MARIN COUNTY, CALIFORNIA

CONTRACT DOCUMENTS FOR

ON-CALL CONTRACT FOR CONSTRUCTION PROJECTS (2026-2028)

JOB NO. 26420-01

JUNE 2026

DISTRICT BOARD

Crystal J. Yezman – President
Nicholas Lavrov – Vice President
Megan Clark
Craig K. Murray
Gary E. Robards

Curtis Paxton – General Manager
Jasmine Diaz, PE – District Engineer
Don Moore – Plant Manager
Dale McDonald – Administrative Services Manager
Greg Pease – Collection System/Safety Manager

Copy No. _____

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ACKNOWLEDGEMENT

ACKNOWLEDGEMENT OF THE CONTRACT DOCUMENTS MUST BE RECEIVED BY THE DISTRICT IN ORDER FOR YOU TO RECEIVE ADDENDA (i.e., updates or changes to the Contract Documents). PLEASE COMPLETE BELOW AND FAX TO 415-499-7715, OR EMAIL TO engineering@lgvsd.org IMMEDIATELY UPON RECEIPT OF THIS PACKET so that you will receive any changes or updates as they occur. If we do not receive this form from you, any updates or changes that you do not receive are not the responsibility of the District.

BID ITEM: ON-CALL CONTRACT FOR CONSTRUCTION PROJECTS (2026-2028)

Date Received: _____

Recipient: _____ (BIDDER)

_____ (ADDRESS)

_____

_____

_____ (PHONE)

_____ (FAX)

_____ (EMAIL)

_____ _____

Printed Name Signature

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LAS GALLINAS VALLEY SANITARY DISTRICT
101 Lucas Valley Road, Suite 300
San Rafael, California 94903

NOTICE INVITING SEALED BIDS

1. The Las Gallinas Valley Sanitary District hereby invites bids for the **ON-CALL CONTRACT FOR CONSTRUCTION PROJECTS (2026-2028)**, in accordance with California Public Contract Code Section 20804 and other applicable law, and the following:

2. All bids must be delivered to the **Engineering Department, Las Gallinas Valley Sanitary District, 101 Lucas Valley Road, Suite 300, San Rafael, California 94903** on or before **1:30 PM, July 14, 2026**. Bids will be opened and read publicly at that time. Bids must be made on the bid forms included in the bid package. Bids that are submitted late according to the official time kept by the District Engineer or a designee will be returned unopened. Bids submitted by facsimile or other electronic means will not be accepted. Bids that are incomplete or that otherwise do not conform to the requirements specified in the bid package may be deemed non-responsive.

3. The project Contractor shall furnish all tools, equipment, apparatus, facilities, labor and material necessary to perform and complete in a good and workmanlike manner the construction of the on-call project as shown in the project Technical Specifications and plans, if any, and in accordance with the Contract Documents.

4. SCOPE OF WORK. Anticipated scopes of work are industrial in nature and consistently include civil, mechanical, electrical, and structural trades.

5. All the project work shall be completed in accordance with the bid packages on file at the District. Complete bid packages and any addenda may be obtained at https://www.lgvsd.org/call-for-bids or the **Engineering Department, Las Gallinas Valley Sanitary District, 101 Lucas Valley Road, Suite 300, San Rafael, California 94903.**

6. Pursuant to California Public Contract Code Section 3300, a **Class A General Engineering** California contractor's license is required to bid on the project. In accordance with California Business and Professions Code Section 7028.15, all project work must be performed by properly licensed contractors and subcontractors with active licenses in good standing as of the date and time specified for bid opening. However, in accordance with California Public Contract Code Section 20103.5, if the project involves federal funds, project contractors and subcontractors must have active licenses in good standing no later than the time the project contract is awarded. Bids that do not satisfy applicable licensing requirements will be considered non-responsive. Licenses must be issued by the Contractor's State License Board of California and must be maintained in good standing throughout the project term. In accordance with California Business and Professions Code Section 7030.5, bidders must

verify their Contractor's License number and license expiration date on the bid forms under penalty of perjury.

7. In accordance with California Public Contract Code Section 6109, contractors and subcontractors who are ineligible to perform work on public works projects pursuant to California Labor Code Sections 1777.1 or 1777.7 may neither bid on, be awarded or perform work as a subcontractor on the project.

8. In accordance with California Labor Code Section 1771, not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the project is to be performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in the California Labor Code shall be paid to all workers engaged in performing the project. In accordance with California Labor Code Section 1770 and following, the Director of Industrial Relations has determined the general prevailing wage per diem rates for work in the locality in which the project is to be performed. In accordance with California Labor Code Section 1773, the District has obtained the general prevailing rate of per diem wages and the general rate for holiday and overtime work in the locality in which the project is to be performed for each craft, classification or type of worker needed to perform the project. In accordance with California Labor Code Section 1773.2, copies of the prevailing rate of per diem wages are on file at the District Engineer's Office and will be made available on request. A copy of said wage rates is available online at www.dir.ca.gov/DLSR/PWD. In accordance with California Labor Code Section 1777.1, contractors and subcontractors that are found guilty of willfully violating Chapter 1 of Part 7 of Division 2 of the Labor Code (except for Section 1777.5), or that are found guilty of such violations with intent to defraud, and entities in which such contractors or subcontractors have any interest, may be ineligible to bid on, be awarded, or perform project work as a subcontractor.

9. In accordance with California Public Contract Code Section 22300, except where prohibited by federal regulations or policies, the successful bidder may, on request and at its expense, substitute securities in lieu of amounts withheld by the District from progress payments to ensure performance under the contract in accordance with the Contract Documents. Such securities will be subject to the terms of the escrow for security deposit agreement contained in the Contract Documents.

10. The District reserves the right to reject any and all bids and/or to waive any bid irregularities to the extent permitted by law. If the District elects to award a contract for performance of the project, the contract will be awarded in accordance with California Public Contract Code Section 20803 and other applicable law to the responsible bidder submitting a responsive bid with the lowest total bid price for the base bid.

11. Questions regarding the bid package should be directed in writing as soon as possible (but no later than five (5) working days prior to the opening of bids to: Jasmine Diaz, PE at jdiaz@lgvsd.org and cc: engineering@lgvsd.org or delivered to 101 Lucas Valley Road,

Suite 300, San Rafael, CA 94903. Where appropriate, the District may respond to such questions by addenda transmitted to all bid package recipients.

12. All bids will remain valid for ninety (90) calendar days after the bid opening. Except as permitted by law and subject to all applicable remedies, including forfeiture of bidder's security, bidders may not withdraw their bid during the ninety (90) day period after the bid opening.

Las Gallinas Valley Sanitary District

By: /s/ Jasmine Diaz
Jasmine Diaz, PE, District Engineer

Date: June 29, 2026

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LAS GALLINAS VALLEY SANITARY DISTRICT
101 Lucas Valley Road, Suite 300
San Rafael, California 94903

INSTRUCTIONS TO BIDDERS

1. DEFINITIONS

1.1 Bid forms. The bid forms are the forms contained in Volume 2 of the bid package.

1.2 Bid package. A complete bid package consists of the following documents: Volume 1 – Contract Forms includes the Notice Inviting Sealed Bids, Instructions to Bidders, Contract Check List, Contract, Performance Bond (As-Needed), Payment/Labor and Materials Bond (As-Needed), Maintenance Bond (As-Needed), and Escrow for Security Deposit Agreement (As-Needed). Volume 2 – Bid Forms, includes the Bidder's Check List, Bid Label, Proposal Cover Page and Bid Schedule, Contractor License Information, Workers Compensation Insurance Certification, Non-Collusion Affidavit, Drug-Free Workplace Certification, Debarment Certification, Statement of Experience of Bidder, Financial Qualifications, and Bidder's Signature Page. Volume 3 – Technical Specifications, and Supplemental Reports or Data (if any). Volume 4 – Drawings (Not Used).

1.3 Contract Documents. The Contract Documents refer to all of the documents incorporated into the final Project contract as listed in the contract.

1.4 Project. The Project is the ON-CALL CONTRACT FOR CONSTRUCTION PROJECTS (2026-2028) as described in the Technical Specifications and Drawings included in the project bid package.

1.5 Drawings (Not Used). The Drawings are primarily graphic detailed requirements concerning the Project and are contained in Volume 4 of the bid package.

1.6 Technical Specifications. The Technical Specifications provide detailed requirements concerning the Project and are contained in Volume 3 of the bid package.

2. BIDDER'S REPRESENTATIONS

Each bidder by submitting a bid represents that:

2.1 The bidder has read and understands the bid package and the bid is in accordance with all of the requirements of the bid package and applicable law.

2.2 Neither the bidder nor any subcontractor included on the list of proposed subcontractors submitted with the bid, are ineligible to perform work on public works projects pursuant to California Labor Code Sections 1777.1 or 1777.7.

2.3 The bidder understands that quantities of unit price items may vary from the estimates provided in the Technical Specifications.

2.4 Representatives of the bidder have visited the Project site and have familiarized themselves with the conditions under which the Project work is to be performed so as to ensure that the Project work may be performed for the amount bid.

2.5 The bidder has informed the District in writing no later than five (5) working days prior to the time specified for bid opening of any apparent conflicts, errors, or ambiguities contained in the bid package or between the contents of the bid package and the Project site.

3. PRE-BID COMMUNICATION AND INTERPRETATION OF THE BID PACKAGE

3.1 Any bidder that discovers any apparent conflicts, errors, or ambiguities contained in the bid package or between the contents of the bid package and the Project site, or that has questions or requires clarification concerning the bid package or its intent must inform the District in writing as soon as reasonably possible, but no later than five (5) working days before the date specified for bid opening. Such notice to the District must be sent to the address specified in the Notice Inviting Sealed Bids for questions concerning the bid package. Questions received less than five (5) working days before the time specified for opening bids may not be answered.

3.2 Any interpretation, correction or change of the bid package prior to bid opening will be made by addendum signed by an authorized representative of the District and transmitted to all bid package recipients. No other interpretation or information concerning the bid package issued prior to the date specified for opening bids will be binding. All addenda signed by an authorized representative of the District and issued prior to the time and date specified for opening bids will form a part of the Contract Documents and must be acknowledged on the bid forms. Any changes, exceptions or conditions concerning the Project and/or the bid package submitted by any bidder as part of a bid may render that bid non-responsive.

4. PRE-BID ACCESS TO THE PROJECT SITE

4.1 Prior to submitting a bid, it will be the sole responsibility of each bidder to conduct any additional examination, investigation, exploration, test, study or other inquiry and to obtain any additional information pertaining to the physical conditions (including surface, subsurface, and underground utilities) at or near the Project site that may affect the cost, progress, or performance of the Project, and that the bidder deems are necessary to prepare its bid for performance of the Project in accordance with the bid package and Contract Documents. Bidders seeking any such additional examination or other inquiries or information concerning the Project will do so at the bidder’s sole expense.

4.2 Bidders seeking to conduct any additional examination or other inquiry at the Project site must request site access from the District at least two (2) working days in advance. The location of any excavation, boring or other invasive testing will be subject to approval on behalf of the District and any other agencies with jurisdiction over such testing. Bidders may not conduct tests at the Project site prior to obtaining District approval. The District may require bidders to execute an access agreement prior to approving testing at the Project site. Once approved testing is complete, Bidders must fill all trenches or holes, restore all pavements to match existing structural section, and otherwise clean up and restore the test site to its pre-test condition.

5. BIDDING PROCEDURE

5.1 Bids must be delivered to the **Engineering Department, Las Gallinas Valley Sanitary District, 101 Lucas Valley Road, Suite 300, San Rafael, California, 94903**, no later than the time and date specified in the Notice Inviting Sealed Bids. Bids will be opened and read publicly at that time. Bids that are submitted late according to the official time kept by the District Engineer or a designee will be returned unopened. Telephones for use by bidders are not available at the District offices.

5.2 In accordance with California Public Contract Code Section 20804.5, bids must be presented under sealed cover. A completed bid label form furnished with the bid forms must be affixed to and visible on the outside of the sealed bid cover at the time the bid is submitted. Bids must be submitted using the bid forms furnished with the bid package. Bids must include all documents listed in the Bidder's Check List contained in Volume 2 completed in accordance with the bid package. Bids must bear the bidder's legal name and be signed by a representative authorized to bind the bidder. Bids must be typed or written in ink. Corrections may be made if initialed by the individual signing the bid. No oral or telegraphic modifications of bids, including facsimile modifications, will be considered. Bids that are incomplete or that are not presented on the bid forms furnished with the bid package may be deemed non-responsive.

5.3 Each bid must give the full business address of the bidder. Bids of partnerships must furnish the full name of all partners and must be signed in the partnership name by one of the members of the partnership, or by an authorized representative, followed by the printed name and title of the person signing. Bids of corporations must be signed with the legal name of the corporation, followed by the name of the state of incorporation and by the signature and designation of the president, secretary or other person authorized to bind the corporation. The name of each person signing shall also be typed or printed below the signature. Upon request of the District, bidders will furnish satisfactory evidence of the authority of the person signing the bid. Bids of joint ventures must include a certified copy of the legal agreement constituting the joint venture.

5.4 No person, firm, corporation, partnership or legal joint venture may submit more than one bid for the Project. However, a person, firm, corporation, partnership or legal joint venture that has submitted a subcontract proposal to a bidder, or that has quoted prices on materials to a bidder may submit a subcontract proposal, quote prices to other bidders and submit its own bid.

5.5 (Not Used)

5.6 In accordance with California Business and Professions Code Section 7028.15, Public Contract Code Section 20103.5, and as specified in the Notice Inviting Sealed Bids, all Project work must be performed by properly licensed contractors and subcontractors with active licenses in good standing as of the date and time specified for bid opening, or, if the project involves federal funds, no later than the time the Project contract is awarded. Bidders must verify their Contractor's License number and license expiration date on the proposal cover page under penalty of perjury. Bids that do not satisfy applicable licensing requirements will be considered non-responsive and rejected and may subject the bidder to criminal and/or civil penalties.

5.7 If the bid forms include a bidder's questionnaire, all bids must include a completed bidder's questionnaire on the forms provided. By submitting a bid, bidders authorize District representatives to verify any and all information provided on the bidder's questionnaire and agree to indemnify, defend and hold harmless the District and its officials, officers, employees, agents and volunteers to full the extent permitted by law from and against any claims, liability or causes of action, including, without limitation, legal fees and costs, arising out of verification of the information provided on the bidder's questionnaire, and/or arising out of use of information provided in the bidder's questionnaire to determine, in accordance with applicable law, the qualification of the bidder for performing the Project.

5.8 Bids may be withdrawn prior to the time set for bid opening by a written request signed by an authorized representative of the bidder filed with the District Engineer. The bid security submitted with bids so withdrawn will be returned to the bidder. Bidders that have withdrawn their bid in accordance with this provision may submit a new bid prior to the time set for bid opening in accordance with all applicable bid package requirements. Bids may not be withdrawn during the ninety (90) day period after the time set for bid opening except as permitted by law pursuant to California Public Contract Code Section 5100 and following. Any other bid withdrawal will result in forfeiture of the bidder's bid security to the District.

6. BID PROTESTS

Any protest of the proposed award of Bid to the bidder deemed the lowest responsible bidder must be submitted in writing to the District, no later than 3:00 PM on the third (3rd) business day following the date of the Bid opening.

6.1 The initial protest must contain a complete statement of the basis for the protest.

6.2 The protest must state the facts and refer to the specific portion of the document or the specific statute that forms the basis for the protest. The protest must include the name, address, and telephone number of the person representing the protesting party.

6.3 The party filing the protest must concurrently transmit a copy of the initial protest to the bidder deemed the lowest responsible bidder.

6.4 The party filing the protest must have actually submitted a Bid on the Project. A subcontractor of a party filing a Bid on this Project may not submit a Bid Protest. A party may not rely on the Bid Protest submitted by another Bidder, but must timely pursue its own protest.

6.5 The procedure and time limits set forth in this Section are mandatory and are the Bidder's sole and exclusive remedy in the event of a Bid Protest. The Bidder's failure to fully comply with these procedures shall constitute a waiver of any right to further pursue the Bid Protest, including filing of a challenge of the award pursuant to the California Public Contracts Code, filing of a claim pursuant to the California Government Code, or filing of any other legal proceedings.

6.6 The District shall review all timely protests prior to formal award of the Bid. The District shall not be required to hold an administrative hearing to consider timely protest, but may do so at the option of the General Manager. At the time of the District Board's consideration of the award of the bid, the District Board shall also consider the merits

of any timely protests. The District Board may either accept the protest and award the bid to the next lowest responsible bidder or reject the protest and award to the lowest responsible bidder. Nothing in this section shall be construed as a waiver of the District Board's right to reject all bids.

6.7 The District reserves the right to waive any bid irregularities not affecting the amount of the bid, except where such waiver would give the low bidder an advantage or benefit not allowed other bidders.

7. AWARD

7.1 In accordance with applicable law, the District reserves the right to reject any or all bids and to waive any informality in any bid. The District reserves the right to accept any portion of any bid, unless the bid package expressly provides that the award will be made as a whole. If the District elects to award a contract for performance of the Project, the contract will be awarded in accordance with California Public Contract Code Section 20803 and other applicable law to the responsible bidder submitting a responsive bid with the lowest total bid price for the base bid and the additive or deductive alternate items listed in the Notice Inviting Sealed Bids. In accordance with the Contract Documents and other applicable law, the District may add or deduct items of work from the Project after the lowest responsible bidder is determined.

7.2 The successful bidder must submit to the District complete, executed copies of all documents specified in the contract checklist included in Volume 1 of the bid package within seven (7) calendar days of receiving written Notice of Award of the Project. Bidder's security of any successful bidder that fails to do so will be forfeited to the District.

7.3 The successful bidder and any subcontractors and others engaged in performance of the Project must have valid local business license(s), as applicable, before commencing work on the Project.

7.4 Upon verifying that the successful bidder has provided complete, executed copies of all documents specified in the contract checklist included in Volume 1 of the bid package, an authorized District representative will execute the Project contract, and the District will issue to the successful bidder a Notice to Proceed specifying the Project commencement date. The number of working days within which the Project must be complete begins to run on the Project commencement date.

8. PRICING

8.1 If an inconsistency exists between the amount listed for a unit price in a bid and the total listed for that bid item (e.g., if the total listed for a bid item does not equal the unit price listed in the bid multiplied by the quantity listed), subject to applicable law, the unit price will be deemed to accurately reflect the bidder's intent concerning the bid item and the intended total for the bid item will be deemed to be the unit price as listed in the bid multiplied by the quantity listed.

8.2 If the Project bid price is a lump sum total made up of smaller individual bid item prices and an inconsistency exists between the lump sum total bid price and any individual bid item price, subject to applicable law, the individual bid item prices as listed in the bid will be deemed to accurately reflect the bidder's intended bid for the Project and the

intended lump sum total bid for the Project will be deemed to be the sum of the individual bid item prices as listed in the bid, even if that sum is different from the amount actually listed as the lump sum total bid for the Project.

8.3 Any federal, state, or local tax payable on articles to be furnished for the Project shall be included in the lump sum total bid price and paid by the Contractor under the contract.

9. QUANTITIES

9.1 Quantities, including but not limited to, material or labor quantities, that are provided in the bid package concerning the Project are estimates only and are provided solely as a general indication of the Project scope. The District does not warrant that such quantity estimates provided in the bid package represent the actual quantities required to perform the Project in accordance with the Contract Documents. Such quantity estimates do not bind the District, and bidders should not rely on them in preparing their bids. Each bidder is solely responsible for determining the quantities on which to base their bids in light of information contained in the bid package, bidder investigation and analysis of the Project and the Project site, and any other analysis or expertise of the bidder concerning the Project.

9.2 The District may amend, decrease or increase the Project work in accordance with the bidding package and the Contract Documents. If the District amends, decreases or increases the Project work prior to award of the Project each bidder will be solely responsible for determining the revised quantities, if any, on which to base their bid in light of information contained in the bid package and any amendments or addenda to the bid package, bidder investigation and analysis of the Project as amended, decreased or increased, the Project site, and any other analysis or expertise of the bidder concerning the Project.

10. SUBSTITUTION OF “OR EQUAL” ITEMS

10.1 In accordance with California Public Contract Code Section 3400, where the Drawings list products by manufacturer's name, brand or model number such information indicates the quality and utility of the items desired and does not restrict bidders to that manufacturer's name, brand or model number, unless the Technical Specifications or Drawings specify that the listed product is necessary to match others in use on a particular public improvement either completed or in the course of completion. Except where the Specifications indicate that a particular brand product is necessary to match others in use, when a manufacturer’s name, brand or model number is listed, it shall be construed to be followed by the words "or equal" whether or not those words in fact follow the manufacturer’s name, brand name or model number listed in the Technical Specifications or Drawings. Unless the Technical Specifications or Drawings indicate that a particular brand product is necessary to match others in use, bidders may propose equals of products listed by manufacturer name, brand name or model number.

10.2 Complete information for products proposed as equals must be submitted to the District Engineer for review at least seven (7) calendar days before the time specified for opening bids. To be considered, proposals concerning products proposed as equals must include sufficient information to permit the District to determine whether the products proposed as equals will satisfy the same performance requirements as

products listed by manufacturer's name, brand or model number. Such performance requirements may include, but are not limited to, size, strength, function, appearance, ease of maintenance and repair, and useful life requirements. Proposals concerning products proposed as equals that are submitted less than seven (7) calendar days before the time specified for opening bids will not be considered. Failure to bid products specified by manufacturer name, brand name or model number where the Technical Specifications or Drawings specify that a particular product is necessary to match others in use, or where no proposal concerning products proposed as equals has been submitted in accordance with this provision may render a bid non-responsive.

11. SUBCONTRACTING

11.1 Bids must be in accordance with the requirements of the Subletting and Subcontracting Fair Practices, Act, California Public Contract Code Section 4100 and following. Bids must include a completed list of proposed subcontractors on the form included in the bid package. In accordance with California Public Contract Code Section 4104, completed lists of proposed subcontractors must include the name, business location, the portion (type or trade), and dollar amount of the Project work to be subcontracted for each subcontractor that will perform a portion of the Project work (including special fabrication and installation of a portion of the work) valued in excess of one half (½) of one (1) percent of the total Project bid price. If the Project work includes construction of streets or highways, the completed list of proposed subcontractors must include the subcontractor name, business location, type of work and dollar amount to be subcontracted for each subcontractor that will perform a portion of the Project work (including special fabrication and installation of a portion of the work) valued in excess of one half (½) of one (1) percent of the total Project bid price, or ten thousand dollars ($10,000), whichever is greater. Bids that fail to include complete lists of proposed subcontractors in accordance with Public Contract Code Section 4100 and following and this provision may be deemed non-responsive.

