure to only award contracts to responsible subcontractors in covered lower tier transactions. Construction managers must consider contractor integrity, compliance with public policy, record of past performance, and financial and technical resources. NFEs and construction managers must check the exclusions list for suspended or debarred parties on [www.SAM.gov](http://www.SAM.gov) during their responsibility assessments. See also [2 C.F.R. § 200.214](#).



## **Full and Open Competition Requirements ([2 C.F.R. § 200.319](#))**

All full and open competition requirements established in the federal procurement rules apply when a non-state entity uses the CMAR delivery method. These rules state that contractors that develop or draft specifications, requirements, statements of work, or invitations for bids or requests for proposals must be excluded from competing for such procurements. Some CMAR processes allow entities to solicit bids or proposals for the construction phase if they do not accept the construction manager's GMP proposal. If this occurs, the originally selected construction manager, which likely assisted in drafting one of the above-mentioned documents, must be prohibited from competing for the separate construction phase procurement.

## **Applicable Requirements for Procurement Methods ([2 C.F.R. § 200.320](#))**

Any procurement method used by a non-state entity must align with one of the procurement methods set forth at 2 C.F.R. § 200.320. CMAR procurements often resemble the competitive proposal procurement method. In addition to considering price as a selection factor, non-state entities must also publicly advertise a Request for Proposal and solicit from an adequate number of qualified sources when procuring a construction manager.

## **Price as a Selection Factor for Competitive Proposals ([2 C.F.R. § 200.320\(b\)\(2\)](#))**

When procuring a construction manager, non-state entities should review anticipated project costs and determine if a majority of the costs are for actual construction costs or for A/E professional services. If a majority of the costs are for the actual cost of construction, then non-state entities must consider price for the entire project (design, planning, and construction phases) such that no part of the construction manager selection, including the initial selection of qualified contractors, is done without consideration of cost competition. Because the majority of costs when using CMAR are often for actual construction costs, not A/E services, using a qualifications-based procurement for the CMAR approach may not comply with the federal procurement rules.

## **Socioeconomic Affirmative Steps ([2 C.F.R. § 200.321](#))**



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Solicitations for either contractors or subcontractors under the CMAR delivery method must still follow the six socioeconomic affirmative steps found at 2 C.F.R. § 200.321. Some CMAR processes may require entities to follow socioeconomic affirmative steps when procuring the construction manager but fail to require the construction manager (acting as a general contractor) to follow the applicable affirmative steps. Both state and non-state entities must require construction managers to comply with these same six socioeconomic affirmative steps when soliciting subcontractors under CMAR.

### **Cost or Price Analysis for all Project Costs ([2 C.F.R. § 200.324](#))**

Use of CMAR may not comply with 2 C.F.R. § 200.324 if the most significant construction cost is excluded from an entity's cost or price analysis. Cost or price analysis is a potential risk area under CMAR if the construction manager is selected without consideration of the actual cost of construction. Since hard construction cost estimates are not typically provided under CMAR until the construction manager submits the GMP proposal, non-state entities should include price considerations during the initial CMAR procurement through such means as general conditions costs and anticipated costs.

### **Independent Estimates for Projects over \$250,000 ([2 C.F.R. § 200.324](#))**

Non-state entities must make independent estimates before receiving bids or proposals for procurements over \$250,000. If the design is not yet complete at the time of the CMAR solicitation, non-state entities may be unable to conduct a complete independent estimate before receiving bids. In the absence of a completed design, non-state entities must take steps to make accurate and meaningful independent estimates for all project phases. A comprehensive understanding of the costs of labor, materials, equipment, and the means and methods of both design and construction required to complete the project will assist non-state entities in forecasting costs.

### **Required Contract Provisions ([2 C.F.R. § 200.327](#))**

Under a FEMA award, state and non-state entity contracts are required to contain the applicable provisions enumerated in Appendix II to Part 200 - Contract Provisions for Non-Federal Entity Contracts Under Federal Awards. The federal procurement rules authorize FEMA to require additional provisions for NFE contracts; however, FEMA instead recommends several provisions described in



the [PDAT Field Manual](#) and [Contract Provisions Guide](#).