11.2 In accordance with California Public Contract Code Section 4106, for any portion of the Project work with a value of more than one half (½) of one (1) percent of the total Project bid price for which no subcontractor is listed, or for which more than one subcontractor is listed, bidders certify by submitting their bids that they are qualified to perform that portion of the Project work and that they will perform that portion of the Project work with their own forces. Bidders may not substitute another subcontractor for a subcontractor listed in their bid except as permitted by the District in accordance with Section 4107 and following of the California Public Contract Code.

12. ASSIGNMENT

Bidders may not assign, sublet, sell, transfer, or otherwise dispose of their bid or any right, title or interest in their bid, or their obligations under their bid, without the written consent of an authorized representative of the District. Any purported assignment, subletting, sale, transfer or other disposition of a bid or any interest in a bid, or of any obligations under a bid without such written consent will be void and of no effect.

13. BONDS

No Bid Bonds are required for this project. The successful bidder will be required to furnish a performance bond, payment/labors and materials bond or material guaranty bond for task orders involving expenditures in excess of twenty-five thousand dollars ($25,000). All bonds

must be executed by corporate sureties who are admitted surety insurers in the State of California in accordance with applicable law and acceptable to the District. Individual sureties will not be accepted. All project bonds must be executed using the forms provided in the bid package.

13.1 In accordance with California Civil Code Section 3247, the payment or labor and materials bond must be in the amount of one hundred percent (100%) of the total amount payable by the terms of the Project contract and guarantee payment to persons listed in California Civil Code Section 3181 for work performed and for charges for materials, supplies, and equipment provided under the Project contract (including amounts due under or subject to the Unemployment Insurance Code) in accordance with the requirements of California Civil Code Section 3248.

13.2 The performance bond must be in the amount of one hundred (100) percent of the amount payable by the terms of the Project contract to guarantee the faithful performance of the Project work.

14. LABOR LAWS

14.1 Bidders shall comply with applicable provisions of Chapter 1 of Part 7 of the California Labor Code, beginning with Section 1720.

14.2 In accordance with California Labor Code Section 1861, bids must include a workers' compensation insurance certification on the form included in the bid package.

14.3 In accordance with California Labor Code Section 1771, not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the project is to be performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in the California Labor Code shall be paid to all workers engaged in performing the project.

14.4 In accordance with California Labor Code Section 1770 and following, the Director of Industrial Relations has determined the general prevailing wage per diem rates for work in the locality in which the project is to be performed. A copy of said wage rates is available online at www.dir.ca.gov/DLSR/PWD. Said prevailing rate of per diem wages will be made available to any party upon request, and a copy thereof shall be posted at the jobsite by the Contractor.

14.5 In accordance with California Labor Code Section 1777.1, contractors and subcontractors that are found guilty of willfully violating Chapter 1 of Part 7 of Division 2 of the Labor Code (except for Section 1777.5), or that are found guilty of such violations with intent to defraud, and entities in which such contractors or subcontractors have any interest, may be ineligible to bid on, be awarded, or perform project work as a subcontractor.

LAS GALLINAS VALLEY SANITARY DISTRICT
101 Lucas Valley Road, Suite 300
San Rafael, California 94903

CONTRACT CHECK LIST

Complete, accurate, executed copies of the following documents must be submitted to the Las Gallinas Valley Sanitary District in accordance with the bid package issued by the District for the ON-CALL CONTRACT FOR CONSTRUCTION PROJECTS (2026-2028), JOB NO. 26420-01, within seven (7) calendar days of receiving written Notice of Award of the project. The bidder's security of any successful bidder that fails to do so will be forfeited to the District.

Contract Check List:

_____ 2 copies of the signed Agreement

_____ Certificates of Insurance and Endorsements

_____ Escrow for Deposit Agreement, if applicable

_____ Safety Manual

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LAS GALLINAS VALLEY SANITARY DISTRICT
101 Lucas Valley Road, Suite 300
San Rafael, California 94903

AGREEMENT

The Las Gallinas Valley Sanitary District, ("District") enters into this agreement, dated _____, with _____("Contractor"), whose address is _____.

RECITALS

1. NOTICE INVITING SEALED BIDS. The District gave Notice Inviting Sealed Bids on _____ for bids to be submitted for the ON-CALL CONTRACT FOR CONSTRUCTION PROJECTS (2026-2028) by published notice and/or posting in accordance with California Public Contract Code Section 20804 and other applicable law.

2. BID OPENING. On _____, District representatives opened the bids for the ON-CALL CONTRACT FOR CONSTRUCTION PROJECTS (2026-2028) and read the bids aloud.

3. PROJECT AWARD. On _____, the District Board awarded the ON-CALL CONTRACT FOR CONSTRUCTION PROJECTS (2026-2028) to the Contractor and directed District staff to send the Contractor written Notice of Award of the project. The District Board conditioned award of the project on the Contractor's providing executed copies of all documents specified in the contract check list included in the bid package within seven (7) calendar days of receiving written Notice of Award of the project.

4. REQUIRED DOCUMENTS. The Contractor has provided the District executed copies of all documents specified in the contract check list included in the bid package within seven (7) calendar days of receiving written Notice of Award, unless noted otherwise.

AGREEMENT TERMS

The District and the Contractor agree as follows:

1. THE WORK. The Contractor shall furnish all equipment, tools, apparatus, facilities, material labor, and skill necessary to perform and complete in a good and workmanlike manner the ON-CALL CONTRACT FOR CONSTRUCTION PROJECTS (2026-2028) ("Work") as shown in the Technical Specifications and Drawings in accordance with the Contract Documents and applicable law.

2. LOCATION OF WORK. The Work will be performed at the following location:

Various locations within City of San Rafael and Unincorporated Marin County

3. TIME FOR COMPLETION (Not Used).

4. REMEDIES FOR FAILURE TO TIMELY COMPLETE THE WORK. If the Contractor fails to fully perform the Work in accordance with the Contract Documents by the Time for Completion, as such time may be amended by change order or other modification to this agreement in

accordance with its terms, and/or if the Contractor fails, by the Time for Completion, to fully perform all of the Contractor's obligations under this agreement that have accrued by the Time for Completion, the Contractor will become liable to the District for all resulting loss and damage in accordance with the Contract Documents and applicable law. The District's remedies for the Contractor's failure to perform include, but are not limited to, assessment of liquidated damages of **$1,000 per day** in accordance with California Government Code Section 53069.85 and the Contract Documents, and/or obtaining or providing for substitute performance in accordance with the Contract Documents.

5. CONTRACT PRICE AND PAYMENT. As full compensation in consideration of completion of the Work in accordance with the Contract Documents and in consideration of the fulfillment of all of the Contractor's obligations under the Contract Documents, the District will pay the Contractor in lawful money of the United States for each on-call effort based on time and expense tracking according to force account rates as outlined in Section 9-1.04 of the Standard Specifications of the State of California Department of Transportation, latest edition, with the modifications and additional requirements listed below, including material charges with applicable mark-up, and applying a Labor Mark-up of **_____%** **(__ Percent)** as specified in Contractor's completed Bid Schedule dated _____, and attached to and incorporated in this agreement.

6. PREVAILING WAGES. In accordance with California Labor Code Section 1771, not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the Work is to be performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in the California Labor Code must be paid to all workers engaged in performing the Work. In accordance with California Labor Code Section 1770 and following, the Director of Industrial Relations has determined the general prevailing wage per diem rates for the locality in which the Work is to be performed. In accordance with California Labor Code Section 1773, the District has obtained the general prevailing rate of per diem wages and the general rate for holiday and overtime work in the locality in which the Work is to be performed for each craft, classification or type of worker needed to perform the project. In accordance with California Labor Code Section 1773.2, copies of the prevailing rate of per diem wages are on file at the District Engineer's Office and will be made available on request. Throughout the performance of the Work the Contractor must comply with all provisions of the Contract Documents and all applicable laws and regulations that apply to wages earned in performance of the Work.

7. THE CONTRACT DOCUMENTS. This agreement consists of the following documents ("Contract Documents"), all of which are incorporated into and made a part of this agreement as if set forth in full. In the event of a conflict between or among the Contract Documents, precedence will be in the following order:

    a. Permits
    b. Typical Details
    c. Reference Standard Specs
    d. Reference Standard Plans

    7.1 This agreement and change orders and other amendments to this agreement signed by authorized representatives of the District and the Contractor.

7.2 The General Conditions and change orders and other amendments to the General Conditions signed by authorized representatives of the District and the Contractor.

7.3 The Technical Specifications, addenda to the Technical Specifications signed by authorized representatives of the District and issued prior to bid opening, Equal Product Proposals accepted by the District and signed by authorized District representatives prior to bid opening, and change orders and other amendments to the Technical Specifications signed by authorized representatives of the District and the Contractor.

7.4 The Drawings, addenda to the Drawings signed by authorized representatives of the District and issued prior to bid opening, Equal Product Proposals accepted by the District and signed by authorized District representatives prior to bid opening, and change orders and other amendments to the Drawings signed by authorized representatives of the District and the Contractor.

7.5 Notice Inviting Sealed Bids
7.6 Instructions to Bidders
7.7 The successful bidder's completed Proposal Cover Page and Bid Schedule
7.8 The successful bidder's completed Contractor License Information
7.9 The successful bidder's completed Notice to Proceed
7.10 (Not Used)
7.11 The successful bidder's Workers Compensation Insurance Certification
7.12 The successful bidder's completed Non-Collusion Affidavit
7.13 The successful bidder's Drug-Free Workplace Certification
7.14 The successful bidder's Debarment Certification
7.15 The successful bidder's completed Certificates of Insurance and Endorsements
7.16 (Not Used)
7.17 (Not Used)
7.18 (Not Used)
7.19 The successful bidder's Statement of Experience
7.20 The successful bidder's signed Bidder's Signature Page
7.21 The successful bidder's Financial Qualifications

8. INTERPRETATION OF CONTRACT DOCUMENTS. Any question concerning the intent or meaning of any provision of the Contract Documents, including, but not limited to, the Technical Specifications or Drawings, must be submitted to the District Engineer, or his/her designee, for issuance of an interpretation and/or decision by the authorized District representative in accordance with the requirements of the Contract Documents. Interpretations or decisions by any other person concerning the Contract Documents will not be binding on the District. The decision of the District Engineer, or his/her designee, shall be final.

9. ASSIGNMENT PROHIBITED. The Contractor may not assign part or all of this agreement, or any moneys due or to become under this agreement, or any other right or interest of the Contractor under this agreement, or delegate any obligation or duty of the Contractor under this agreement without the prior written approval of an official authorized to bind the District and an authorized representative of Contractor's surety or sureties. Any such purported assignment or delegation without such written approval on behalf of the District and the

Contractor's sureties will be void and a material breach of this agreement subject to all available remedies under this agreement and at law and equity.

10. CERTIFICATION RE: CONTRACTOR'S LICENSE. By signing this Agreement the Contractor certifies that the Contractor holds a valid **Class A** license issued by the California State Contractors Licensing Board, and that the Contractor understands that failure to maintain its license in good standing throughout the performance of the Work may result in discipline and/or other penalties pursuant to the California Business and Professions Code, and may constitute a material breach of this agreement subject to all available remedies under this agreement and at law and equity.

11. SEVERABILITY. If any term or provision or portion of a term or provision of this Agreement is declared invalid or unenforceable by any court of lawful jurisdiction, then the remaining terms and provisions or portions of terms or provisions will not be affected thereby and will remain in full force and effect.

12. VENUE. This Agreement shall be governed and construed by the laws of the State of California. The parties agree that jurisdiction and venue of any dispute shall be in the Superior Court of the State of California in the County of Marin, exclusively.

13. ENTIRE AGREEMENT. This Agreement supersedes any and all other agreements, either oral or in writing, between the parties with respect to the subject of this agreement. This agreement contains all of the covenants and agreements between the parties with respect to the subject of this agreement, and each party acknowledges that no representations, inducements, promises, or agreements have been made by or on behalf of any party except the covenants and agreements embodied in this Agreement. No agreements, statement, or promise not contained in this Agreement shall be valid or binding between the parties with respect to the subject of this Agreement. Any modifications shall be in writing.

Executed on _____ by

CONTRACTOR	DISTRICT
By: _____	By: _____ Curtis Paxton, General Manager
	Las Gallinas Valley Sanitary District
Title:	Attest:
[Attach Notary Page]	By: _____

LAS GALLINAS VALLEY SANITARY DISTRICT
101 Lucas Valley Road, Suite 300
San Rafael, California 94903

GENERAL CONDITIONS

1. DEFINITIONS:

The following terms as used in any agreement of which these General Conditions are a part are defined as follows:

1.1 Agreement: The agreement between the District and Contractor concerning the Project, as evidenced by and comprised of the Contract Documents.

1.2 Architect or Engineer: The person or persons so specified on the title sheet of the Technical Specifications and/or Drawings.

1.3 Bid Package: All of the documents listed as comprising the entire Bid Package as specified in the Instructions to Bidders and representing the full set of documents made available to bidders on the Project.

1.4 District: Las Gallinas Valley Sanitary District

1.5 Documents: All those documents listed in the Project agreement as comprising the entire agreement between the District and the Contractor.

1.6 Construction Manager – The person, firm, designated in writing by the District to act as its representative at the construction site and to perform construction observation services and administrative functions relating to this Contract. All contact by the Contractor with the District shall be through the Construction Manager.

1.7 Contractor: The successful bidder for the Project and party to the Project agreement with the District as specified in the Project agreement.

1.8 Days: Unless otherwise specified in the Contract Documents, days mean working days. Where necessary for clarity, calendar days and working days are appropriately specified as such in the Contract Documents.

1.9 Project: The ON-CALL CONTRACT FOR CONSTRUCTION PROJECTS (2026-2028) as described in the Technical Specifications and Drawings.

1.10 District Engineer: The District's authorized representative for administration and overall management of the Project agreement and Work. The District Engineer is the official point of contact between the District, the Architect and/or Engineer, and the Contractor.

1.11 Owner: Las Gallinas Valley Sanitary District

1.12 Drawings: The primarily graphic detailed requirements concerning the Project contained in Volume 4 of the Bid Package and any addenda to the Drawings signed by authorized District representatives and issued prior to bid opening, Equal Product

Proposals accepted by the District and signed by authorized District representatives prior to bid opening, and change orders and other amendments to the Drawings signed by authorized representatives of the District and the Contractor in accordance with the requirements of the Contract Documents.

1.13 Project Inspector: The party or parties charged by the District with inspecting the Work for compliance with the requirements of the Contract Documents and applicable laws and regulations. The Project Inspector acts under the direction of the District and shall coordinate with the District Engineer and Architect as directed by the District in accordance with the Contract Documents.

1.14 Subcontractor: A person, firm or corporation that is obligated as a party to a contract with the Contractor to perform part of the Project work. For purposes of these General Conditions Subcontractors include, but are not limited to, those that are obligated as parties to a contract with the Contractor to specially fabricate and install a portion of the Project Work according to the Technical Specifications and/or Drawings.

1.15 Technical Specifications: The detailed Project requirements contained in Volume 3 of the Bid Package and any addenda to the Technical Specifications signed by authorized District representatives and issued prior to bid opening, Equal Product Proposals accepted by the District and signed by authorized District representatives prior to bid opening, and change orders and other amendments to the Technical Specifications signed by authorized representatives of the District and the Contractor in accordance with the requirements of the Contract Documents.

1.16 Work: The furnishing of all equipment, tools, apparatus, facilities, material, labor and skill necessary to perform and complete in a good and workmanlike manner the Project as shown in the Technical Specifications and Drawings in accordance with the Contract Documents and applicable law.

1.16 Written Notice: Will be deemed to have been duly served for purposes of these General Conditions and any agreement of which they are a part if delivered in person to the individual or to a member of the firm or to any office of the corporation for whom the notice is intended, or if sent by registered or certified mail to the last known business address known to the party giving notice. Unless otherwise specified in the Contract Documents, the last known address of the Contractor shall be that listed in the Contractor’s completed Proposal Cover Page and Bid Schedule.

2. SCOPE OF WORK

2.1 Documents Furnished by District. The District will furnish to the Contractor, free of charge, five (5) sets of half-size prints of the Drawings and Technical Specifications for execution of the Work upon request. Throughout the performance of the Work the Contractor must keep one copy of the Drawings and Technical Specifications in good order and available for review by the District Engineer, the Engineer, the Architect, and any other District contractors or representatives.

2.2 Ownership of Documents Furnished by District. All documents furnished by the District, including, but not limited to, the Technical Specifications, Drawings, and any copies, are the property of the District. Documents furnished by the District may not to

be used on any other work. All documents furnished by the District must be returned to District upon completion of the Work.

2.3 Technical Specifications and Drawings.

2.3.1 The Technical Specifications and Drawings are complementary and intended to mutually describe the Work necessary to complete the Project in accordance with the Contract Documents.

2.3.2 In general, the Drawings indicate dimensions, position and kind of construction, and the Technical Specifications indicate qualities and methods. Any Work indicated on the Drawings and not mentioned in the Technical Specifications or vice versa must be furnished as though fully set forth in both. Work that is not particularly detailed, marked or specified shall be the same as similar Work that is detailed, marked or specified. The Contractor must furnish items necessary for the operation of equipment depicted in the Drawings or specified in the Technical Specifications that are suitable to allow such equipment to function properly at no extra charge.

2.3.3 The Contractor must notify the District Engineer and the Architect as soon as possible of any apparent errors or inconsistencies, including, but not limited to, typographical or notational errors in the Drawings, Technical Specifications, and/or in work done by others affecting the Work. The District Engineer will issue instructions concerning any such apparent errors or inconsistencies. If the Contractor proceeds with Work impacted by apparent errors or inconsistencies without instructions from the District Engineer, the Contractor shall do so at its sole risk and shall have all of the obligations and the District shall have all of the rights and remedies specified in Section 11 concerning any resulting damage or defect.

2.3.4 The General Conditions apply with equal force to all of the Work, including extra work authorized by the District Engineer in accordance with the Contract Documents. The Contractor must submit any required shop diagrams and/or drawings by the times and in the quantities indicated in the Technical Specifications. Any such shop diagrams and/or drawings must show completely the Work to be done, expanding on the Drawings concerning details not previously shown, field conditions and the condition of the Work. Architect or Engineer review of such shop diagrams and/or drawings will concern conformance with the requirements of the Contract Documents only. The Architect or Engineer assumes no responsibility for the correctness or accuracy of the dimensions or any other contents of any shop diagrams and/or drawings submitted by the Contractor. The Contractor must check all dimensions at the Work site. Shop diagrams and/or drawings must be clearly marked with the name of the Project and the name of the Contractor, subcontractor or supplier making the submittal, and must be stamped and signed by the Contractor and submitted under a signed transmittal letter from the Contractor certifying that all dimensions have been checked at the Work site. These requirements are mandatory. The Architect or Engineer will not review shop diagrams and/or drawings that do not satisfy these requirements. The Contractor will be responsible for any and all discrepancies between dimensions of the actual Project site and/or Work and those shown on shop diagram and/or drawings

submitted by the Contractor, and for any other errors contained in or resulting from such shop diagrams and/or drawings, including, but not limited to, errors in material and/or equipment quantities and any resulting errors, delays or additional cost in the performance of the Work. The Contractor will have all of the obligations and the District will have all of the rights and remedies that are specified in Section 11 concerning any discrepancies or errors in shop diagrams and/or drawings submitted by the Contractor, and concerning any resulting errors, delays or additional costs in the performance of the Work.

3. CONTROL OF WORK AND MATERIAL

3.1 District Engineer's Status. The District Engineer will administer the Project in accordance with the Contract Documents. After execution of the agreement and issuance of the Notice to Proceed, all correspondence and/or instructions concerning the Project between the Contractor and/or District shall be forwarded through the District Engineer. Except as otherwise provided in the Contract Documents, the District Engineer will not be responsible for and will not have control or charge of construction means, methods, techniques, or procedures or for safety precautions in connection with the Work. The District Engineer, however, will have authority to reject materials and/or workmanship that do not conform to the requirements of the Contract Documents. The District Engineer will also have the authority to require inspection or testing of the Work.

3.2 Architect or Engineer's Status. The Architect or Engineer will advise the District Engineer concerning decisions on all claims of the Contractor and all other matters relating to the execution and progress of the Work or the interpretation of the Contract Documents. The Architect or Engineer will also advise the Construction Manger concerning Work that does not conform to the Contract Documents. Whenever, in the Architect's or Engineer's opinion, it is necessary or advisable in accordance with the Contract Documents, the Architect or Engineer may recommend to the District Engineer inspection or testing of the Work, whether or not such Work is then fabricated, installed or completed.

3.3 Inspection and Testing of Work and Material.

3.3.1 The District, the District Engineer, the Architect or Engineer and their representatives will have access to the Work at all times wherever it is in preparation or progress. The Contractor must provide proper facilities for such access and for inspection.

3.3.2 The Contractor must inspect all materials as delivered and promptly return all defective materials without waiting for their rejection by the District Engineer or Architect or Engineer.

3.3.3 If the District Engineer, the Technical Specifications, or any laws, ordinances, or any public authority require any Work to be tested or approved, the Contractor must give the District Engineer timely notice of the Contractor's readiness for inspection. Inspections will be promptly made, and where practicable, at the source of supply. Any work subject to such testing that is covered up without timely notice to the District Engineer or without the approval or consent of the District Engineer must, if required by the District Engineer, be uncovered for examination at the Contractor's expense. The Contractor will have all of the

obligations and the District will have all of the rights and remedies that are specified in Section 11 concerning any work subject to testing that is covered up without timely notice to the District Engineer and that is not uncovered for examination at the Contractor's Expense if required by the District Engineer.

3.3.4 Tests of materials or qualification tests required by the Contract Documents must be made in accordance with the Technical Specifications and the requirements of the California Building Standards Code as adopted by the District and other applicable law. Copies of all testing reports shall be distributed as required in the Technical Specifications.

3.3.5 The District or its representatives may order re-examination of questioned Work. If ordered to do so, the Contractor must uncover such Work. If such Work is found to be according to the Contract Documents, the District shall pay the cost of uncovering and restoring the Work, unless such Work was subject to testing and covered up without timely notice to or approval of the District Engineer. If re-examined Work is found not in accordance with the Contract Documents, the Contractor must pay the cost of uncovering and restoring the Work. The Contractor will have all of the obligations and the District will have all of the rights and remedies that are specified in Section 11 concerning any re-examined Work not in accordance with the Contract Documents that the Contractor fails to uncover and restore at the Contractor's expense.

3.3.6 The Contractor must replace or correct without charge any material or workmanship found not to conform to the requirements of the Contract Documents, unless the District consents to accept such material or workmanship with an appropriate adjustment in the Contract Price. The Contractor must promptly segregate and remove non-conforming material from the Work site. The Contractor will have all of the obligations and the District will have all of the rights and remedies that are specified in Section 11 concerning any failure by the Contractor to replace or correct without charge any material or workmanship that does not conform to the requirements of the Contract Documents and that the District has not consented to accept.

3.4 Samples Furnished by the Contractor. The Contractor must furnish all samples for approval as directed in sufficient time to permit the Architect or Engineer to examine, approve and select samples before they are required by the progress of the Work. Portions of the Work for which samples are required and for which the Architect or Engineer has selected samples must be in accordance with such approved samples. Samples must be sent prepaid to the office of the District Engineer or to such place as the District Engineer may direct.

3.5 Materials and Substitutions.

3.5.1 Materials used for the Work must be new and of the quality specified. When not particularly specified, materials must be the best of their class or kind. The Contractor must, if required, submit satisfactory evidence as to the kind and quality of materials.

3.5.2 If the Contractor submitted complete information to the District Engineer for products proposed as equals in accordance with the Bid Package, and the District approved such products proposed as equals in writing, the Contractor

may either furnish such products approved as equals, or furnish the products listed by manufacturer name, brand or model number in the Technical Specifications or Drawings. The District retains the right, in its sole discretion, to accept or reject any other proposed substitution. To be considered, proposals concerning products proposed as equals must include sufficient information to permit the District to determine whether the products proposed as equals will satisfy the same performance requirements as products listed by manufacturer's name, brand or model number. Such performance requirements may include, but are not limited to, size, strength, function, appearance, ease of maintenance and repair, and useful life requirements. If the District does not accept a proposed substitution, the Contractor must furnish the product specified in the Technical Specifications or Drawings for the Contract Price, regardless of whether the product is specified by manufacturer's name, brand or model number, or otherwise.

3.5.3. During the performance of the Work, all materials must be neatly stacked, properly protected from the weather and other adverse impacts, and placed so as to avoid interference with efficient progress of the Work, with other activities of the District, or with the use of existing District facilities by the public. All materials must be delivered so as to ensure efficient and uninterrupted progress of the Work. Materials must be stored so as to cause no obstruction and so as to prevent overloading of any portion of the Work. The Contractor will be responsible for damage or loss of materials delivered to and/or stored at the Work site due to weather or other causes. The Contractor must promptly remove from the Work site all materials rejected by the District or its representatives as failing to conform to the requirements of the Contract Documents, whether such non-conforming materials have been incorporated in the Work or not. If the District or its representatives so direct, the Contractor must promptly replace and re-execute Work performed by the Contractor and order the replacement and re-execution of Work performed by subcontractors using non-conforming materials with materials that satisfy the requirements of the Contract Documents without expense to the District. The Contractor will bear the expense of making good all Work destroyed or damaged by such removal. The Contractor will have all of the obligations and the District will have all of the rights and remedies that are specified in Section 11 concerning any failure by the Contractor to replace or re-execute Work using non-conforming materials, and/or to make good all work destroyed or damaged by such removal and/or execution.

3.6 Audits and Examination of Records. The District may examine and audit at no additional cost to the District all books, estimates, records, contracts, documents, bid documents, bid cost data, subcontract job cost reports and other Project related data of the Contractor, subcontractors engaged in performance of the Work, and suppliers providing supplies, equipment and other materials required for the Work, including computations and projections related to bidding, negotiating, pricing or performing the Work or contract modifications and other materials concerning the Work, including, but not limited to, Contractor daily logs, in order to evaluate the accuracy, completeness, and currency of cost, pricing, scheduling and any other project related data. The Contractor will make available all such Project related data at all reasonable times for examination, audit, or reproduction at the Contractor's business office at or near the Work site, and at any other location where such Project related data may be kept until

three years after final payment under the Agreement. Pursuant to California Government Code Section 8546.7, if the amount of public funds to be expended is in excess of $10,000, this Agreement shall be subject to the examination and audit of the State Auditor, at the request of the District, or as part of any audit of the District, for a period of three (3) years after final payment under the Agreement.

3.7 Advertising. No advertising signs of any kind may be displayed on the Work site, or on fences, offices or elsewhere adjacent to the Work site.

3.8 Project Schedule. Within seven (7) calendar days of the Notice to Proceed, the Contractor shall submit a schedule showing each task of Work, the sequence of each task, the number of days required to complete each task, and the critical path controlling the completion of the entire Work. The schedule shall allow for the completion of the entire Work within the Time for Completion.

3.8.1 District Review of Schedule. The District may review the Contractor's submitted schedule and may note any exceptions. The Contractor shall correct any exceptions noted by the District within five (5) working days of being notified of the exceptions.

3.8.2 Update of Schedule. After submission of a schedule to which the District has taken no exceptions, the Contractor shall submit an updated schedule on a biweekly basis until completion of the Work. The updated schedule shall show the progress of Work as of the date specified in the updated schedule.

3.8.3 Float. The schedule shall show early and late completion dates for each task. The number of working days between these dates shall be designated as "float". The Float shall be designated to the Project and shall be available to both the District and the Contractor as needed.

3.8.4 Failure to Submit Schedule. If the Contractor fails to submit the schedule within the time period specified in Section 3.8, or the updated schedule as specified in Section 3.8.2, or submit a schedule to which the District has taken uncorrected exceptions, **the District shall be entitled to withhold payment for the next application for payment submitted after the schedule or updated schedule becomes late.**

3.8.5 Responsibility for Schedule. The Contractor shall have sole and exclusive responsibility for creating the schedule and properly updating it. The District has no authority to approve the schedule. The District may note exceptions to any schedule submitted by the Contractor. However, it shall be the Contractor's sole responsibility to determine the proper method to address exceptions and the District's review of the schedule shall not serve to place any such obligation on the District.

4. CHANGES IN WORK

4.1 District Directed Change Orders. The District may at any time during the progress of the Work direct any amendments to the Work or any of the Contract Documents, including, but not limited to the Technical Specifications, or Drawings. Such amendments will in no way void the agreement, but will be applied to amend the

Contract Price, if such amendments affect the Contract Price, the Project schedule, if such amendments affect the Project schedule, or any other provision of the Contract Documents based on a fair and reasonable valuation of the amendment in accordance with this Section 4.

4.2 Writing Requirement. Change orders and other amendments to the Technical Specifications, the Drawings, or other Contract Documents may be made only by a writing executed by authorized representatives of the District and the Contractor.

4.3 Contractor Proposed Change Orders. Unless the District Engineer otherwise authorizes or the District and the Contractor otherwise agree, change order proposals submitted by the Contractor must be submitted to the District Engineer no later than the time of the proposed change.

4.4 All Change Orders. All change order proposals must be submitted on completed Change Order forms provided in the Contract Documents. All such change order proposals must itemize all cost impacts of the proposed change order and include a total price for that change order and the amended Contract Price that would become effective upon execution of the change order. All change order proposals must specify any change in the Project schedule, or in any project milestone including, but not limited to, the Time for Completion, under the change order. It is understood that change orders that do not specify a change in any milestone, including, but not limited to, the Time for Completion, may be accomplished by the Time for Completion then in effect.

4.5 Change Order Pricing. Change order pricing will be governed by the following:

4.5.1 Unit prices specified in the Contract Documents will apply to cost impacts involving items for which the Contract Documents specify unit prices.

4.5.2 Cost impacts involving items for which no unit prices are specified will be calculated by adding the itemized actual direct cost that would be added or reduced under the change order and an allowance for indirect costs in accordance with this Section. Itemization for direct costs for required labor must include the classifications of labor required, the total hours required for each classification, the hourly rate for each classification and other labor related costs such as liability and workers compensation insurance, social security, retirement and unemployment insurance. All other cost impacts for which no unit prices are specified must be itemized as appropriate, including the cost of tools, vehicles, phones and other equipment, and the cost of all required materials or supplies. Indirect costs added under a change order may not exceed an allowance of fifteen (15) percent of the total of combined Contractor and subcontractor direct costs added under the change order. Such allowance covers Contractor overhead and profit under the change order and includes the cost of insurance in addition to that required pursuant to Section 8.8, bond premiums, superintendent labor, clerical labor, home office expenses, worksite office expenses, and utility costs under the change order. Such costs may not be itemized as direct costs under a change order. Indirect costs deducted under a change order will be calculated in exactly the same way as indirect costs added under a change order, except indirect costs deducted under a change order may not exceed an allowance of seven and a half (7.5) percent of the

total of combined Contractor and subcontractor direct costs deducted under the change order.

4.6 Liability Under Unapproved Change Orders. The Contractor shall be solely responsible for any and all losses, costs, or liabilities of any kind incurred by the Contractor, any subcontractor engaged in the performance of the Work, any party supplying material or equipment for the Work or any third party that are incurred pursuant to Contractor-proposed change orders prior to issuance of an approved change order executed in accordance with this Section 4. The Contractor will have all of the obligations and the District will have all of the rights and remedies that are specified in Section 11 concerning any work or resulting losses, costs, or liabilities pursuant to a Contractor proposed change order before issuance of an approved change order executed in accordance with this Section 4.

4.7 Changes Subject to Contract Documents. Any changes in the Work and/or the Contract Documents pursuant to change orders and any other amendments issued in accordance with the Contract Documents, including this Section 4, will in all respects be subject to all provisions of the Contract Documents, including, but not limited to, the Technical Specifications and the Drawings, except as modified by such change orders or amendments.

4.8 Change Order Disputes.

4.8.1 Disputed District Directed Change Orders. If the Contractor disputes a District directed change order following a reasonable effort by the District and the Contractor to resolve the dispute including, at a minimum, a meeting between appropriate representatives of the Contractor and the District, the Contractor must commence performing the Work consistent with the disputed change order within five (5) working days of the last meeting between representatives of the Contractor and the District to resolve the dispute, or within the time specified in the disputed District directed change order, whichever is later. In performing Work consistent with a disputed District-directed change order pursuant to this provision the Contractor will have all of the Contractor's rights concerning claims pursuant to the Contract Documents and applicable law.

4.8.2 Disputed Contractor Proposed Change Orders. If the District disputes a Contractor proposed change order, the District and the Contractor will use reasonable efforts to resolve the dispute including, at a minimum, holding a meeting between appropriate representatives of the Contractor and the District. Regardless of and throughout any such efforts to resolve the dispute the Contractor must continue performing the Work irrespective of and unmodified by the disputed change order. In continuing to perform the Work, the Contractor will retain all of the Contractor's rights under contract or law pertaining to resolution of disputes and protests between contracting parties. Disputes between the District and the Contractor concerning any Contractor-proposed change order or other amendment do not excuse the Contractor's obligation to perform the Work in accordance with the Contract Documents excluding such Contractor-proposed change order or other amendment by the Time for Completion or waive any other Project milestone or other requirement of the Contract Documents.

5. TRENCHING AND UTILITIES

5.1 Excavation More Than Four Feet Deep. In accordance with California Public Contract Code Section 7104, if the Work involves excavation more than four feet deep the Contractor must promptly notify the District in writing before disturbing: any material that the Contractor believes may be hazardous waste, as defined in Section 25117 of the Health and Safety Code, that is required to be removed to a Class I, Class II or Class III disposal site in accordance with provisions of existing law; any subsurface or latent physical conditions at the Work site differing from those indicated; or any unknown physical conditions at the Work site of any unusual nature, different materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the Contract Documents. The District will promptly investigate any such conditions for which notice is given. If the District finds that the conditions do materially differ, or involve hazardous waste, and would cause a decrease or increase in the cost or time of performance of the Work, the District will issue a change order pursuant to Section 4 of these General Conditions. If a dispute arises between the District and the Contractor concerning whether the conditions materially differ, or involve hazardous waste, or cause a decrease of increase in the cost or time of performance, the Contractor will not be excused from any completion date provided in the Contract Documents, but shall proceed with all Work to be performed. The Contractor will retain all rights under contract or law pertaining to resolution of disputes and protests between contracting parties.

5.2 Excavation of Five Feet or More. In accordance with California Labor Code Section 6705, contractors performing contracts exceeding $25,000 in cost and involving excavation five or more feet deep must submit for the District's acceptance, prior to excavation, a detailed plan showing the design of shoring, bracing, sloping, or other provisions to be made for worker protection from the hazard of caving ground during excavation. If the plan varies from the shoring system standards, it must be prepared by a registered civil or structural engineer.

5.3 Existing Utilities.

5.3.1 General – The location of known existing utilities and pipelines are shown on the Plans in their approximate locations. However, nothing herein shall be deemed to require the District to indicate the presence of existing service laterals or appurtenances whenever the presence of such utilities on the site of the project can be inferred from the presence of other visible facilities, such as buildings, cleanouts, meter and junction boxes, on or adjacent to the site of the Project.

The District will assume the responsibility for the timely removal, relocation, or protection of existing main or trunk line utility facilities located on the Project site if such utilities are not identified by the District in the Contract Documents or which cannot reasonably be inferred from the presence of other visible facilities.

5.3.2 Utility Location – It shall be the Contractor's responsibility to determine the exact location and depth of all utilities, including service connections, which have been marked by the respective utility owners and which the Contractor believes may affect or be affected by the Contractor's operations. The Contractor shall not be entitled to additional compensation nor time extensions

for work necessary to avoid interferences nor for repair to damaged utilities if the Contractor does not expose all such existing utilities as required by this section.

The locating of utilities shall be in conformance with Government Code Section 4216 et seq. except for the District's utilities located on the District's property and not on public right-of-way.

A "High Priority Subsurface Installation" is defined in Section 4216 (e) as "high-pressure natural gas pipelines with normal operating pressures greater than 415kPA gauge (60psig) or greater than six inches nominal pipe diameter, petroleum pipelines, pressurized sewage pipelines, high-voltage electric supply lines, conductors, or cables that have a potential to ground of greater than or equal to 60kv, or hazardous materials pipelines that are potentially hazardous to workers or the public if damaged."

A "Subsurface Installation" is defined in Section 4216 (l) as "any underground pipeline, conduit, duct, wire, or other structure, except non-pressurized sewer lines, non-pressurized storm drains, or other non-pressurized drain lines."

Pursuant to Government Code Section 4216.2 the Contractor shall contact the appropriate regional notification center at least two (2) working days but not more than fourteen (14) calendar days before performing any excavation. The Contractor shall request that the utility owners conduct a utility survey and mark or otherwise indicate the location of their service. The Contractor shall furnish to the Construction Manager written documentation of its contact(s) with the regional notification center prior to commencing excavation at such locations.

After the utility survey is completed, the Contractor shall commence "potholing" or hand digging to determine the actual location of the pipe, duct, or conduit. The Construction Manager and District Engineer shall be given notice prior to commencing potholing operations. The Contractor shall uncover all piping and conduits, to a point one (1) foot below the pipe, where crossings, interferences, or connections are shown on the Drawings, prior to trenching or excavating for any pipe or structures, to determine actual elevations. New pipelines shall be laid to such grade as to clear all existing facilities, which are to remain in service for any period subsequent to the construction of the run of pipe involved.

The Contractor's attention is directed to the requirements of Government Code Section 4216.2 (a)(2) which provides: "When the excavation is proposed within 10 feet of a high priority subsurface installation, the operator of the high priority subsurface installation shall notify the excavator of the existence of the high priority subsurface installation prior to the legal excavation start date and time, as such date and time are authorized pursuant to paragraph (1) of subdivision (a) of 4216.2. The excavator and the operator or its representative shall conduct an onsite meeting at a mutually-agreed-on time to determine actions or activities required to verify the location of the high priority subsurface installation prior to start time." The Contractor shall notify the Construction Manager and District Engineer in advance of this meeting.

5.3.4. Utility Relocation and Repair – If interferences occur at locations other than those indicated in the Contract Documents with reasonable accuracy, the Contractor shall notify the Construction Manager and District Engineer in writing. The Construction Manager will supply a method for correcting said interferences in accordance with the responsibilities of this section and Government Code Section 4215.

Care shall be exercised by the Contractor to prevent damage to adjacent existing facilities and public or private works; where equipment will pass over these obstructions, suitable planking shall be placed. If high priority subsurface installations are damaged and the operator cannot be contacted, the Contractor shall call 911 emergency services.

The District will compensate the Contractor for the costs of locating and repairing damage not due to the failure of the Contractor to exercise reasonable care, and for removing or relocating such main or trunk line utility facilities not indicated in the Contract Documents with reasonable accuracy, and for the cost of equipment on the Project necessarily idled during such work. The payment for such costs will be made as provided in Section 4, Change Orders. The Contractor shall not be assessed liquidated damages for delay in completion of the Project, when such delay is caused by the failure of the District or utility company to provide for removal or relocation of such utility facilities.

The public utility, where they are the owner of the effected utility, shall have the sole discretion to perform repairs or relocation work or permit the Contractor to do such repairs or relocation work at a reasonable price. The right is reserved to the District and the owners of utilities or their authorized agents to enter upon the Work area for the purpose of making such changes as are necessary for the rearrangement of their facilities or for making necessary connections or repairs to their properties. The Contractor shall cooperate with forces engaged in such work and shall conduct its operations in such a manner as to avoid any unnecessary delay or hindrance to the work being performed by such forces and shall allow the respective utilities time to relocate their facility.

When the Contract Documents indicate that a utility is to be relocated, altered or constructed by others, the District will conduct all negotiations with the utility company and the work will be done at no cost to the Contractor, unless otherwise stipulated in the Agreement.

Temporary or permanent relocation or alteration of utilities desired by the Contractor for its own convenience shall be the Contractor’s responsibility and it shall make arrangements and bear all costs for such work.

6. PROJECT FACILITIES

6.1 Work Site Offices. Any Work site office facilities used by the Contractor and/or its privities must conform to all applicable codes, ordinances and regulations. The cost of such Work site office facilities shall be paid from the included in the Contract Price.

6.2 District Rights of Access and Ownership. The District and its authorized representatives will at all reasonable times while such office facilities are located at the Work site (including, at a minimum, all times during which the Work is performed), have access to any such Work site office facilities used by the Contractor and/or its privities. With respect to the right of access of the District and its authorized representatives, neither the Contractor nor its privities shall have a reasonable expectation of privacy pursuant to the Fourth Amendment to the Unites States Constitution or other applicable law concerning such Work site office facilities used by the Contractor and/or its privities. Without exception, any and all Project related materials located at such Work site facilities will be deemed at all times to be District property subject to inspection and copying by the District and its authorized representatives at all reasonable times while such facilities are located at the Work site (including, at a minimum, all times during which the Work is performed). Any interference by the Contractor or its privities with the District's rights of access and/or ownership pursuant to this Section 6 will constitute a material breach of the Agreement subject to any and all remedies available pursuant to the Contract Documents and at law and equity.

7. PROSECUTION AND PROGRESS OF THE WORK

7.1 Liquidated Damages. Time is of the essence in the Agreement. The District and the Contractor agree that it will be difficult and/or impossible to determine the actual damage which the District will sustain in the event of the Contractor's failure to fully perform the Work or to fully perform all of the Contractor's obligations that have accrued pursuant to the Agreement by the Time for Completion. Accordingly, the District and the Contractor agree in accordance with California Government Code Section 53069.85 that the Contractor will forfeit and pay to the District liquidated damages in the sum of $1,000 per day for each and every calendar day completion of the Work and/or performance of all of the Contractor's obligations that have accrued pursuant to the Agreement is delayed beyond the Time for Completion. The District and the Contractor further agree in accordance with California Government Code Section 53069.85 that the liquidated damages sum specified in this provision is not manifestly unreasonable under the circumstances existing at the time the Agreement was made, and that the District may deduct liquidated damages sums in accordance with this provision from any payments due or that may become due the Contractor under the Agreement.

7.2 No Damage for Delay Beyond District and Contractor Control. The Contractor will not be held responsible for delays in performance of the Work caused by delay beyond the control of both District and Contractor, such as by strikes, lockouts, or labor disturbances that are not within the control of the contractor to resolve, lack or failure of transportation, or acts of other government entities. This provision will not apply where the delay would not have occurred but for a previous contractor caused delay in the prosecution of the Work. The District will not be liable to the Contractor, any subcontractor or other entity engaged in the performance of the Work, any supplier, or any other person or organization, or to any surety or employee or agent of any of them, for damages arising out of or resulting from (i) delays beyond the control of the District and the Contractor including but not limited to fires, floods, epidemics, abnormal weather conditions, earthquakes and acts of God or acts or neglect by utility owners or other contractors performing other work, or (ii) delays caused by the District,

its officials, officers, employees, agents, or volunteers, or delays caused by the District Engineer or the Architect or Engineer, which delays are reasonable under the circumstances involved and/or are within the contemplation of the District and the Contractor. An extension of the Time for Performance in an amount equal to the time loss due to such delay(s) will be the Contractor's sole and exclusive remedy for such delay(s).

7.3 No Damage for Contractor Caused Delay. Contractor shall not be entitled to additional compensation for extended field or home office overhead, field supervision, costs of capital, interest, escalation charges, acceleration costs or other impacts for any delays to the extent such delays are caused by the failure of the Contractor or any subcontractor or other entity engaged in performance of the Work to perform the Work in accordance with the Contract Documents. Contractor may be eligible for additional compensation in excess of the Contract Price for delays caused by the District and/or its privities.

7.4 No Damage for Other Delay. Contractor will not be entitled to damages for delay to the Work caused by the following, which the District and Contractor agree will be deemed for purposes of California Public Contract Code Section 7102 either not caused by the District, and/or within the contemplation of the District and the Contractor, and/or reasonable under the circumstances:

7.4.1 Exercise of the District’s right to sequence the Work in a manner that would avoid disruption to the District and other contractors based on: the failure of the Contractor or any subcontractor or other entity engaged in the performance of the Work to perform the Work in accordance with the Contract Documents, enforcement by the District or any other governmental agency of competent jurisdiction of any government act or regulation, or enforcement by the District of any provisions of the Agreement.

7.4.2 Requests for clarification or information concerning the Contract Documents or proposed change orders or modifications to the Contract Documents, including extensive and/or numerous such requests for clarification or information or proposed change orders or modifications, provided such clarifications or information or proposed change orders or modifications are processed by the District or its representatives in a reasonable time in accordance with the Contract Documents.

7.5 Delays Caused by the District and/or Its Privities. Either the District or the Contractor may propose a change in the Time for Completion for delays that are purported to be caused by the District and/or its privities and that are not reasonable under the circumstances involved and/or that are not within the contemplation of the District and the Contractor. Such proposed changes in the Time for Completion will constitute change order proposals subject to Section 4. In accordance with Section 4, the District and the Contractor may agree upon pricing for the cost impacts, if any, resulting from such delays. If such pricing is in anticipation of cost impacts that may, but have not yet occurred, the District will be obligated to pay the Contractor for such anticipated impacts in accordance with the Agreement and any applicable, approved change orders only to the extent the Contractor actually incurs the anticipated cost impacts. Notwithstanding anything to the contrary in Section 4.5.2, the District and the Contractor may agree to a daily rate or cap or lump sum that will apply to the cost impacts, if any, resulting from delay purportedly caused by the District and/or its

privities subject to this provision. However, if such daily rate or cap or lump sum is in anticipation of cost impacts that have not yet occurred, the District will be obligated to pay such daily rate or cap or lump sum only to the extent the Contractor actually incurs such cost impacts.

7.5.1 Weather Delays. Extensions of the Time for Completion will not be allowed for weather conditions that are consistent with the following list of anticipated rain days based on historical weather data of the National Oceanographic and Atmospheric Administration of the U.S. Department of Commerce for the record station that is nearest or most applicable to the Work site. Extensions of the Time for Completion for delays due to adverse weather will be allowed only if the number of rain days exceeds those listed in the following table and the Contractor can verify to the District's reasonable satisfaction that such adverse weather caused actual delay in the timely completion of the Work. No extensions of the Time for Completion will be granted for rain days in addition to those listed in the following table that merely result in delays that do not or would not, themselves, result in failure to complete the Work by the Time for Completion. Anticipated weather delays, which may include rain, strong wind, or other types of inclement weather conditions, are as follows:

August through October:	4 days
November through April:	40 days
May through July	4 days

7.6 Delay Claims. Whenever the Contractor claims a delay for which the Time for Completion may be extended, the Contractor must request an extension of time within five (5) working days of the start of the delay. The request must be in writing and describe in detail the cause for the delay, and, if possible, the foreseeable extent of the delay.

7.7 Contractor Coordination of the Work.

7.7.1 The District reserves the right to do other work in connection with or in the vicinity of the Project by contract or otherwise, and Contractor shall at all times conduct the Work so as to impose no hardship on the District, others engaged in the Work or other contractors working at the Work site. The Contractor will adjust, correct and coordinate the Work with the work of others so that no delays result in the Work or other work at or near the Work site.

7.7.2 If any part of the Work depends for proper execution or results upon the work of the District or any other contractor, the Contractor will, before proceeding with such Work, promptly report to the District any apparent discrepancies or defects in such other Work. Failure of the Contractor to promptly report any apparent discrepancy or defect will be deemed an acceptance of the District's or other contractor's Work as fit and proper.

7.7.3 The Contractor will anticipate the relations of the various trades to the progress of the Work and will ensure that required anchorage or blocking is furnished and set at proper times. Anchorage and blocking necessary for each trade shall be part of the Work except where stated otherwise.

7.7.4 The Contractor will provide proper facilities at all times for access of the District, the District Engineer, Architect or Engineer, and other authorized District representatives to conveniently examine and inspect the Work.

7.8 Suspension of Work

7.8.1 If the Contractor fails to correct defective work, or fails to carry out the Work in accordance with the Contract Documents or any other applicable rules and regulations, the District, by a written order of the District 's representative or signed personally by an agent specifically so empowered by the District, in writing, may order the Contractor to stop the work, in its entirety or any portion thereof. In the event of a suspension of only a portion of the work, the Contractor is obligated to perform the portion of the work not suspended. The Suspension of Work shall remain in effect until the condition or cause for such order has been eliminated. The District's concurrence that the condition or cause has been eliminated will be provided to the Contractor in writing. This right of the District to stop and suspend the Work shall not give rise to any duty on the part of the District to exercise this right for the benefit of the Contractor or any other person or entity. All delays in the Work occasioned by such stoppage shall not relieve the Contractor of any duty to perform the Work or serve to extend the time for its completion. Any and all necessary corrective work done in order to comply with the Contract Documents shall be performed at no cost to the District.

7.8.2 In the event that a suspension of Work is ordered, as provided in this paragraph, the Contractor, at its expense, shall perform all work necessary to provide a safe, smooth, and unobstructed passageway through construction for use by public, pedestrian, and vehicular traffic, during the period of such use by suspension. Should the Contractor fail to perform the Work as specified, the District may perform such work and the cost thereof may be deducted from partial payments and/or final payment due the Contractor under the Contract.

7.8.3 The District shall also have authority to suspend the Work wholly or in part, for such period as the District may deem necessary, due to unsuitable weather, or to such other conditions as are considered unfavorable for the suitable prosecution of the Work. Such temporary suspension of the Work will be considered justification for time extensions to the Contract in an amount equal to the period of such suspension if such suspended work includes the current critical activity on the latest favorably reviewed progress schedule. The Contractor as directed by the District shall comply with the provisions in Section 7.8.2 above. Such additional work shall be compensated as provided for in Section 4, Changes in Work.

8. CONTRACTOR RESPONSIBILITIES

8.1. Eligibility. By executing the Agreement, the Contractor certifies that the Contractor is not ineligible to perform work on public works projects pursuant to California Labor Code Sections 1777.1 or 1777.7. In accordance with California Public Contract Code Section 6109(a), contractors who are ineligible to perform work on public works projects pursuant to California Labor Code Sections 1777.1 or 1777.7 may neither bid

on, be awarded or perform the Work. The Contractor shall hold harmless and indemnify the District from and against any and all damages, costs, and liability arising from or as a consequence of any violation of Public Contract Code Section 6109.

8.2 Supervision of the Work. The Contractor will be solely responsible for the performance of the Work, including portions of the Work to be performed by subcontractors. The Contractor is charged with ensuring that all orders or instructions from the District, District Engineer or Architect are disseminated to and followed by all subcontractors engaged in performance of the Work. The Contractor will supervise the Work using the Contractor's best skill and attention. At any time during the progress of the Work, the District, the District Engineer, or the Architect may require the Contractor and/or subcontractors engaged in performance of the Work to attend a project meeting and the Contractor will attend, and ensure the attendance of any subcontractors whose attendance is required by the District and/or advisable in light of the matters to be addressed at the meeting.

8.3 Contractor's Superintendent. The Contractor will keep on the Work, throughout its progress, a competent superintendent and any necessary assistants, all satisfactory to the District. The superintendent may not be changed without the consent of the District. The superintendent will represent the Contractor and all directions given by the District to the superintendent will bind the Contractor in accordance with the Agreement. Superintendent time included in Contractor's completed Bid Schedule and/or in approved change orders, if any, must be included in Contractor's approved overhead rate and may not be charged as a direct cost.

8.4 Competent Employees. The Contractor must at all times enforce strict discipline and good order among the Contractor's employees and may not employ on the Work any unfit person or anyone not skilled in the Work assigned, or anyone incompetent or unfit for the duties of that person. When the District determines that a Contractor employee does not satisfy the requirements of this provision, upon notice from the District, the Contractor must ensure that employee performs no further Work and is no longer present at the Work site. Any such Contractor employee may not again be employed on the Work without District approval.

8.5 Items Necessary for Proper Completion of the Work. Except as otherwise noted in the Contract Documents, the Contractor will provide and pay for all labor, materials, equipment, permits, fees, licenses, facilities and services necessary for the proper execution and timely completion of the Work in accordance with the Contract Documents.

8.6 Construction Reports. The Contractor must submit daily construction reports detailing the daily progress of the Work to the District Engineer on a weekly basis.

8.7 Subcontracting.

8.7.1 By executing the Agreement, the Contractor certifies that no subcontractor included on the list of proposed subcontractors submitted with the Contractor's bid is ineligible to perform work on public works projects pursuant to California Labor Code Sections 1777.1 or 1777.7. In accordance with California Public Contract Code Section 6109(a), subcontractors who are ineligible to perform work on public works projects pursuant to California Labor Code Sections

1777.1 or 1777.7 may neither bid on, be awarded or perform as a subcontractor on the Work. In accordance with California Public Contract Code Section 6109(b), any contract on a public works project entered into between a contractor and a debarred subcontractor is void as a matter of law. The Contractor will ensure that no debarred subcontractor receives any public money for performing the Work, and any public money that may have been paid to a debarred subcontractor for the Work is returned to the District. The Contractor will be responsible for payment of wages to workers of a debarred subcontractor who has been allowed to perform the Work.

8.7.2 The Agreement and the performance of the Work are subject to the requirements of the Subletting and Subcontracting Fair Practices Act codified at California Public Contract Code Section 4100 and following. If the Contractor fails to specify a subcontractor or specifies more than one subcontractor for the same portion of the Work in excess of one-half of 1 percent of the Contractor's total bid, the Contractor agrees that the Contractor is fully qualified to perform that portion of the Work with the Contractor's own forces, and that the Contractor will perform that portion of the Work with the Contractor's own forces. If after award of the Agreement the Contractor subcontracts, except as provided for in California Public Contract Code Sections 4107 or 4109, any such portion of the Work, the Contractor will be subject to the penalties set forth in California Public Contract Code Sections 4110 and 4111, including cancellation of the Agreement, assessment of a penalty of up to 10 percent of the amount of the subcontract, and disciplinary action by the Contractors State License Board.

8.7.3. No contractual relationship exists between the District and any subcontractor engaged in performance of the Work.

8.7.4 Incorporation of Contract Documents. The Contractor must incorporate the Contract Documents in each contract with a subcontractor engaged in the performance of the Work. The Contractor shall be solely responsible for any delay or additional costs incurred as a result of its failure to provide adequate or accurate project information to a subcontractor that results in improper submittals and/or work, or time or other impacts is the sole responsibility of the Contractor. The Contractor will have all of the obligations and the District will have all of the remedies that are specified in Section 11.

8.7.5 Coordination of Subcontract Work: The Contractor is responsible for scheduling the Work of subcontractors so as to avoid delay or injury to either Work or materials.

8.8 Insurance.

8.8.1 All required insurance shall be provided in the form of "occurrence"-type policies underwritten by admitted insurers in the State of California with a current A.M. Best rating of no less than A: VII, unless otherwise acceptable to the District. All policies must be issued at the expense of the Contractor and must be maintained at the Contractor's expense throughout the performance of the Work. Coverage should be maintained for a minimum of five (5) years after contract completion.

8.8.2 The Contractor and any subcontractors engaged in performance of the Work must secure payment of workers compensation in accordance with California Labor Code Section 3700 and other applicable law. The Contractor must verify that all Subcontractors comply with this requirement.

8.8.3 Within seven (7) calendar days following Notice of Award the Contractor must submit to the District along with executed copies of all other documents specified in the Contract Check List certificates of insurance and endorsements evidencing that the Contractor has in effect and will maintain throughout the performance of the Work the following kinds and amounts of insurance:

8.8.3.1 Worker's Compensation Insurance. In accordance with the provisions of Article 5, Chapter 1, Part 7, Division 2 (commencing with Section 1860) and Chapter 4, Part 1, Division 4 (commencing with Section 3700) of the Labor Code of the State of California, the Contractor is required to secure the payment of compensation to its employees and for that purpose obtain and keep in effect adequate Workers' Compensation Insurance. If the Contractor, in the sole discretion of the District, satisfies the District of the responsibility and capacity under the applicable Workers' Compensation Laws, if any, to act as self-insurer, the Contractor may so act, and in such case, the insurance required by this paragraph need not be provided. The Contractor is advised of the provisions of Section 3700 of the Labor Code, which require every employer to be insured against liability for Workers' Compensation or to undertake self-insurance in accordance with the provisions of that code, and shall comply with such provisions and have Employers' Liability limits of **$1,000,000** per accident and per employee, and in the aggregate for injury by disease, before commencing the performance of the work of this Contract. Before the Notice to Proceed with the Work under this Contract is issued, the Contractor shall submit written evidence that the Contractor has obtained for the period of the Contract Workers' Compensation and Employer's Liability Insurance as required for all persons whom it employs or may employ in carrying out the work under this Contract. Such evidence of coverage shall be accompanied by an endorsement from the insurer agreeing to waive all rights of subrogation against the District, its officers, officials, employees, agents and volunteers, the Design Consultants, the Construction Manager and their agents, consultants and employees which might arise by reason of any payment under the policy. This insurance shall be in accordance with the requirements of the most current and applicable State Workers' Compensation Insurance Laws.

8.8.3.2 Commercial General Liability and Automobile Liability Insurance - This insurance shall protect the Contractor from claims for bodily injury, personal injury and property damage which may arise because of the nature of the work or from operations under this Contract. The Commercial General Liability Insurance shall be maintained for five (5) years after final completion and shall provide coverage on an occurrence basis.

a. Additional Insureds - The Commercial General Liability and Automobile Policies of insurance shall include as additional insureds or be endorsed to contain the following provisions the "entities" listed below and each of their partners, officers, officials, employees, agents and volunteers are to be covered as insureds as respects: liability arising out of activities performed by or on behalf of the Contractor; products and completed operations of the Contractor; premises owned, occupied or used by the Contractor and or automobiles owned, leased, hired or borrowed by the Contractor. The coverage shall contain no special limitation on the scope of protection afforded to the "entities" and each of their partners, officers, officials, employees, agents and volunteers and coverage provided to such additional insured. This policy shall provide coverage to each of the said insureds with respect to said work. Said policy shall provide primary coverage to the full limit of liability stated in the declarations.

Las Gallinas Valley Sanitary District
300 Smith Ranch Road
San Rafael, CA 94903

Construction Manager: (To be selected by the District later.)
District Consultants: (To be selected by the District later.)
Other Public Agencies Having Jurisdiction

b. (1) Amount of Coverage (General Contractor) - The bodily injury, personal injury and property damage liability of the Commercial General Liability insurance shall provide coverage in the following limits of liability: **$5,000,000** on account of anyone occurrence for bodily injury and property damage, **$5,000,000** personal and advertising injury limit with an annual general aggregate limit of not less than **$5,000,000**, and **$5,000,000** products and completed operations aggregate, combined single limit. The Automobile Liability insurance policy shall provide minimum limits of **$5,000,000** per accident for bodily injury and property damage and **$5,000,000** policy aggregate arising out of the ownership, maintenance, or use of any owned or non-owned vehicles.

(2) Amount of Coverage for Subcontractors - The bodily injury, personal injury and property damage liability of the Commercial General Liability insurance shall provide coverage in the following limits of liability: **$3,000,000** on account of anyone occurrence for bodily injury and property damage **$3,000,000** personal and advertising injury limit with an annual general aggregate limit of not less than **$3,000,000**, and **$3,000,000** products and completed operations aggregate, combined single limit. The Automobile Liability insurance policy shall provide minimum limits of **$3,000,000** per accident and **$3,000,000** policy aggregate arising out of the ownership, maintenance, or use of any owned or non-owned vehicles.

c. Subcontractors - The bodily injury and property damage liability insurance shall not be deemed to require the Contractor to have its

subcontractors named as insureds in the Contractor's policy, but the policy shall protect the Contractor from contingent liability which may arise from operations of its subcontractors.

d. Included Coverage - The above Commercial General Liability insurance shall also include the following coverage:

- Premises – Operations
- Independent Contractors
- Products - Completed Operations
- Personal Injury - (False Arrest, Libel, Wrongful Eviction, etc.)
- Advertising Injury
- Broad Form Property Damage, Including, Completed Operations
- Separation of Insureds/Cross-Liability Provision
- Duty to Defend all Insureds
- Deletion of any Limitation on Coverage for Bodily Injury or Property Damage Arising out of Subsidence or Soil or Earth Movement
- Separate Aggregate - A provision that the annual general aggregate and the products and completed operations annual aggregate shall apply separately to each project for which Contractor provides services away from premises owned by or rented to Contractor.
- XCU - (Explosion, Collapse, and Underground Damage) is applicable to operations performed by the Contractor or its subcontractors.
- Blanket Contractual Liability

8.8.3.3 Commercial Umbrella Policy. The Commercial policy is to insure losses above General liability, Employers liability, Auto liability, and Contractor's Pollution Legal liability limits. The Contractor may use an umbrella policy to meet the limit requirements of Section 8.8.3.2.b(1). However, any such umbrella/excess policy must be approved by the District and maintain an A.M. Best Rating of no less than A:VII.

8.8.3.4 Builders Risk. (Not Required)

8.8.3.5 Contractor's Pollution Legal Liability. Coverage for liability because of third-party claims for bodily injury and/or property damage, including insurance for remediation costs stemming from pollution incidents resulting from the contractor's operations. The Contractor's Pollution Legal Liability insurance policy shall provide coverage with limits no less than $1,000,000 per occurrence or claim, and $2,000,000 policy aggregate.

8.8.4 For any claims related to this project, the Contractor's insurance coverage shall be primary and non-contributory insurance coverage as respects the District, its officers, officials, employees, and volunteers. Any insurance or self-insurance maintained by the District, its officers, officials, employees, or volunteers shall

be excess of the Contractor's insurance and shall not contribute with it. This requirement shall also apply to any Excess or Umbrella liability policies.

8.8.5 Any deductibles or self-insured retentions must be declared to and approved by the District.

8.8.6 See Appendix section for the required insurance endorsement forms and other requirements.

8.8.7 For each insurance policy required under the Agreement except for the required workers compensation insurance policy, the Contractor must provide endorsements that add the District, its officers, officials, employees, and volunteers, as an additional insured. Such endorsements must: provide that the insurance required to be furnished by the Contractor will be primary as regards the District, its officers, officials, employees, and volunteers, and that the District's insurance will be excess of and not contribute to the insurance required to be furnished by the Contractor; that the District will receive 30-calendar day written notice of any reduction or cancellation of such insurance required to be furnished by the Contractor; and include a severability of interest clause acceptable to the District. Said endorsement shall be at least as broad as Insurance Services Office form number CG20 10 11 85 (Modified).

8.8.8 Contractor hereby grants to District a waiver of subrogation which any insurer may acquire against District, its officers, officials, employees, and volunteers, from Contractor by virtue of the payment of any loss. Contractor agrees to obtain any endorsement that may be necessary to affect this waiver of subrogation, but this provision applies regardless of whether or not the District has received a waiver of subrogation endorsement from the insurer.

8.8.9 The Contractor shall not allow any subcontractor to commence work on its subcontract until all similar insurance required of the subcontractor, except Builder's Risk Insurance, has been obtained and verified by the Contractor and submitted to the Construction Manager for the District's review and records. Subcontractors shall furnish original certificates and required endorsements as verification of insurance coverage. The insurance liability limits specified in Sections 8.8.3.2.a(2), shall also apply for all subcontractors listed in Section LIST OF PROPOSED SUBCONTRACTORS. The Contractor shall designate the required insurance liability limits for all other subcontractors.

8.8.10 Proof of Coverage - Before the Notice to Proceed with the Work under this Contract is issued, the Contractor shall furnish the District with certificate(s) evidencing issuance of all insurance mentioned herein, copies of the policy declaration or information page(s) and additional insured endorsements. The certificate(s) and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf. The endorsements are to be on forms as included in the appendix section or equivalent endorsement forms acceptable to the District. The certificate(s), policy declaration or information page(s), and endorsements are to be received and approved by the District before work commences. Except for the waiver of subrogation rights endorsements, no other endorsements are required for Workers Compensation or Builder's Risk Insurance. Such certificates of

Insurance shall provide that the insurance policy shall be endorsed to state that coverage shall not be suspended, voided, cancelled by either party, reduced in coverage or limits except after thirty (30) calendar days prior written notice by certified mail, return receipt requested, has been given to the District. Contractor shall also provide certificate(s) evidencing renewals of all insurance required herein, at least thirty (30) calendar days prior to the expiration date of any such insurance.

Any deductibles or self-insured retentions must be declared to and approved by the District. At the option of the District, either: the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects the District, the Design Consultants and the Construction Manager and their officers, officials, employees, agents and volunteers; or the Contractor shall procure a bond guaranteeing payment of losses and related investigations, claim administration and defense expenses. In the event of the breach of any provision of this paragraph, or in the event of any notices received which indicates any required insurance coverage will be diminished or canceled, District, at its option, may, notwithstanding any other provisions of this Agreement to the contrary, immediately declare a material breach of this Agreement and suspend all further work pursuant to this Agreement.

8.8.11 Insurance During Guarantee Period

For any construction related work, including, but not limited to, maintenance, service, or repair work performed by the Contractor or its subcontractors during the guarantee period, workers compensation, and commercial general liability insurance in the amounts and format required herein, shall remain in force and shall be maintained for five (5) years after final completion of the contract of work.

8.9 Indemnities.

8.9.1 The Contractor will take all responsibility for the Work, and will bear all losses and damages directly or indirectly resulting to the Contractor, any subcontractors engaged in performance of the Work, the District, its officials, officers, employees, agents, volunteers and consultants, and to third parties on account of the performance or character of the Work, unforeseen difficulties, accidents, or occurrences of other causes predicated on active or passive negligence of the Contractor or of any subcontractor engaged in performance of the Work. To the fullest extent permitted by law the Contractor will indemnify, defend and hold harmless the District, its officials, officers, employees, agents, volunteers and consultants from and against any or all loss, liability, expense, claims, costs (including costs of defense), suits, and damages of every kind, nature and description (including, but not limited to, penalties resulting from exposure to hazards in violation of the California Labor Code) directly or indirectly arising from the performance of the Work (“Claims”).

8.9.2 The Contractor will indemnify, defend and hold harmless the District, the District’s officials, officers, employees, volunteers, agents and the District Engineer and Architect for all liability on account of any patent rights, copyrights, trade names or other intellectual property rights that may apply to the Contractor’s performance of the Work. The Contractor will pay all royalties

or other charges as a result of intellectual property rights that may apply to methods, types of construction, processes, materials, or equipment used in the performance of the Work, and will furnish written assurance satisfactory to the District that any such charges have been paid.

8.9.3 The Contractor assumes all liability for any accident or accidents resulting to any person or property as a result of inadequate protective devices for the prevention of accidents in connection with the performance of the Work. The Contractor will indemnify, defend, and hold harmless the District and its officials, officers, employees, agents, volunteers and consultants from such liability.

8.9.4 Approval of the Contractor's certificates of insurance and/or endorsements does not relieve the Contractor of liability under this Section 8.9. The Contractor will defend, with legal counsel reasonably acceptable to the District, any action or actions filed in connection with any Claims and will pay all related costs and expenses, including attorney's fees incurred. The Contractor will promptly pay any judgment rendered against the District, its officials, officers, employees, agents, volunteers or consultants for any Claims. In the event the District, its officials, officers, employees, agents, volunteers or consultants is made a party to any action or proceeding filed or prosecuted against Contractor for any Claims, Contractor agrees to pay the District, its officials, officers, employees, agents, volunteers and consultants any and all costs and expenses incurred in such action or proceeding, including but not limited to, reasonable attorneys' fees.

8.9.5 In accordance with California Civil Code Section 2782(a), nothing in the Agreement will be construed to indemnify the District for its sole negligence, willful misconduct, or for defects in design furnished by District. In accordance with California Civil Code Section 2782(b), nothing in the Agreement will be construed to impose on the Contractor or to relieve the District from liability for the District's active negligence. By execution of the Contract Documents the Contractor acknowledges and agrees that the Contractor has read and understands the insurance and other requirements of Agreement, and this Section 8.9, which is a material element of consideration.

8.10 Licenses/Permits. The Contractor must, without additional expense to the District, obtain all licenses, permits and other approvals required for the performance of the Work.

8.11 California Labor Code Requirements.

8.11.1 In accordance with California Labor Code Section 1810, eight (8) hours of labor in performance of the Work shall constitute a legal day's work under the Agreement.

8.11.2 In accordance with California Labor Code Section 1811, the time of service of any worker employed in performance of the Work is limited to eight hours during any one calendar day, and forty hours during any one calendar week, except in accordance with California Labor Code Section 1815, which provides that work in excess of eight hours during any one calendar day and forty hours during any one calendar week is permitted upon compensation for all hours

worked in excess of eight hours during any one calendar day and forty hours during any one calendar week at not less than one-and-one-half times the basic rate of pay. However, if the prevailing wage determination requires a higher rate of pay for overtime than is required under Section 1815, then the overtime rate must be paid, as specified in California Code of Regulation Title 8, Group 3, Section 16200(a)(3)(F).

8.11.3 In accordance with California Labor Code Section 1813, the Contractor and its subcontractors will forfeit as a penalty to the District $25 for each worker employed in the performance of the Work for each calendar day during which the worker is required or permitted to work more than eight (8) hours in any one calendar day, or more than forty (40) hours in any one calendar week, in violation of the provisions of California Labor Code Section 1810 et seq.

8.11.4 In accordance with California Labor Code Section 1773.2, the District has determined the general prevailing wages in the locality in which the Work is to be performed for each craft or type of work needed to be as published by the State of California Department of Industrial Relations, Division of Labor Statistics and Research, a copy of which is on file in the office of the District Engineer and shall be made available on request. The Contractor and subcontractors engaged in the performance of the Work shall pay no less than these rates to all persons engaged in performance of the Work.

8.11.5 In accordance with California Labor Code Section 1775, the Contractor and any subcontractors engaged in performance of the Work must comply with Labor Code Section 1775 which establishes a penalty of up to $200 per day for each worker engaged in the performance of the Work that the Contractor or any subcontractor pays less than the specified prevailing wage. The amount of such penalty shall be determined by the Labor Commissioner. The Contractor or subcontractor shall pay the difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate. If a subcontractor worker engaged in performance of the Work is not paid the general prevailing per diem wages by the subcontractor, the Contractor is not liable for any penalties therefore unless the Contractor had knowledge of that failure or unless the Contractor fails to comply with all of the following requirements:

8.11.5.1 The contract executed between the Contractor and the subcontractor for the performance of part of the Work must include a copy of the provisions of California Labor Code Sections 1771, 1775, 1776, 1777.5, 1813, and 1815.

8.11.5.2 The Contractor must monitor payment of the specified general prevailing rate of per diem wages by the subcontractor by periodic review of the subcontractor’s certified payroll records.

8.11.5.3 Upon becoming aware of a subcontractor’s failure to pay the specified prevailing rate of wages, the Contractor must diligently take corrective action to halt or rectify the failure, including, but not limited to, retaining sufficient funds due the subcontractor for performance of the Work.

8.11.5.4 Prior to making final payment to the subcontractor, the Contractor must obtain an affidavit signed under penalty of perjury from the subcontractor that the subcontractor has paid the specified general prevailing rate of per diem wages employees engaged in the performance of the Work and any amounts due pursuant to California Labor Code Section 1813.

8.11.6 In accordance with California Labor Code Section 1776, the Contractor and each subcontractor engaged in performance of the Work, must keep accurate payroll records showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed in performance of the Work. Each payroll record must contain or be verified by a written declaration that it is made under penalty of perjury, stating that the information contained in the payroll record is true and correct and that the employer has complied with the requirements of Sections 1771, 1811, and 1815 for any work performed by the employer's employees on the public works project. The payroll records required pursuant to California Labor Code Section 1776 must be certified and must be available for inspection by the District and its authorized representatives, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards of the Department of Industrial Relations and must otherwise be available for inspection in accordance with California Labor Code Section 1776.

8.11.7 In accordance with California Labor Code Section 1777.5, the Contractor, on behalf of the Contractor and any subcontractors engaged in performance of the Work, will be responsible for ensuring compliance with California Labor Code Section 1777.5 governing employment and payment of apprentices on public works contracts.

Apprentices - Prior to commencing the Work, Contractor shall comply with the provisions of Labor Code 1777.5, including but not limited to the submission of contract award information to an applicable apprenticeship program that can supply apprentices to the site of the Work. Such information shall include an estimate of journeyman hours to be performed under this Contract, the number of apprentices proposed to be employed, and the approximate dates the apprentices would be employed. A copy of this information shall be submitted to the District if requested by the District.

A determination by the Chief of the Division of Apprenticeship Standards that Contractor or its subcontractors have knowingly violated Labor Code 1777.5 shall forfeit as a civil penalty an amount not exceeding one hundred dollars ($100) for each full calendar day of noncompliance. Contractor or its subcontractor, who knowingly commits a second or subsequent violation of Labor Code 1777.5 within a three-year period, where the noncompliance results in apprenticeship training not being provided as required, shall forfeit as a civil penalty the sum of not more than three hundred dollars ($300) for each full calendar day of noncompliance. Upon the receipt of a determination that a civil penalty has been imposed by the Chief of the Division of Apprenticeship

Standards, the District shall withhold the amount of the civil penalty from the next progress payment then due or to become due Contractor.

8.11.8 In case it becomes necessary for the Contractor or any subcontractor engaged in performance of the Work to employ on the Work any person in a trade or occupation (except executive, supervisory, administrative, clerical, or other non-manual workers as such) for which no minimum wage rate has been determined by the Director of the Department of Industrial Relations, the Contractor must pay the minimum rate of wages specified therein for the classification which most nearly corresponds to Work to be performed by that person. The minimum rate thus furnished will be applicable as a minimum for such trade or occupation from the time of the initial employment of the person affected and during the continuance of such employment.

8.11.9 Labor Discrimination. Attention is directed to Section 1735 of the Labor Code, which reads as follows:

"No discrimination shall be made in the employment of persons upon public works because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age or sexual orientation of such persons, except as provided in Section 12940 of the Government Code, and every contractor for public works violating this section is subject to all the penalties imposed for violation of this chapter."

8.11.10 Receipt of Workers' Wages, Fee for Registering or Placing Persons In Public Works - Attention is directed to the provisions of sections 1778 and 1779 of the California Labor Code, which read as follows:

"Section 1778. Every person, who individually or as a representative of an awarding or public body or officer, or as a contractor or subcontractor doing public work, or agent or officer thereof, who takes, receives or conspires with another to take or receive, for its own use or the use of any other person any portion of the wages of any workman or working subcontractor, in connection with services rendered upon any public work is guilty of a felony."

"Section 1779. Any person or agent or officer thereof who charges, collects, or attempts to charge or collect, directly or indirectly, a fee or valuable consideration for registering any person for public work, or for giving information as to where such employment may be procured, or for placing, assisting in placing, or attempting to place, any person in public work, whether the person is to work directly for the state, or any political subdivision or for a contractor or subcontractor doing public work is guilty of a misdemeanor."

8.12 Laws and Ordinances. The Contractor and all subcontractors engaged in the performance of the Work must conform to the following specific rules and regulations as well as all other laws, ordinances, rules and regulations that apply to the Work. Nothing in the Technical Specifications or Drawings is to be construed to permit Work not conforming to these codes:

National Electrical Safety Code, U. S. Department of Commerce
National Board of Fire Underwriters' Regulations
California Building Standards Code as adopted by the District

Manual of Accident Prevention in Construction, latest edition, published by A.G.C. of America
Industrial Accident Commission's Safety Orders, State of California
Regulations of the State Fire Marshall (Title 19, California Code of Regulation) and Applicable Local Fire Safety Codes
Labor Code of the State of California - Division 2, Part 7, Public Works and Public Agencies.

8.13 Guaranty. The Contractor guarantees all of the Work for **one (1) year** from the date the District accepts the Work. Upon receiving written notice of a need for repairs which are directly attributable to defective materials or workmanship the Contractor must make good any defects arising or discovered in any part of the Work by diligently commencing the necessary repairs within seven (7) calendar days from the date of notice from the District. If the Contractor fails to make good any defects in the Work in accordance with this provision, in addition to any other available remedy under the contract or at law or equity, the District may make good or have made good such defects in the Work and deduct the cost from amounts that may be due or become due the Contractor. The Contractor shall remain responsible for repairing any Work found to be defective regardless of when such defect is discovered by the District. See Drawings for other Guaranty/Warrantee requirements for the project.

8.14 Safety.

8.14.1 Contractor's Safety Responsibility - The Contractor shall be solely and completely responsible for conditions of the jobsite, including safety of all persons and property during performance of the Work. This requirement shall apply continuously and not be limited to normal working hours. Safety provisions shall conform to U.S. Department of Labor (OSHA), the California Occupational Safety and Health Act (CalOSHA), and all other applicable Federal, State, County, and local laws, ordinances, codes, including but not limited to the requirements set forth below, and any regulations that may be detailed in other parts of these Contract Documents. In the event of conflicting requirements, the most stringent requirement as it pertains to the Contractor’s safety responsibility shall be followed by the Contractor.

No provision of the Contract Documents shall act to make the District, the Construction Manager, Design Consultant or any other party than the Contractor responsible for safety. The Contractor agrees that for purposes of California Labor Code Section 6400 and related provisions of law the Contractor, the Contractor's privities and any other entities acting pursuant to this contract will be “employers” responsible for furnishing employment and a place of employment that is safe and healthful for the employees, if any, of such entities acting pursuant to this contract and that neither the District nor the Construction Manager, Design Consultant or their respective officers, officials, employees, agents or volunteers or other authorized representatives will be responsible for having hazards corrected and /or removed at the location(s) where the work is to be performed. The Contractor agrees that neither the District nor the Construction Manager, Design Consultant or their respective officers, officials, employees, agents or volunteers or other authorized representatives will be responsible for taking steps to protect the Contractor's employees from such hazards, or for instructing the Contractor's employees to recognize such hazards or to avoid the associated dangers. The Contractor

agrees that with respect to the work to be performed under this contract and the location(s) where such work is to be performed, the Contractor will be responsible for not creating hazards, and for having hazards corrected and/or removed. The Contractor agrees that through the safety obligations contained in this contract and the Contractor's own inspection of the site(s) where the contract work is to be performed, the Contractor is aware and has been notified of the hazards to which the Contractor's employees may be exposed in the performance of contract work. The Contractor has taken and/or will take appropriate, feasible steps to protect the Contractor's employees from such hazards, and has instructed and/or will instruct its employees to recognize such hazards and how to avoid the associated dangers. The Contractor agrees that neither the District nor the Construction Manager, Design Consultant or their respective officers, officials, employees, agents or volunteers or other authorized representatives will be “employers” pursuant to California Labor Code Section 6400 and related provisions of law with respect to the Contractor, the Contractor's privities or other entities acting pursuant to this contract.

8.14.2 Review and inspection by the District, the District Engineer, the Architect or Engineer, and/or other representatives of the District of the Contractor's performance of the Work will not constitute review of the adequacy of the Contractor's safety measures in, on, or near the Work site. Such reviews and inspections do not relieve the Contractor of any of the Contractor’s obligations under the Contract Documents and applicable law to ensure that the Work site is maintained and the Work is performed in a safe manner.

8.14.3 The Contractor will be solely responsible for the implementation and maintenance of safety programs to ensure that the Work site is maintained and the Work is performed in a safe manner in accordance with the Contract Documents and applicable law.

8.14.4 Safety Plan - Within seven (7) calendar days following Notice of Award the Contractor must submit to the District a copy of the Contractor’s Safety Plan.

The Contractor shall establish, implement, and maintain a written injury prevention program as required by Labor Code Section 6401.7. Before beginning the Work, the Contractor shall prepare and file with the Construction Manager a written Contractor Safety Plan that provides for the implementation of all of the Contractor's safety responsibilities in connection with the Work at the Project site. The coordination of that program and its associated procedures and precautions with safety plans, precautions and procedures of each of its subcontractors and other Contractors performing work at the Project site. The Contractor shall be solely responsible for initiating, maintaining, monitoring, coordinating, and supervising all safety plans, precautions, and procedures in connection with the Work and for coordinating its programs, precautions, and procedures of the other contractors and subcontractors performing the Work at the Project site. The Safety Plan should contain all the necessary elements for the Contractor to administer its program on the Project site. At a minimum, this written Safety Plan shall address the elements required by Labor Code Section 6401.7.

The Contractor's compliance with requirements for safety and/or the Construction Manager's review of the Contractor's Safety Plan shall not relieve or decrease the liability of the Contractor for safety. The Construction Manager's review of the Contractor's Safety Plan is only to determine if the above listed elements are included in the program.

8.14.5 The Contractor must furnish and place proper guards and systems for the prevention of accidents, including, but not limited to, those systems required pursuant to Title 8, Section 1670 and following of the California Code of Regulations concerning safety belts and nets. The Contractor must provide and maintain any other necessary systems or devices required to secure safety of life or property at the Work site in accordance with accepted standards of the industry and applicable law. The Contractor must maintain during all night hours sufficient lights to prevent accident or damage to life or property.

8.14.6 The Contractor must comply with the District’s Confined Space Entry Program shown in the Appendix section of the Contract Documents.

8.14.7 The Contractor shall indemnify, defend and hold District and Construction Manager, Design Consultant and their respective officers, officials, employees, agents and volunteers or other authorized representatives harmless to the full extent permitted by law concerning liability related to the Contractor’s safety obligations in accordance with the indemnification section of the Contract Documents.

If death or serious injuries or serious damages are caused, the accident shall be reported immediately by telephone or messenger to both the Construction Manager and the District. In addition, the Contractor shall furnish the Construction Manager with a copy of the Employer's Report of Injury immediately following any incident requiring the filing of said report during the prosecution of the Work under this Contract. The Contractor shall also furnish the Construction Manager with a copy of the Employer's Report of Injury involving any subcontractors on this Project. The Contractor shall make all reports as are, or may be, required by any authority having jurisdiction, and permit all safety inspections of the Work being performed under this Contract.

If a claim is made by anyone against the Contractor or any subcontractor on account of any accident, the Contractor shall promptly report the facts in writing to the Construction Manager, giving full details of the claim.

8.14.8 Safety Supervisor - The Contractor shall appoint an employee as safety supervisor who is qualified and authorized to supervise and enforce compliance with the Safety Program. The Contractor shall notify the Construction Manager in writing prior to the commencement of work of the name of the person who will act as the Contractor's Safety Supervisor and furnish the safety supervisor's resume to the Construction Manager.

Contractor will, through and with its Safety Supervisor, ensure that all of its employees, and its subcontractors of any tier, fully comply with the Project Safety Policies. The Safety Supervisor shall be a full-time employee of the Contractor whose responsibility shall be for supervising compliance with

applicable safety requirements on the Project site and for developing and implementing safety training classes for all job personnel. The District shall have the authority to require removal of the Contractor's Safety Supervisor if the representative is judged to be improperly or inadequately performing the duties; however, this authority shall not in any way affect the Contractor's sole responsibility for performing this work safely, nor shall it impose any obligation upon the District to ensure the Contractor performs its work safely.

8.14.9 Safety and Protection - The Contractor shall take all necessary precautions to prevent damage, injury, and loss to:

- All employees on the Project, employees of all subcontractors, and other persons and organizations who may be affected thereby;
- All the Work and materials and equipment to be incorporated therein, whether in storage on or off the site; and
- Other property at the site or adjacent thereto, including trees, shrubs, lawns, walks, wetlands, pavements, roadways, structures, utilities, and underground facilities not designated for removal, relocation, or replacement in the course of construction, even if not shown on the Contract Drawings.

The Contractor shall comply with all applicable laws and regulations of any public body having jurisdiction for the safety of persons or property or to protect them from damage, injury or loss and shall erect and maintain all necessary safeguards for such safety and protection. The Contractor shall notify owners of adjacent property and of underground facilities and utility districts when prosecution of the Work may affect them and shall cooperate with them in the protection, removal, relocation, and replacement of their property. All damage, injury or loss to any property caused, directly or indirectly, in whole or in part, by the Contractor, any subcontractor, supplier or any other person or organization directly or indirectly employed by any of them to perform or furnish any of the Work or anyone for whose acts any of them may be liable, shall be remedied by the Contractor, and the Contractor shall be responsible for any direct or indirect costs resulting from such damage, injury or loss.

8.14.10 Excavation Safety - In accordance with the provisions of Section 6705 of the Labor Code, the Contractor shall submit, in advance of excavation of any trench or trenches five feet or more in depth, a detailed plan showing the design of shoring, bracing, sloping, or other provisions to be made for worker protection from the hazard of caving ground during the excavation of such trench or trenches. If such plans vary from the shoring system standards set forth in the Construction Safety Orders of the Division of Industrial Safety in Title 8, Subchapter 4, Article 6, California Code of Regulations, the plans shall be prepared and signed by a registered civil or structural engineer employed by the Contractor, and all costs therefor shall be included in the price named in the Contract for completion of the work as set forth in the Contract Documents. Nothing in this section shall be deemed to allow the use of a shoring, bracing, sloping, or other protective system less effective than that required by the Construction Safety Orders. Nothing in this section shall be construed to impose a tort liability on the District, the Design Consultant, the Construction Manager, nor any of their officers, officials, employees, agents, consultants or

volunteers. The District's review of the Contractor's excavation plan is only for general conformance to the Construction Safety Orders.

Prior to commencing any excavation, the Contractor shall designate in writing to the Construction Manager the "competent person(s)" with the authority and responsibilities designated in the Construction Safety Orders.

8.14.11 Safety Emergencies - In emergencies affecting the safety or protection of persons or the Work or property at the Project site or adjacent thereto, the Contractor, without special instruction or authorization from the Construction Manager, is obligated to act to prevent threatened damage, injury or loss. The Contractor shall give the Construction Manager prompt written notice if the Contractor believes that any significant changes in the Work or variations from the Contract Documents have been caused thereby.

8.14.12 Safety Violations - Should the Contractor fail to correct an unsafe condition, the District shall have the right to notify the Contractor through the Construction Manager that an unsafe condition may exist and must be corrected or the work in question can be stopped in accordance with Section 7.8, Suspension of Work until the condition is corrected to the satisfaction of the District. No extension of time or additional compensation will be granted as a result of any stop order so issued. The notification and suspension of such work or the failure to provide such notification and suspension by the District shall not relieve the Contractor of its sole responsibility and liability for safety and the correction of any unsafe conditions.

The District shall have the authority to require the removal from the project of any worker and the foreman and/or superintendent in responsible charge of the work where safety violations occur.

8.14.13 Equipment Safety Provisions - The completed Work shall include all necessary permanent safety devices, such as machinery guards and similar safety items, required by the State and Federal (OSHA) industrial authorities and applicable local and national codes. Further, any features of the Work, including District -selected equipment, subject to such safety regulations shall be fabricated, furnished, and installed in compliance with these requirements. All equipment furnished shall be grounded and provided guards and protection as required by safety codes. Where vapor-tight or explosion-proof electrical installation is required by safety codes, this shall be provided. Contractors and manufacturers of equipment shall be held responsible for compliance with the requirements included herein. The Contractor shall notify all equipment suppliers and subcontractors of the provisions of this paragraph.

8.14.14 Confined Spaces – The Project requires work in confined spaces and requires compliance with CAL/OSHA and Federal OSHA requirements. Confined spaces for the purposes of this section shall be as defined by the Division of Industrial Safety. Notwithstanding any classifications relative to the Tunnel Safety Orders, work within confined spaces of this project is subject to the definitions and applicable provisions of Section 5156 et. seq., Title 8, Division 1, Chapter 4, Subchapter 7, Group 16, Article 108 of California Code of Regulations.

Entry into existing “permit” confined spaces as defined by OSHA shall be allowed only in compliance with a confined space entry permit program by the Contractor that meets the requirements of CAL/OSHA Section 5157. While the District has identified certain existing facilities as confined spaces other confined spaces may exist on the Project. It shall be the responsibility of the Contractor to identify and classify these confined spaces.

Sources of ignition, including smoking, shall be prohibited in any confined space.

It is anticipated that the Contractor may encounter hazardous conditions within these confined spaces which include, but are not limited to the following:

A. Exposure to hydrogen sulfide, methane, carbon dioxide and other gases and vapors commonly found in municipal sewers which could have or has the potential of having Immediate Danger to Life or Health Conditions (IDLH).

B. Exposure to atmosphere containing insufficient oxygen to support human life.

C. Exposure to combustible, flammable and/or explosive atmosphere.

D. Exposure to sewage which may contain bacteriological, chemical and other constituents harmful to humans.

E. Work in conditions where engulfment or entrapment may occur.

F. Work in environments which may be slippery and/or have uneven work surfaces.

G. Work in structures which have limited and/or restricted access and egress.

H. Work in structures where workers may trip, slip and/or fall several feet.

I. See Appendices “Contractor Safe Work Requirements” and “Confined Space Entry Program” for additional requirements. Copies of confined space permits shall be submitted to the District weekly.

8.14.15 Construction Activity Permits - The Contractor must submit a copy of its respective current DOSH permit before beginning work on any the following construction activities:

A. Construction of trenches or excavations which are five feet or deeper and into which a person is required to descend.

B. Construction of any building, structure, scaffolding or falsework more than three stories high or the equivalent height (36 feet).

C. Demolition of any building or structure, or dismantling of scaffolding or falsework more than three stories high or the equivalent height (36 feet).

D. Erection or dismantling of vertical shoring systems more than three stories high, or the equivalent height (36 feet).

8.14.16 Public Safety and Convenience – In accordance with the provisions of Section 6500 of the Labor Code the Contractor shall conduct his work so as to ensure the least possible obstruction to traffic and inconvenience to the general public and the residents in the vicinity of the Work and to ensure the protection of persons and property. No road or street shall be closed to the public except with the permission of the Construction Manager and the proper governmental authority. Fire hydrants on or adjacent to the Work shall be accessible to firefighting equipment. Temporary provisions shall be made by the Contractor to ensure the use of sidewalks, private and public driveways and proper functioning of gutters, sewer inlets, drainage ditches and culverts, irrigation ditches and natural water courses. To the maximum extent permitted by law, Contractor shall indemnify, hold harmless and defend District from any and all liability, including attorneys' fees and costs of litigation, arising from any failure to comply with this section by Contractor or its privities.

8.15 Assignment of Unfair Business Practice Claims. In accordance with California Public Contract Code Section 7103.5, the Contractor and any subcontractors offer and agree to assign to the District all rights, title, and interest in and to all causes of action the Contractor or any subcontractors may have under Section 4 of the Clayton Act (15 U.S.C. § 15) or under the Cartwright Act (Chapter 2 (commencing with § 16700) of Part 2 of Division 7 of the Business and Professions Code), arising from purchases of goods, services or materials pursuant to this contract. This assignment shall be made and become effective at the time the District tenders final payment to the Contractor, without further acknowledgement by the parties.

9. MEASUREMENT AND PAYMENT

9.1 F.O.B. All shipments must be F.O.B. destination to the Work site and/or other sites indicated in the Contract Documents. The Contract Price is all-inclusive (including sales tax). There shall be no additional compensation paid for containers, packing, unpacking, drayage or insurance.

9.2 Payment

9.2.1 On or about the first day of each calendar month the Contractor will submit to the District Engineer a verified application for payment and schedule of values supported by a statement showing all materials actually installed during the preceding month and the cost of labor actually expended in the performance of the Work. Unless otherwise provided in the Contract Documents, no allowances or payments will be made for material or equipment not placed at the Work site.

9.2.2 To be eligible for payment the Contractor's applications for payment must include certified payroll reports prepared in accordance with California Labor Code Section 1776 and the Agreement for each employee of the Contractor and any subcontractors engaged in the performance of the Work during the

preceding months, applications for payment will not be processed without certified payroll reports.

9.2.3 In accordance with California Public Contract Code Section 20104.50, the District will review applications for payment as soon as practicable after receipt. Any application or part of an application that is determined to be improper will be returned to the Contractor as soon as practicable, but no later than seven (7) calendar days after receipt by the District, along with a written description of the reasons why the application is improper. The Contractor's failure to submit a schedule in the time specified in Section 3.8, or its submission of a schedule to which the District has taken any uncorrected exception, shall serve as a basis for returning an application for payment in its entirety.

9.2.4 Unless the Contractor has elected to post securities in lieu of retention in accordance with California Public Contract Code Section 22300 and the Agreement, and the Contractor and the District have executed an escrow agreement in accordance with the Public Contract Code and the Agreement, the District will make progress payments to the Contractor in accordance with applicable law in the amount of 95 percent of the value of the labor actually performed and the material incorporated in the Work as specified in Contractor's verified application for payment upon approval by the District's authorized representative(s). Payment of progress payments will not be construed as acceptance of the Work performed. If the Contractor has elected to post securities in lieu of retention in accordance with Public Contract Code Section 22300 and the Agreement and the Contractor and the District have executed an escrow agreement in accordance with the Public Contract Code and the Agreement, the District will make payments to the Contractor or the Contractor's escrow agent in accordance with such escrow agreement.

9.2.5 The District will pay the Contractor's final invoice in accordance with applicable law and this Section 9 following acceptance of the Work provided that:

9.2.5.1 The Contractor has furnished evidence satisfactory to the District that all claims for labor and material have been paid, or the time for filing valid stop notices has passed and no stop notices have been filed, or all stop notices filed have been released by valid release or release bond acceptable to the District.

9.2.5.2 No claim has been presented to the District by any person based upon any acts or omissions of the Contractor or any subcontractor engaged in the performance of the Work.

9.2.5.3 No other claim or dispute exists under the Agreement or applicable law concerning payment of the Contractor's final invoice and/or release of the Agreement retention.

9.2.5.4 (Not Used)

9.2.5.5 The Contractor's application for final payment contains a written waiver of all claims against the District of which the Contractor may not yet

asserted at the time of the submission of the application for final payment.

9.2.5.6 In accordance with California Public Contract Code Section 7107, the final payment or release of retention shall not be due and payable until the expiration of 60 days from the date of recording the Notice of Completion by the District.

9.2.6 In accordance with California Public Contract Code Section 20104.50, if the District fails to make a progress payment within 30 calendar days of receipt of an undisputed, properly submitted application for payment, the District will pay the Contractor interest equivalent to the legal rate set forth in subdivision (a) of California Code of Civil Procedure Section 685.010. The number of calendar days available to the District to make a payment without incurring an interest obligation pursuant to this provision and California Public Contract Code Section 20104.50 will be reduced by the number of calendar days, if any, by which the District has delayed return of an application for payment beyond the seven day return requirement set forth in Section 9.2.5.

9.3 Non-Allowable Direct Charges. The following costs are not allowable direct charges under the Agreement. The following costs may only be paid under the Agreement, if at all, as part of any allowance for contractor overhead and/or profit established under the Agreement.

9.3.1 Labor costs in excess of applicable prevailing wages pursuant to the Agreement and applicable law, liability and workers compensation insurance, social security, retirement and unemployment insurance and other employee compensation and benefits pursuant to bona fide compensation plans in effect at the time specified for the opening of Project bids for contractor and subcontractor employees engaged in the performance of the Work. However, in no event will allowable direct labor charges under the agreement include employee bonuses, employee vehicles or vehicle allowances, employee telephones or telephone allowances, or employee housing or housing allowances, whether or not such benefits are part of a bona fide compensation plan in effect at the time specified for the opening of Project bids.

9.3.2 Superintendent labor and clerical labor.

9.3.3 Bond premiums

9.3.4 Insurance in excess of that required under Section 8.8

9.3.5 Utility costs

9.3.6 Work Site office expenses

9.3.7 Home office expenses.

9.4 Withhold. The District or its agent may, in accordance with the Contract Documents and applicable law, withhold any payment of monies due or that may become due the Contractor because of:

9.4.1 Defective work not remedied or uncompleted work.

9.4.2 Claims filed or reasonable evidence indicating probable filing of claims.

9.4.3 Failure to properly pay subcontractors or to pay for material or labor.

9.4.4 Reasonable doubt that the Work can be completed for the balance then unpaid.

9.4.5 Damage to another contractor.

9.4.6 Damage to the District.

9.4.7 Damage to a third party.

9.4.8 Delay in the progress of the Work, which, in the District's judgment, is due to the failure of the Contractor to properly expedite the Work.

9.4.9 Liquidated damages or other charges that apply to the Contractor under the Agreement.

9.4.10 Any other lawful basis for withholding payment under the contract.

9.4.11 Failure of the Contractor to maintain record documents and as-built drawings.

9.4.12 Cost of insurance arranged by the District due to cancellation or reduction of the Contractor's insurance.

9.4.13 Failure to submit, revise, resubmit or otherwise conform to the requirements herein for preparing and maintaining a construction schedule.

9.4.14 Failure to make proper submissions, as specified herein.

9.4.15 Stop Notice claims filed by Contractor's subcontractors, of any tier, or its material suppliers.

9.4.16 Provisions of law that enable or require the District to withhold such payments in whole or in part.

9.4.17 Failure to comply with environmental or other regulatory requirements.

9.4.18 Failure of Contractor to submit Operation and Maintenance Manuals.

9.5 Securities in Lieu of Retention.

9.5.1 In accordance with Public Contract Code Section 22300, except where federal regulations or polices do not permit substitution of securities, the Contractor may substitute securities for any moneys withheld by the District to ensure performance of the Work. At the Contractor's request and expense, securities equivalent to the amount withheld will be deposited with the District, or with a state or federally chartered bank in California as the escrow agent, who will then pay those moneys to the Contractor under the terms of an Escrow for Security Deposit agreement. The Escrow for Security Deposit agreement is

provided in the Contract Documents. Upon satisfactory completion of the Work, the securities will be returned to the Contractor.

9.5.2 Alternatively, at the Contractor's request and expense, the District will pay retentions earned directly to the escrow agent. At the Contractor's expense, the Contractor may direct investment of the payments into securities. Upon satisfactory completion of the Work, the Contractor will receive from the escrow agent all securities, interest, and payments received by the escrow agent from the District pursuant to this provision and the terms of the Escrow for Security Deposit agreement. The Contractor will, within twenty (20) working days of receipt of payment, pay to each subcontractor the respective amount of interest earned, less costs of retention withheld from each Subcontractor, on monies withheld to ensure the Contractor's performance of the Work.

9.5.3 Securities eligible for investment in accordance with this provision include those listed in Government Code Section 16430, bank or savings and loan certificates of deposit, interest bearing demand deposit accounts, standby letters of credit, or any other security mutually agreed to by the Contractor and the District.

9.5.4 The Contractor will be the beneficial owner of any securities substituted for moneys withheld and will receive any interest thereon.

10. PROJECT ACCEPTANCE AND CLOSEOUT

10.1 Occupancy. The District reserves the right to occupy or use any part or parts or the entire of the Work before the Work is fully performed. Subject to applicable law, exercising this right will in no way constitute acceptance of any part of the Work so occupied or used or acceptance of the entire Work, nor will such occupancy or use in any way affect the times when payments will become due the Contractor, nor will such occupancy or use in any way prejudice the District's rights under the Agreement, any Agreement bonds, or at law or equity. Occupancy or use shall not waive the District's rights to assess liquidated damages in accordance with Section 7 after the date of such occupancy or use.

10.2 Work Completion and Final Inspection.

10.2.1 Certificate of Completion. When the Contractor considers the Work is completed, the Contractor will submit written certification to the District Engineer specifying that: the Contract Documents have been reviewed; the Work has been inspected for compliance with the Contract Documents; the Work has been completed in accordance with the Contract Documents; and that equipment and systems have been tested in the presence of the District's representative and are operational. The District and/or the District's authorized representatives will make an inspection to verify that the Work is complete and will notify the Contractor in writing of any incomplete or deficient Work. The Contractor will take immediate steps to remedy the stated deficiencies and give notice of correction to the District Engineer. Upon receiving a notice of correction, the District or the District's authorized representatives will re-inspect the Work. The Contractor must correct all punch list items within 15 working days after the issuance of the punch list.

10.2.2 Project Record Drawings (As-Builts). Before acceptance of the Work the Contractor must submit:

1. One set of Project Record Drawings, based on the Conformed Set, in 24 x 36 and 11 x 17 sheets.
2. Project Record Drawings, based on the Conformed Set, in AutoCad (.DWG) and portable document file (.PDF) formats.
3. Equipment operating and maintenance instructions and data: one set of hard copy, and one scanned set in portable document file (.PDF) format.
4. Miscellaneous construction-related documents, studies, reports, etc., obtained or developed by the contractor during construction of the project in portable document file (.PDF) format.
5. Warranties, etc.

10.3 Work Acceptance.

10.3.1 All finished Work will be subject to inspection and acceptance or rejection by the District, the District Engineer, and the Architect or Engineer and other government agencies having jurisdiction over the Work. Final acceptance of the Work will be at the discretion of the District.

10.3.2 The District will accept the Work in writing only when the Work has been completed to the District's reasonable satisfaction. Progress payments will in no way be construed as acceptance of any part of the Work.

10.3.3 In evaluating the Work, no allowance will be made for deviations from the Technical Specifications, Drawings or other Contract Documents unless already approved in writing in accordance with the requirements of Section 4, above.

10.3.4 The fact that the Work and materials have been inspected from time to time and that progress payments have been made does not relieve the Contractor of the responsibility of replacing and making good any defective or omitted work or materials in accordance with the requirements of the Contract Documents.

11. REMEDIES AND DISPUTES

11.1 Failure to Correct Work. Within ten (10) working days of receiving written notice from the District describing Work that is defective or that is otherwise not in accordance with the requirements of the Agreement and/or applicable law and directing that such Work be corrected, the Contractor and/or the Contractor's sureties must give the District written notice of the intent of the Contractor and/or the Contractor's sureties to correct such Work and commence correction of such Work in accordance with the District's notice and the Agreement. If the Contractor and/or the Contractor's sureties do not give the District written notice of intent to correct such Work and commence correction of such Work within ten (10) working days of receipt of the District's notice, then the District may correct such work and/or have such work corrected for the account and at the expense of the Contractor and/or its sureties, and the Contractor and/or its sureties will be liable to the District for any resulting excess cost. The District may, in addition to all other remedies that the District may have under the Agreement and at law or equity, deduct any such excess cost of completing the Work from amounts that are due or that may become due the contractor.

11.2 Termination.

11.2.1 In accordance with California Public Contract Code Section 7105, in addition to all other available remedies that the District may have under the Agreement, and at law or equity, the District may terminate the Contractor's control of the Work:

11.2.1.1 If the Contractor or any of its subcontractors engaged in the performance of the Work fails to timely perform the Work and/or any of the Contractor's material obligations under the Contract Documents, including but not limited to submission of an acceptable schedule, that have accrued except for due to reasons beyond the control of the Contractor pursuant to the Contract Documents.

11.2.1.2 If the Contractor is adjudged bankrupt, or if it should make a general assignment for the benefit of creditors, or if a receiver should be appointed on account of its creditors.

11.2.1.3 If the Contractor or any of the subcontractors engaged in the performance of the Work persistently or repeatedly refuses or fails to supply enough properly skilled workmen or proper materials for the timely completion of the Work.

11.2.1.4 If the Contractor fails to make prompt payment to subcontractors engaged in the performance of the Work or for material or labor used in the performance of the Work in accordance with the Contract Documents and applicable law.

11.2.1.5 If the Contractor or any subcontractors engaged in the performance of the Work persistently disregards laws or ordinances applicable to the performance of the Work, or the instructions of the District, the District Engineer, the Architect, or other authorized representatives of the District.

11.2.1.6 For any reason or for no reason, at the District's sole discretion.

11.2.2 If the District intends to terminate the Contractor's control of the Work for any of the reasons specified in Sections 11.2.1.1 through 11.2.1.5, above, the District will immediately serve written notice to the Contractor and its sureties in accordance with the Contract Documents. Notice of the District's intent to terminate the Contractor's control of the Work will be given by registered or certified mail and specify the grounds for termination, the required cure and the time by which the cure must be effected. Upon receipt of notice of the District's intent to terminate the Contractor's control of the Work for any of the reasons specified in provisions 11.2.1.1 through 11.2.1.5, above, the Contractor will have ten (10) working days from receipt of the notice or a longer time specified in the notice to cure its default. If the Contractor does not effect the required cure by the time specified in the notice, the District will issue a written notice of termination to the Contractor and its sureties by registered or certified mail. The notice of termination will specify: that upon receipt of the notice the Contractor's right to perform or complete the Work, including on behalf of the Contractor's sureties, is terminated; that the Contractor's sureties will have the right to take over and complete the Work and perform all of the Contractor's remaining obligations that have accrued under the Agreement; and that if the Contractor's

sureties do not both give the District written notice of their intention to take over and perform the Agreement and commence completion of the Work and performance of all of the Contractor's remaining obligations that have accrued under the Agreement within ten (10) working days after receipt of notice of termination that the District may declare the Contractor's sureties in default and take over the completion of the Work or have the Work completed for the account and at the expense of the Contractor and its sureties, and the Contractor and its sureties will be liable to the District for any resulting excess cost. The District may, in addition to all other available remedies that the District may have under the Contract Documents and at law or equity, deduct any such excess cost of completing the Work from amounts that are due or that may become due the Contactor.

11.2.3 Upon termination of the Contractor's control of the Work for any of the reasons specified in Sections 11.2.1.1 - 11.2.1.5, the Contractor will, if so directed by the District, immediately remove from the Work site any and all materials and personal property belonging to the Contractor which have not been incorporated in the Work and the Contractor and its sureties will be liable upon their bond for all damages caused the District by reason of the Contractor's failure to complete the Work.

11.2.4 Upon termination of the Contractor's control of the Work for any of the reasons specified in provisions 11.2.1.1 through 11.2.1.5, above, the District reserves the right to refuse tender of the Contractor by any surety to complete the Work.

11.2.5 If the District completes or has completed any portion of, or the whole of the Work, following termination of the Contractor's control of the Work for any of the reasons specified in Sections 11.2.1.1 through 11.2.1.5, above, the District will neither be liable for nor account to the Contractor or the Contractor's sureties in any way for the time within which, or the manner in which such Work is performed, or for any changes made in such Work or for the money expended in satisfying claims and/or suits and/or other obligations in connection with completing the Work. If, following termination of the Contractor's control of the Work for any of the reasons specified in Sections 11.2.1.1 through 11.2.1.5, above, the unpaid balance of the Contract Price exceeds the expense of completing the Work, including compensation for additional legal, managerial and administrative services and all other amounts due for the completion of the Work and/or satisfaction of claims of the District and/or others arising out of the Agreement and any other charges that apply to the Contractor under the Agreement, the difference will be paid to the Contractor. If such expenses of completing the Work exceed the unpaid balance of the Contract Price, the Contractor or its sureties will pay the difference to the District.

11.2.6 If the Agreement or Contractor's control of the Work is terminated for any reason, no allowances or compensation will be granted for the loss of any anticipated profit by the Contractor.

11.2.7 In accordance with California Government Code Section 4410, in the event a national emergency occurs, and public work being performed by contract is stopped, directly or indirectly, because of the freezing or diversion of materials, equipment or labor, as the result of an order or a proclamation of the President

of the United States, or of an order of any federal authority, and the circumstances or conditions are such that it is impracticable within a reasonable time to proceed with a substantial portion of the work, then the District and the Contractor may, by written agreement, terminate the Agreement. In accordance with California Government Code Section 4411, such an agreement will include the terms and conditions of the termination of the contract and provision for the payment of compensation or money, if any, which either party will pay to the other or any other person, under the facts and circumstances in the case. Compensation to the Contractor will be determined on the basis of the reasonable value of the work done, including preparatory work. As an exception to the foregoing, in the case of any fully completed separate item or portion of the Work for which there is a separate contract price, the contract price shall control. The parties may in any other case adopt the contract price as the reasonable value of the work or any portion of the work done.

11.3 Disputes.

11.3.1 In accordance with California Public Contract Code Section 20104.2, the following procedures apply to claims of $375,000 or less between the Contractor and the District:

11.3.1.1 The claim shall be in writing and include the documents necessary to substantiate the claim. Claims must be filed on or before the date of final payment. Nothing in this subdivision is intended to extend the time limit or supersede notice requirements otherwise provided by contract for the filing of claims.

11.3.1.2 For claims of less than fifty thousand dollars ($50,000), the District shall respond in writing to any written claim within forty five (45) calendar days of receipt of the claim, or may request, in writing, within thirty (30) days of receipt of the claim, any additional documentation supporting the claim or relating to defenses to the claim the District may have against the Contractor.

11.3.1.2.1 If additional information is thereafter required, it shall be requested and provided pursuant to this subdivision, upon mutual agreement of the District and the Contractor.

11.3.1.2.2 The District's written response to the claim, as further documented, shall be submitted to the Contractor within fifteen (15) calendar days after receipt of the further documentation or within a period of time no greater than that taken by the Contractor in producing the additional information, whichever is greater.

11.3.1.3 For claims of over fifty thousand dollars ($50,000) and less than or equal to three hundred seventy-five thousand dollars ($375,000), the District shall respond in writing to all written claims within sixty (60) calendar days of receipt of the claim, or may request, in writing, within thirty (30) calendar days of receipt of the claim, any additional documentation supporting the claim or relating to defenses to the claim the District may have against the Contractor.

11.3.1.3.1 If additional information is thereafter required, it shall be requested and provided pursuant to this subdivision, upon mutual agreement of the District and the Contractor.

11.3.1.3.2 The District's written response to the claim, as further documented, shall be submitted to the Contractor within thirty (30) calendar days after receipt of the further documentation, or within a period of time no greater than that taken by the Contractor in producing the additional information or requested documentation, whichever is greater.

11.3.1.4 If the Contractor disputes the District's written response, or the District fails to respond within the time prescribed, the Contractor may so notify the District, in writing, either within fifteen (15) calendar days of receipt of the District's response or within fifteen (15) calendar days of the District's failure to respond within the time prescribed, respectively, and demand an informal conference to meet and confer for settlement of the issues in dispute. Upon a demand, the District shall schedule a meet and confer conference within thirty (30) calendar days for settlement of the dispute.

11.3.1.5 Following the meet and confer conference, if the claim or any portion remains in dispute, the Contractor may file a claim as provided in Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of Division 3.6 of Title 1 of the Government Code. For purposes of those provisions, the running of the period of time within which a claim must be filed shall be tolled from the time the Contractor submits his or her written claim pursuant to subdivision (a) until the time that claim is denied as a result of the meet and confer process, including any period of time utilized by the meet and confer process.

11.3.1.6 This article does not apply to tort claims and nothing in this article is intended nor shall be construed to change the time periods for filing tort claims or actions specified by Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of Division 3.6 of Title 1 of the Government Code.

11.3.2 In accordance with California Public Contract Code Section 20104.4, the following procedures apply to civil actions to resolve claims greater than $375,000 between the District and the Contractor:

11.3.2.1 Within sixty (60) calendar days, but no earlier than thirty (30) calendar days, following the filing or responsive pleadings, the court shall submit the matter to non-binding mediation unless waived by mutual stipulation of both parties. The mediation process shall provide for the selection within fifteen (15) calendar days by both parties of a disinterested third person as mediator, shall be commenced within thirty (30) calendar days of the submittal, and shall be concluded within fifteen (15) calendar days from the commencement of the mediation unless a time requirement is extended upon a good cause showing to

the court or by stipulation of both parties. If the parties fail to select a mediator within the 15-day period, any party may petition the court to appoint the mediator.

11.3.2.2 If the matter remains in dispute, the case shall be submitted to judicial arbitration pursuant to Chapter 2.5 (commencing with Section 1141.10) of Title 3 of Part 3 of the Code of Civil Procedure, notwithstanding Section 1141.11 of that code. The Civil Discovery Act of 1986 (Article 3 (commencing with Section 2016) of Chapter 3 of Title 3 of Part 4 of the Code of Civil Procedure) shall apply to any proceeding brought under this subdivision consistent with the rules pertaining to judicial arbitration.

11.3.2.2.1 Notwithstanding any other provision of law, upon stipulation of the parties, arbitrators appointed for purposes of this article shall be experienced in construction law, and, upon stipulation of the parties, mediators and arbitrators shall be paid necessary and reasonable hourly rates of pay not to exceed their customary rate, and such fees and expenses shall be paid equally by the parties, except in the case of arbitration where the arbitrator, for good cause, determines a different division. In no event shall these fees or expenses be paid by state or county funds.

11.3.2.2.2 In addition to Chapter 2.5 (commencing with Section 1141.10) of Title 3 of Part 3 of the Code of Civil Procedure, any party who after receiving an arbitration award requests a trial de novo but does not obtain a more favorable judgment shall, in addition to payment of costs and fees under that chapter, pay the attorney's fees of the other party arising out of the trial de novo.

11.3.2.3 The court may, upon request by any party, order any witnesses to participate in the mediation or arbitration process.

11.3.3 In accordance with California Public Contract Code Section 20104.6:

11.3.4.1 The District shall not fail to pay money as to any portion of a claim which is undisputed except as otherwise provided in the contract.

11.3.4.2 In any suit filed under Public Contract Code Section 20104.4 concerning this contract, the District shall pay interest at the legal rate on any arbitration award or judgment. Such interest shall accrue from date the suit was filed.

LAS GALLINAS VALLEY SANITARY DISTRICT
101 Lucas Valley Road, Suite 300
San Rafael, California 94903

PERFORMANCE BOND
(AS-NEEDED)

BOND NO. _____

PREMIUM: _____

KNOW ALL MEN BY THESE PRESENTS:

WHEREAS, LAS GALLINAS VALLEY SANITARY DISTRICT, (hereinafter designated as "Obligee") and _____ (hereinafter designated as "Principal") have entered into an agreement whereby principal agrees to install and complete certain designated public improvements, which said agreement, dated _____, and identified as project ON-CALL CONTRACT FOR CONSTRUCTION PROJECTS (2026-2028), JOB NO. 26420-01, is hereby referred to and made a part hereof; and

WHEREAS, Said principal is required under the terms of said agreement to furnish a bond for the faithful performance of said agreement;

NOW, THEREFORE, We, the principal and _____ as surety, are held and firmly bound unto the hereinafter called "The Obligee," in the penal sum of _____ dollars ($ _____) lawful money of the United States for the payment of which sum well and truly to be made, we bind ourselves, our heirs, successors, executors and administrators, jointly and severally firmly by these presents.

The condition of this obligation is such that if the above bound principal, his or its heirs, executors, administrators, successors or assigns, shall in all things stand to and abide by, and well and truly keep and perform the covenants, conditions and provisions in the said agreement and any alteration thereof made as therein provided, on his or their part, to be kept and perform and at the time and in the manner therein specified, and in all respects according to their true intent and meaning, and shall indemnify and save harmless the Obligee, its officers, agents and employees, as therein stipulated, then this obligation shall become null and void; otherwise it shall be and remain in full force and effect.

As part of the obligation secured hereby and in addition to the face amount specified therefore, there shall be included costs and reasonable expenses and fees, including reasonable attorney's fees, incurred by county in successfully enforcing such obligation, all to be taxed as costs and included in any judgment rendered.

The surety hereby stipulates and agrees that no change, extension of time, alteration or addition to the terms of the agreement or to the work to be performed thereunder or the specification accompanying the same shall in any wise affect its obligations on this bond, and it does hereby waive notice of any such change, extension of time, alteration or addition to the terms of the agreement or to the work or to the specifications.

IN WITNESS WHEREOF, the above-bound parties have executed this instrument under their several seals this_____day of _____,_____, the name and corporate seals of each corporate party being hereto affixed and these presents duly signed by their undersigned representatives, pursuant to authority of their governing bodies.

(Corporate Seal)

PRINCIPAL

By:

(Acknowledgement) Title:_____

(Corporate Seal)

SURETY

By:_____

(Attorney-in-fact)

(Acknowledgement) Title:_____

(NOTE TO SURETY COMPANY: A certified copy of unrevoked resolution of authority for the attorney-in-fact must be submitted with and attached to the executed bid bond.)

LAS GALLINAS VALLEY SANITARY DISTRICT
101 Lucas Valley Road, Suite 300
San Rafael, California 94903

PAYMENT/LABOR AND MATERIALS BOND
(AS-NEEDED)

BOND NO.: _____

KNOW ALL MEN BY THESE PRESENTS:

That we, _____ Principal, and _____, incorporated under the laws of the State of _____ and authorized to execute bonds and undertakings as sole surety, as Surety, are held and firmly bound unto any and all persons named in California Civil Code Section 1181 whose claim has not been paid by the contractor, company or corporation, in the aggregate total of _____ dollars ($ _____) , for the payment whereof, well and truly to be made, said Principal and Surety bind themselves, their heirs, administrators, successors and assigns, jointly and severally, firmly by these present.

The Condition of the foregoing obligation is such that; whereas the above bounden Principal has entered into a contract, dated _____, with the LAS GALLINAS VALLEY SANITARY DISTRICT to do the following work, to-wit: ON-CALL CONTRACT FOR CONSTRUCTION PROJECTS (2026-2028), JOB NO. 26420-01.

NOW, THEREFORE, if the above bounden Principal contractor, person, company or corporation, or his or its subcontractor, fails to pay any claimant named in Section 3181 of the Civil Code of the State of California, or amounts due under the Unemployment Insurance Code, with respect to work or labor performed by any such claimant, that, the Surety on this bond will pay the same, in an amount not exceeding the aggregate sum specified in this bond, and also in case suit is brought upon this bond, a reasonable attorney's fee, which shall be awarded by the court to the prevailing party in said suit, said attorney's fee to be taxes as costs in said suit. This bond shall inure to the benefit of any person named in Section 3181 of the Civil Code of the State of California so as to vie a right of action to them or their assignees in any suit brought upon this bond.

This bond is executed and filed to comply with the provisions of the act of Legislature of the State of California as designated in Civil Code Sections 3247-3252 inclusive, and all amendments thereto.

IN WITNESS WHEREOF, the above-bound parties have executed this instrument under their several seals this _____ day of _____, _____ the name and corporate seals of each corporate party being hereto affixed and these presents duly signed by their undersigned representatives, pursuant to authority of their governing bodies.

(Corporate Seal)

PRINCIPAL

By:
(Acknowledgement) Title:_____

(Corporate Seal)

SURETY

By:_____

(Attorney-in-fact)

(Acknowledgement) Title:_____

(NOTE TO SURETY COMPANY: A certified copy of unrevoked resolution of authority for the attorney-in-fact must be submitted with and attached to the executed bid bond.)

LAS GALLINAS VALLEY SANITARY DISTRICT
101 Lucas Valley Road, Suite 300
San Rafael, California 94903

ESCROW AGREEMENT FOR SECURITY DEPOSITS IN LIEU OF RETENTION (AS-NEEDED)

This Escrow Agreement is made and entered into by and between the Board of the LAS GALLINAS VALLEY SANITARY DISTRICT, whose address is 101 Lucas Valley Road Suite 300, San Rafael, California, 94903, hereinafter called "District", _____ _____, whose address is _____, hereinafter called "Contractor", and _____, whose address is _____, hereinafter called “Escrow Agent”
For consideration hereinafter set forth, the District, Contractor, and Escrow Agent agree as follows:

1. Pursuant to Section 22300 of the Public Contract Code of the State of California, Contractor has the option to deposit securities with Escrow Agent as a substitute for retention earnings required to be withheld by District pursuant to the Construction Contract entered into between the District and Contractor for the project entitled ON-CALL CONTRACT FOR CONSTRUCTION PROJECTS (2026-2028) in the amount of _____ _____ dated _____ _____ (hereinafter referred to as the "Contract'). Alternatively, on written request of the Contractor, the District shall make payments of the retention earnings directly to the Escrow Agent. When Contractor deposits the securities as substitute for Contract earnings, the Escrow Agent shall notify the District within ten (10) working days of the deposit. The market value of the securities at the time of the substitution shall be at least equal to the cash amount then required to be withheld as retention under the terms of the Contract between the District and Contractor. Securities shall be held in the name of _____ and shall designate the Contractor as the beneficial owner.

2. The District shall make progress payments to the Contractor for such funds which otherwise would be withheld from progress payments pursuant to the Contract provisions, provided that the Escrow Agent holds securities in the form and amount specified above.

3. When the District makes payment of retentions earned directly to the Escrow Agent, the Escrow Agent shall hold them for the benefit of the Contractor until such time as the escrow created under this contract is terminated. The Contractor may direct the investments of the payments into securities. All terms and conditions of this agreement and the rights and responsibilities of the parties shall be equally applicable and binding when the District pays the escrow agent directly.

4. Contractor shall be responsible for paying all fees for the expenses incurred by Escrow Agent in administering the Escrow Account and all expenses of the District. These expenses and payment terms shall be determined by the District, Contractor and Escrow Agent.

5. The interest earned on the securities or the money market accounts held in escrow and all interest earned on that interest shall be for the sole account of the Contractor and shall be

subject to withdrawal by contractor at any time and from tune to time without notice to the District.

6. Contractor shall have the right to withdraw all or any part of the principal in the Escrow Account only by written notice to Escrow Agent accompanied by written authorization from District to the Escrow Agent that District consents to the withdrawal of the amount sought to be withdrawn by Contractor.

7. The District shall have a right to draw upon the securities in the event of default by the Contractor. Upon seven day's written notice to the Escrow Agent from the District of the default, the Escrow Agent shall immediately convert the securities to cash and shall distribute the cash as instructed by the District.

8. Upon receipt of written notification from the District certifying that the Contract is final and complete, and that the Contractor has complied with all requirements and procedures applicable to the Contract, Escrow Agent shall release to Contractor all securities and interest on deposit less escrow fees and charges of the Escrow Account. The escrow shall be closed immediately upon disbursement of all monies and securities on deposit and payments of fees and charges.

9. Escrow Agent shall rely on the written notifications from the District and the Contractor pursuant to Sections (4) to (6) inclusive, of this agreement and the District and Contractor shall hold Escrow Agent harmless from Escrow Agent's release and disbursement of the securities and interest as set forth above.

10. The names of the persons who are authorized to give written notice or to receive written notice on behalf of the District and on behalf of Contractor in connection with the foregoing, and exemplars of their respective signatures, are as follows:

On behalf of District:	On Behalf of Contractor
	_____
	Title
_____	_____
Curtis Paxton, General Manager	Name

On behalf of Escrow Agent:

_____
Title

_____
Name

_____
Signature

_____
Address

At the time the Escrow Account is opened, the District and Contractor shall deliver to the Escrow Agent a fully executed counterpart of this Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement by their proper officers on the date first set forth above.

District:

_____
Curtis Paxton, General Manager
Las Gallinas Valley Sanitary District
101 Lucas Valley Road, Suite 300
San Rafael, CA 94903

Contractor:

_____
Title

_____
Name

_____
Signature

_____
Address

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VOLUME 2
BID FORMS

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_____
Name of Bidder

LAS GALLINAS VALLEY SANITARY DISTRICT
101 Lucas Valley Road, Suite 300
San Rafael, California 94903

BIDDER'S CHECK LIST

Name of Bidder: _____
(Contractor's Legal Name)

Did You:

_____ Send a properly completed Acknowledgement form immediately after receiving the Contract Documents and before bid opening.

_____ Submit equal product proposals, if any, in accordance with the Instruction to Bidders included in the bid package at least seven (7) calendar days before the time specified for bid opening.

_____ Include with your bid properly completed, accurate copies of the following documents in the following order using the forms included in the bid package:

- _____ Bidder's Check List and Bid Label
- _____ Proposal Cover Page and Bid Schedule
- _____ Acknowledgement of each addendum issued by the District, if any, with signed and dated acknowledgement page.
- _____ Contractor License Information
- _____ Workers Compensation Insurance Certification
- _____ Signed and notarized Non-Collusion Affidavit
- _____ Drug-Free Workplace Certification
- _____ Debarment Certification
- _____ Statement of Experience of Bidder
- _____ Financial Qualifications
- _____ Executed Bidder's Signature Page

_____ Affix a properly completed, signed and accurate Bid Label using the form included in the bid package to the sealed cover of your bid.

_____ Arrange to have the sealed bid delivered to the **Engineering Department, Las Gallinas Valley Sanitary District**, **101 Lucas Valley Road, Suite 300, San Rafael, CA 94903** before the time and day specified on the Notice Inviting Sealed Bids.

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_____
Name of Bidder

LAS GALLINAS VALLEY SANITARY DISTRICT
101 Lucas Valley Road, Suite 300
San Rafael, California 94903

BID LABEL

Sealed bid for the ON-CALL CONTRACT FOR CONSTRUCTION PROJECTS (2026-2028), JOB NO. 26420-01.

Bidder: _____

Bidder Business Address (Street, City, State and Zip Code)

_____

_____

Bidder Business Phone No.: _____

Bidder Business Fax No.: _____

Bidder Email Address: _____

By my signature below I certify under penalty of perjury under the laws of the State of California that a representative of the above bidder visited the project sites listed in the Contract Documents.

By: _____
(Official authorized to bind bidder)

Print Name and Title: _____

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Name of Bidder

LAS GALLINAS VALLEY SANITARY DISTRICT
101 Lucas Valley Road, Suite 300
San Rafael, California 94903

PROPOSAL COVER PAGE AND BID SCHEDULE

TO THE BOARD OF DIRECTORS OF THE LAS GALLINAS VALLEY SANITARY DISTRICT:

Pursuant to the Notice Inviting Sealed Bids for the ON-CALL CONTRACT FOR CONSTRUCTION PROJECTS (2026-2028), JOB NO. 26420-01, the person signing the bidder's signature page contained in this proposal binds the entity listed on the bidder's signature page to submit complete, executed copies of all documents specified in the contract checklist included in Volume 1 of the bid package within seven (7) calendar days of receiving written Notice of Award of the project, and to fully perform the project by the time for completion specified in the Contract Documents for the price specified in the bid schedule below in accordance with the terms of the Contract Documents and applicable law. This proposal cover page and bid schedule will be included as part of the Contract Documents in accordance with the bid package.

This bid includes properly completed, accurate copies of all of the documents listed in the Bidder's Check List included in the bid package in the order listed in the Bidder's Check List and using the forms included in the bid package. This bid includes copies of each of the following addenda issued by the District. Each addendum has been signed and dated to confirm receipt on behalf of the entity listed on the bidder's signature page.

Addendum No. 1 dated _____

Addendum No. 2 dated _____

Addendum No. 3 dated _____

Addendum No. 4 dated _____

Addendum No. 5 dated _____

Name of Bidder

BID SCHEDULE

DEFINITIONS AND TERMS

The work embraced herein shall be done in accordance with the *Standard Specifications of the State of California Department of Transportation*, dated 2025, and any amendments to the Specifications, insofar as the same may apply, which specifications are hereinafter referred to as the Caltrans Standard Specifications; in accordance with the application *Uniform Construction Standards of the Cities of Marin and County of Marin* for Public Improvements, which Standards are hereinafter referred to as the County Standards; in accordance with the *Revised District Standard Specifications and Drawings*, which Specifications and Drawings are hereinafter referred to as the District Specifications and available upon request; *State of California Department of Transportation Standard Plans*, dated 2025, which plans are hereinafter referred to as Caltrans Standard Plans, and in accordance with the following Special Provisions.

Whenever in the Caltrans Standard Specifications the terms, State of California, Department of Transportation, Director, Engineer, or Laboratory are used, the following terms shall be substituted therefor, and any reference to any of the above terms shall be understood and interpreted to mean and refer to such substituted terms as follows:

For State of California, substitute Las Gallinas Valley Sanitary District

For Department – Engineering Department of Las Gallinas Valley Sanitary District

For Director – The District Engineer of the Las Gallinas Valley Sanitary District

For Engineer – The District Engineer, acting either directly or through properly authorized agents, such agents acting within the scope of the particular duties entrusted to them.

For Laboratory – Other laboratory as may be authorized by the District to test materials and work involved in the contract.

SCOPE OF WORK

1. Anticipated scopes of work are industrial in nature and will consistently include civil, mechanical, electrical, and structural trades. Some may require immediate response as described in Item 5 below.

2. The work involved in this contract will be performed on an "as-needed basis" and will typically consist of small projects that can typically be completed in one week. Compensation for each on-call effort is based on time and expense tracking according to force account rates as outlined in the current Labor Surcharge & Equipment Rental Rate Book published regularly by Caltrans Division of Construction. **The competitive basis of award for the contract is the bidder's labor markup**. This labor markup is applied by the successful bidder to the hourly rate of all trades used on any given construction effort. Actual payment is made according to detailed work orders describing each individual on-call effort.

3. The contract includes the ability to invoke FEMA contracting requirements during periods of formally declared emergencies. Contractor shall provide assistance with completing forms and comply with FEMA requirements in the event of formally declared emergencies, which will allow the District to pursue FEMA reimbursement when necessary. See Appendix E.

4. No compensation will be due for travel time between the project site and the contractor's yard, office or other business location. Set up time and superintendence will be considered as included in the overhead cost and will not receive direct compensation.

5. The maximum compensation allowed under this contract is $250,000 with a contract duration of 24 months. The Contractor is solely responsible for ensuring that he/she does not conduct operations that result in costs in excess of this amount. Prior to commencement of any specific scope of work under this contract, the Contractor shall supply the District with the following:

    a. A break down and summary of costs incurred on the contract through the last day of the scope of work; and
    b. A detailed estimate of the scope of remaining work being requested by the District. Payment requests that result in exceeding the contract amount will be rejected.

6. Beginning of Work: Subsequent to the issuance of an authorized Notice to Proceed by the District, the Contractor shall diligently begin work within the times specified as follows:

    24 hours of being requested by the District for emergency related work.

    Ten (10) calendar days of being requested by the District for non-emergency related work.

7. This contract will be valid until closed by the District. Individual underground repairs or installations will be reviewed in the field by the District and the Contractor and a scope of work agreed upon. Once the scope of work is agreed upon, the District will provide written authorization to start the specified work. At the end of each work day the District and Contractor will agree upon labor and equipment used. Once the repair or installation is complete, the Contractor shall submit completed extra work forms for the District’s review. A contract change order will be issued to the Contractor for payment of work performed.

8. All work done on force account basis shall be recorded daily on report sheets prepared by the Contractor and signed by both the District Representative and the Contractor. Such reports shall thereafter be considered the true record of force account work done. Such reports shall be furnished to the District Representative at the end of each work day with a copy retained by Contractor. Payment for work done on force account basis shall conform to the provisions of Section 9-1.04 FORCE ACCOUNT of the latest edition of the Caltrans Standard Specifications with modifications and additional requirements outlined below.

    a. The rental time to be paid for equipment shall be the time the equipment is in operation on the work being performed and in addition, shall include the time

required to move the equipment to the location of the work and return the equipment to the original location or another location requiring no more time than that required to return the equipment to its original location. Loading and transporting costs will be allowed, in lieu of moving time, when the equipment is moved by means other than its own power.

b. When hourly rates are listed, less than 30 minutes of operation shall be considered to be 0.5-hour of operation.

c. When daily rates are listed, less than four hours of operation shall be considered to be 0.5-day of operation.

d. All equipment used in the completion of this contract shall be considered Equipment on the Work, also referred to as Equipment on the Job Site and paid as such.

e. No additional rental time outside that described above shall be considered for compensation.

f. All extensions of labor, equipment, and material costs shall be completed by the Contractor and submitted to the District 30 days of the completion of each separate project under this contract. Completed and extended extra work reports received later than the times herein prescribed may, at the discretion of the District, be deemed invalid and be rejected without payment.

9. Sheeting, Shoring, Bracing: The contractor shall include in his estimate for each on-call work the cost for planning, design, engineering fees, labor, materials, equipment, furnishing and constructing, and removal and disposal of such sheeting, shoring, and bracing, or equivalent method for the protection of life and limb in trenches and open excavation for all project sites in accordance with the requirements of OSHA and applicable safety orders, pursuant to the provisions Section 6707 of the California Labor Code.

10. Cleaning Up: Before acceptance of the work, the Contractor shall clean the streets and all grounds occupied in connection with the work of all rubbish, excess materials, temporary structures, and equipment, and all parts of the work shall be left in a neat and presentable condition. Full compensation for cleaning up as herein specified shall be considered as included in the prices paid for the various contract items of work and no additional allowance will be made therefor.

11. Use of Subcontractors: The majority of the work anticipated under this contract shall be self-performed.

12. Inspection: The Contactor shall bear all costs associated with re-inspection of any defective, rejected or unauthorized work, as determined by Engineer in Engineer’s sole discretion. Such costs of re-inspection, including any costs incurred by the District for additional staff time or fees for third-party consultant inspectors, will be irrevocably deducted from one or more progress payments hereunder.

13. No Bid Bonds are required for this project. The successful bidder will be required to furnish a performance bond, payment/labors and materials bond or material guaranty

bond for task orders involving expenditures in excess of twenty-five thousand dollars ($25,000).

14. Insurance as specified herein will be required to execute the contract.

15. Basis of Award: The Contractor shall bid on the Labor Markup only. The lowest Labor Markup bid will be awarded the bid. In the case of a tie, a coin shall be flipped to determine who the contract shall be awarded to.

16. Permits and Licenses: The Contractor shall obtain all permits and business licenses necessary for work on the Project. Coordinate with all agencies having justification as may be required by the Contract Documents, including but not limited to Marin County and City of San Rafael.

17. At the sole discretion of the District, on-call contractor may be required to perform emergency work for other District capital improvement projects with a separate budget.

BASIS OF AWARD:

For the ON-CALL CONTRACT FOR CONSTRUCTION PROJECTS (2026-2028), the Labor Mark-up is:

_____%

(In figures)

_____ Percent

(In words)

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_____
Name of Bidder

LAS GALLINAS VALLEY SANITARY DISTRICT
101 Lucas Valley Road, Suite 300
San Rafael, California 94903

CONTRACTOR LICENSE INFORMATION

The bidder acknowledges that the license(s) required for performance of the ON-CALL CONTRACT FOR CONSTRUCTION PROJECTS (2026-2028), JOB NO. 26420-01, is a **Class A** license.

The bidder holds the following California Contractors License(s):

1. License No. _____, Class _____, Expiration Date _____
2. License No. _____, Class _____, Expiration Date _____
3. License No. _____, Class _____, Expiration Date _____
4. License No. _____, Class _____, Expiration Date _____
5. License No. _____, Class _____, Expiration Date _____
6. License No. _____, Class _____, Expiration Date _____
7. License No. _____, Class _____, Expiration Date _____
8. License No. _____, Class _____, Expiration Date _____
9. License No. _____, Class _____, Expiration Date _____
10. License No. _____, Class _____, Expiration Date _____

Bidder's Taxpayer Identification No. _____

DIR Registration No. _____

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_____
Name of Bidder

LAS GALLINAS VALLEY SANITARY DISTRICT
101 Lucas Valley Road, Suite 300
San Rafael, California 94903

WORKERS COMPENSATION INSURANCE CERTIFICATION

By submitting its bid the bidder certifies as follows:

I am aware of the provisions of California Labor Code Section 3700 which require every employer to be insured against liability for workmen's compensation or to undertake self-insurance in accordance with the provisions of the Labor Code, and I will comply with such provisions before commencing performance of the work of this Contract.

Signed this _____ day of _____, 20____

_____
Bidder's Name

_____
Authorized Signature Date

_____
Title of Signatory

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_____
Name of Bidder

LAS GALLINAS VALLEY SANITARY DISTRICT
101 Lucas Valley Road, Suite 300
San Rafael, California 94903

NON-COLLUSION AFFIDAVIT

TO BE EXECUTED BY BIDDER
AND SUBMITTED WITH BID

STATE OF CALIFORNIA)
)
COUNTY OF _____)

_____, being first duly sworn, deposes and says that he or she is _____ of _____ _____, the party making the foregoing bid, that the bid is not made in the interest of, or on behalf of, any undisclosed person, partnership, company, association, organization, or corporation; that the bid is genuine and not collusive or sham; that the bidder has not directly or indirectly induced or solicited any other bidder to put in a false or sham bid, and has not directly or indirectly colluded, conspired, connived, or agreed with any bidder or anyone else to put in a sham bid, or that anyone shall refrain from bidding; that the bidder has not in any manner, directly or indirectly, sought by agreement, communication, or conference with anyone to fix the bid price of the bidder or any other bidder, or to fix any overhead, profit, or cost element of the bid price, or of that of any other bidder, or to secure any advantage against the public body awarding the contract of anyone interested in the proposed contract; that all statements contained in the bid are true; and, further, that the bidder has not, directly or indirectly, submitted his or her bid price or any breakdown thereof, or the contents thereof, or divulged information or data relative thereto, or paid, and will not pay, any fee to any corporation, partnership, company, association, organization, bid depository, or to any member or agent thereof to effectuate a collusive or sham bid.

_____
Signature of Bidder

(Acknowledgement)
Subscribed and sworn before me by _____, this _____

day of _____, _____.

(SEAL)

_____
Notary Public

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Name of Bidder

LAS GALLINAS VALLEY SANITARY DISTRICT
101 Lucas Valley Road, Suite 300
San Rafael, California 94903

DRUG-FREE WORKPLACE CERTIFICATION

By submitting its bid the bidder certifies compliance with Government Code Section 8355 in matters relating to providing a drug-free workplace. The above named contractor or applicant will:

1. Publish a statement notifying employees that unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited and specifying actions to be taken against employees for violations, as required by Government Code Section 8355(a).

2. Establish a Drug-Free Awareness Program as required by Government Code Section 8355(b), to inform employees about all of the following:

   (a) The dangers of drug abuse in the workplace,
   (b) The person's or organization's policy of maintaining a drug-free workplace,
   (c) Any available counseling, rehabilitation and employee assistance programs, and
   (d) Penalties that may be imposed upon employees for drug abuse violations.

3. Provide as required by Government Code Section 8355(c), that every employee who works on the proposed contract:

   (a) Will receive a copy of the company's drug-free policy statement, and
   (b) Will agree to abide by the terms of the company's statement as a condition of employment on the contract.

Signed this _____ day of _____, 20____

_____
Bidder's Name

_____
Authorized Signature Date

_____
Title of Signatory

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_____
Name of Bidder

LAS GALLINAS VALLEY SANITARY DISTRICT
101 Lucas Valley Road, Suite 300
San Rafael, California 94903

DEBARMENT CERTIFICATION

By submitting its bid the bidder certifies in accordance with California Public Contract Code Section 6109 that neither the bidder nor any subcontractor included on the list of proposed subcontractors submitted with the bid is ineligible to perform work on public works projects pursuant to California Labor Code Sections 1777.1 or 1777.7. In accordance with California Public Contract Code Section 6109, contractors and subcontractors who are ineligible to perform work on public works projects pursuant to California Labor Code Sections 1777.1 or 1777.7 may neither bid on, be awarded or perform as a subcontractor on public works projects.

Signed this _____ day of _____, 20____

_____
Bidder's Name

_____
Authorized Signature Date

_____
Title of Signatory

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Name of Bidder

LAS GALLINAS VALLEY SANITARY DISTRICT
101 Lucas Valley Road, Suite 300
San Rafael, California 94903

STATEMENT OF EXPERIENCE OF BIDDER

(To Accompany Bid)

The undersigned Bidder certifies that it is, at the time of bidding, and shall be, throughout the period of the contract, licensed under the provisions of Chapter 9, Division 3, of the Business and Professions Code of the State of California, to do the type of work contemplated in the Contract Documents. Bidder further certifies that it is skilled and regularly engaged in the general class and type of work called for in the Contract Documents.

The Bidder represents that it is competent, knowledgeable, and has special skills concerning the nature, extent, and inherent conditions concerning the work to be performed. Bidder further acknowledges that there are certain inherent conditions existent in the construction of the particular facilities which may create, during the construction program, unsafe conditions hazardous to persons and property. Bidder expressly acknowledges that it is aware of such risks and that it has the skill and experience to foresee and to adopt protective measures to adequately and safely perform the construction work with respect to such hazards.

A. ESSENTIAL REQUIREMENTS FOR QUALIFICATION

If the answer to any of questions 1 through 3 is “no”, or if the answer to any of questions 4 through 7 is “yes”, the Bidder will be deemed ineligible or not responsible for purposes of the Contract.

1. Bidder possesses a valid and current California Contractor’s license as required for the project for which it intends to submit a bid.
   □ Yes □ No

2. Bidder will comply with and provide all insurance as defined in Section 8.8, Insurance, of then General Conditions.
   □ Yes □ No

3. Bidder has current Workers’ Compensation insurance coverage as required by the Labor Code or is legally self-insured pursuant to Labor Code section 3700 et. seq.
   □ Yes □ No

4. Has your contractor’s license been revoked at any time in the last five (5) years?
   □ Yes □ No

5. Has a surety firm completed a contract on your behalf, or paid for completion because your firm was default terminated by the project owner within the last five (5) years?
   □ Yes □ No

6. At the time of submitting this qualification form, is your firm ineligible to bid on or be awarded a public works contract, or perform as a subcontractor on a public works contract, pursuant to either Labor Code section 1777.1 or Labor Code section 1777.7?
□ Yes □ No

7. At any time during the last five (5) years, has your firm, or any of its owners or officers been convicted of a crime involving the awarding of a contract of a government construction project, or the bidding or performance of a government contract?
□ Yes □ No

B. COMPANY EXPERIENCE

The Bidder has been engaged in the contracting business, under the present business name for _____ years and has experience in work of a nature similar to this project which extends over a period of _____ years (Bidder must show **at least five (5) years** of related experience).

The Bidder, as a Contractor, has never failed to satisfactorily complete a contract awarded to it, except as follows:

_____

_____

For the District to consider the Bidder properly experienced in work of similar nature to this project, the Bidder must list at least **$1,000,000** in construction volume on **no more than five (5)** projects completed **within the last five (5) years** of the following types of projects:

1. Miscellaneous wastewater collection system and treatment plant projects.

The Bidder can include project(s) currently under construction, but only the total amount paid by the District(s) as of three (3) months prior to the bid date on uncompleted project(s) can be included in the construction volume for purposes of this certification. The Bidder is allowed to list up to a maximum of five (5) projects of the types listed above, that combined, will add up to at least the cost in completed volume of work listed above. Any projects listed below which are not as defined above will not be considered by the District in meeting this experience requirement. For example, pump stations are not considered a treatment plant.

Bidder also certifies that Bidder self-performed at least forty percent (40%) of the Work on each of the projects listed below. The District considers this level of past self-performance demonstrates a benefit to a Project in terms of better control of cost, schedule and safety.

If the Bidder is a Joint Venture of two or more companies, each participant in the Joint Venture shall meet this prior project experience requirement and provide project information for each Joint Venture participant in the format below.

Name of Bidder

1. **Project Name:** _____

   Owner: _____

   Construction Cost: $ _____

   Construction Time: _____ **Calendar Days**

   Owner's Representative: _____

   Owner's Telephone No.: _____

   Date of Substantial Completion: _____

2. **Project Name:** _____

   Owner: _____

   Construction Cost: $ _____

   Construction Time: _____ **Calendar Days**

   Owner's Representative: _____

   Owner's Telephone No.: _____

   Date of Substantial Completion: _____

3. **Project Name:** _____

   Owner: _____

   Construction Cost: $ _____

   Construction Time: _____ **Calendar Days**

   Owner's Representative: _____

   Owner's Telephone No.: _____

   Date of Substantial Completion: _____

4. **Project Name:** _____

Owner: _____

Construction Cost: $ _____

Construction Time: _____ **Calendar Days**

Owner's Representative: _____

Owner's Telephone No.: _____

Date of Substantial Completion: _____

5. **Project Name:** _____

Owner: _____

Construction Cost: $ _____

Construction Time: _____ **Calendar Days**

Owner's Representative: _____

Owner's Telephone No.: _____

Date of Substantial Completion: _____

C. SAFETY QUALIFICATION CRITERIA

The following information will be used to determine if you meet the minimum safety requirements for this project. To qualify to bid and be awarded the project, the contractor shall have a safety record that meets or exceeds the one of the three following safety criteria:

1. If the Contractor's three-year average Workers' Compensation Experience Modification (EMR) is equal to or less than 100%, the contractor meets the minimum safety requirements for this project;
2. If the Contractor's three-year average EMR is greater than 100%, the Contractor's three-year average Recordable Incident Rate (RIR) must not be greater than 3.8 and three-year average Lost Time Incident Rate (LTIR) must not be greater than 1.7 to meet the minimum safety requirements for this project;
3. If the Contractor only meets either the three-year average RIR or LTIR value, the Contractor shall be required to hire at no additional cost to the District a mutually acceptable safety consultant who will prepare a project specific safety plan, conduct random weekly inspections of the Contractor's activities to ensure conformance with the safety plan and prepare and submit a weekly report to the District summarizing the results of each inspection. The contractor's shall adhere to the safety plan. The contractor's activities shall be adjusted immediately to address any issues resulting from the weekly safety inspection.

Contractors that cannot meet any of the three safety criteria above are not eligible to work for the District.

The Bidder shall list its Experience Modification Rate, Lost time Incident Rate, and Recordable Incident Rate for the last three complete years (available from your insurance carrier).

Year	EMR	RIR	LTIR
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
	_____AVG	_____AVG	_____AVG

To verify the above information, the District will contact the Bidder's Workers' Compensation Insurance carrier. The Bidder shall authorize its carrier to release this information. Failure to release this information will result in the bid being non-responsive and result in automatic disqualification of the bid.

Workers' Compensation Insurance Company:_____
Contact Person for Insurance Company:_____
Telephone Number:_____

Name of Bidder

Signed this _____ day of _____, 20 ____.

Name of Bidder

Contractor's License No.

Expiration Date

Signature of Bidder

Title of Signatory

D. FINANCIAL QUALIFICATIONS

(TO BE SUBMITTED WITH BID)

Provide evidence that the Bidder has sufficient financial resources to provide all work necessary to complete the project including construction, start-up, and warranty services.

A. Bidder must provide Section FINANCIAL QUALIFICATIONS to assist the District in determining the Bidder's financial condition.

B. (Not Used)

C. Bidder shall identify any claims filed in court or arbitration against Bidder in the past five years which concerned Bidder's work on a construction project. For each claim, if any, the Bidder shall provide the project name, date of the claim, name of the claimant, a brief description of the nature of the claim, the court in which the case was filed and a brief description of the status of the claim (pending or, if resolved, a brief description of the resolution). Are there any pending claims against your company that should you lose the claim(s), would adversely affect your financial position or your ability to meet your obligations if awarded the contract for this project? If so, please explain.

Claims Filed <u>Against</u> Bidder

Project Name:_____

Date of Claim:_____

Claimant Name:_____

Court:_____

Status of Claim:_____

Explanation:_____

_____

_____

Bidder shall also identify any claims filed in court or arbitration by Bidder against a project owner in the past five years concerning work on a project or payment for a contract. For each claim, if any, the Bidder shall provide the project name, date of the claim, a brief description of the nature of the claim, the court in which the case was filed and a brief description of the status of the claim (pending or, if resolved, a brief description of the resolution). Are there any pending claims filed by your company against a project owner that should you lose the claim(s), would adversely affect your financial position or your ability to meet your obligations if awarded the contract for this project? If so, please explain.

Name of Bidder

Claims Filed By Bidder

Project Name:

Date of Claim:

Claimant Name:

Court:

Status of Claim:

Explanation:

All financial information provided by Bidder that is marked “Confidential” or “Proprietary” shall be handled by the District in accordance with Public Records Act.

The undersigned hereby states that all representations regarding the Bidder’s Company Experience, and Safety Qualification Information are correct and true.

Signed this _____ day of _____, 20____

Bidder’s Name

Authorized Signature

Date

Title of Signatory

Name of Bidder

LAS GALLINAS VALLEY SANITARY DISTRICT
101 Lucas Valley Road, Suite 300
San Rafael, California 94903

FINANCIAL QUALIFICATIONS
BIDDER'S REFERENCES AND CREDIT REPORT

The Contractor shall submit with his/her bid a credit report, current within five (5) working days of the bid opening date for this project. For privacy purposes, the report may be submitted in an envelope marked "CONFIDENTIAL". To be considered a responsible bidder on this project, either the Contractor's credit report shall indicate a Dun & Bradstreet credit risk rating specified below **or** the Contractor's bank shall issue a financial statement on the following page. If the Contractor is a Dun & Bradstreet member, a copy of the current Dun & Bradstreet rating form showing a rating not less than the specified rating.

The specified Dun and Bradstreet credit risk rating for this project is BA2 or better.

If the Contractor is not a Dun & Bradstreet member, an acceptable credit report shall consist of the submittal of the District's Financial Statement Form (which follows) executed by the Contractor's bank. Failure to submit the required report with the bid for this project shall cause the bid to be rejected. Failure to possess the required financial strength and credit risk rating may cause the bid to be rejected. The District shall request confirmation of the Contractor's rating from Dun & Bradstreet Information Services. The sufficiency of the Bidder's financial qualifications will be determined solely by the District and its decision shall be final.

Reference is hereby made to the following bank or banks as to the financial responsibility of the Bidder:

Name of Bank	Address
_____	_____
	_____
_____	_____
	_____

Reference is hereby made to the following surety companies as to the financial responsibility and general reliability of the Bidder:

Name of Surety Company _____

_____

Signature of Bidder _____

Title _____

Company _____

Address _____

_____
Name of Bidder

FINANCIAL STATEMENT FORM

_____ has an established deposit

and borrowing relationship with_____ since
(Bank)

_____. Both business account and credit accommodations are maintained in
(Date)

a highly satisfactory manner. Based on my knowledge of _____ 's
(Contractor)

Average monthly business account balances and its credit worthiness, I believe its general financial strength and credit rating meet or exceed the Dun & Bradstreet alphanumeric rating of not less than **BA2**.

_____
Contractor Company Name

_____
Contractor Representative, Printed Name

_____ _____
Contractor Representative, Signature Date

_____
Bank Name

_____
Business Address

_____
City/State/Zip Code

_____
Bank Representative, Printed Name

_____ _____
Bank Representative, Signature Date

Following are two Dun & Bradstreet rating component sheets to assist in the evaluation of the responsible bidder's tangible net worth and credit worthiness.

D & B RATING KEY

Quickly assesses a company's size and composite credit appraisal, e.g., a company rated 3A3 has a worth of $1,000,000 - $9,999,000 based on an interim or fiscal balance sheet and a composite credit appraisal of 'Fair'.

Key to Employee Range

ER1	1,000 or more
ER2	500-999
ER3	100-499
ER4	50-99
ER5	20-49
ER6	10-19
ER7	5-9
ER8	1-4
ERN	Not Available

Rating Classification Based on Worth from Interim or Fiscal Balance Sheet				Composite Credit Appraisal HIGH	GOOD	FAIR	LIMITED
5A	$50,000,000	and	Over	1	2	3	4
4A	10,000,000	to	$49,999,999	1	2	3	4
3A	1,000,000	to	9,999,999	1	2	3	4
2A	750,000	to	999,999	1	2	3	4
1A	500,000	to	749,999	1	2	3	4
BA	300,000	to	499,999	1	2	3	4
BB	200,000	to	299,999	1	2	3	4
CB	125,000	to	199,999	1	2	3	4
CC	75,000	to	124,999	1	2	3	4
DC	50,000	to	74,999	1	2	3	4
DD	35,000	to	49,999	1	2	3	4
EE	20,000	to	34,999	1	2	3	4
FF	10,000	to	19,999	1	2	3	4
GG	5,000	to	9,999	1	2	3	4
HH	up	to	4,999	1	2	3	4

Rating Classification Based on Number of Employees				Composite Credit Appraisal GOOD	FAIR	LIMITED
1R	10 employees	and	Over	2	3	4
2R	1	to	9	2	3	4

WHAT THE RATINGS MEAN

5A to HH – ‘5A’ to ‘HH’ Ratings reflect company size based on worth or equity as computed by D&B. Company size can be an effective indicator of credit capacity. These Ratings are assigned to businesses that have supplied D&B with a current financial statement.

1R and 2R – the ‘1R’ and ‘2R’ Rating categories reflect company size based on the total number of employees for the business. They are assigned to business files that do not contain a current financial statement.

Composite Credit Appraisal: The Composite Credit Appraisal is a number, one through four, that makes up the second half of the company’s rating and reflects D&B’s overall assessment of that firm’s credit worthiness. The Composite Credit Appraisal is based on analysis by D&B of company payments, financial information, public records, business age and other important factors (where available).

A ‘2’ is the highest Composite Credit Appraisal a company not supplying D&B with current financial information can receive.

Rating: May also include the ‘- -’ symbol, or absence of a D&B Rating. This symbol should not be interpreted as indicating that credit should be denied. It means that the information available to D&B does not permit us to classify the company within our Rating key and that further inquiry should be made before reaching a credit decision. Some reasons for using the ‘- -’ symbol includes: deficit net worth, bankruptcy proceedings, lack of sufficient payment information or incomplete history indicator.

Date Applied: Allows you to review a company’s rating changes over time (the last 10 Rating changes or any changes since 1991 if less than 10 are provided).

ER (Employee Range): Certain lines of business do not lend themselves to classification under the D&B Rating system. Instead, we assign these types of businesses an Employee Range symbol based on the number of people employed. No other significance should be attached to this symbol. For example, a Rating of 'ER7' means there are between five and nine employees in the company. 'ERN' should not be interpreted negatively. It simply means we do not have information indicating how many people are employed at this firm.

DS (DUNS) Support: This indicates that the information available to D&B does not permit us to classify the company within our Rating key. When ordering these reports an investigation can be performed and results sent to you within four working days, at no additional charge.

INV (Investigation Being Conducted): When an ‘INV’ appears, it means an investigation is being conducted on this business to get the most current details.

_____
Name of Bidder

LAS GALLINAS VALLEY SANITARY DISTRICT
101 Lucas Valley Road, Suite 300
San Rafael, California 94903

BIDDER'S SIGNATURE PAGE

By my signature on this proposal I certify, under penalty of perjury under the laws of the State of California, that the information submitted with this proposal for the ON-CALL CONTRACT FOR CONSTRUCTION PROJECTS (2026-2028), JOB NO. 26420-01, which information includes, but is not limited to, the Bidder's Check List, Proposal Cover Page and Bid Schedule, Acknowledgement of Bid Addenda, Contractor License Information, Workers Compensation Insurance Certification, Non-Collusion Affidavit, Drug-Free Workplace Certification, Debarment Certification, Statement of Experience of Bidder, and Financial Qualifications are accurate, true and correct, and are submitted in accordance with the requirements of the bid package issued by the Las Gallinas Valley Sanitary District concerning the ON-CALL CONTRACT FOR CONSTRUCTION PROJECTS (2026-2028), JOB NO. 26420-01, and applicable law. By my signature on this proposal I further certify that I am legally authorized to bind the bidder in accordance with the requirements of the bid package.

Date: _____

_____
(Typed or printed name)

_____
(Signature)

_____
(Bidder)

Bidder Business Address (Street, City, State and Zip Code)

_____

_____

Bidder Business Phone No.: _____

Bidder Business Fax No.: _____

Bidder Email Address: _____

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APPENDIX A

SAFE WORK REQUIREMENTS

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Las Gallinas Valley Sanitary District

Contractor Health and Safety Program

45950 Hotchkiss St. • Fremont, CA 94539• (510) 651-8289 • du-all.com

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Contractor Acknowledgement

I have read and fully understand the requirements of this Contractor Health and Safety Program and agree to comply.

Name: _____

Signature: _____

Company:_____

Date: _____

1.0 TABLE OF CONTENTS

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APPENDIX A- Wastewater Treatment Plant Map

APPENDIX B- Definitions

2.0 REVISION HISTORY LOG

Date	Name	Section	Description
02/2024	Du-All Safety	All	New program draft
03/2024	Du-All Safety	7.0/Appendix	Updated specific site hazards and facility map.

3.0 POLICY

It is the policy of the Las Gallinas Valley Sanitary District to provide employers, District employees and worker representatives with a sound, flexible framework for addressing safety and health issues in diverse workplaces. This Contractor Safety Program shall be used as a proactive approach to managing contractor workplace safety and health. This policy requires commitment to safety and health and the cooperative atmosphere between management, contractors and the Las Gallinas Valley Sanitary District employees. The chart below outlines the core elements of the Las Gallinas Valley Sanitary District's Contractor Health and Safety Program.

Management Leadership	• Top management demonstrates its commitment to continuous improvement in safety and health, communicates that commitment to workers, and sets program expectations and responsibilities. • Managers at all levels make safety and health a core organizational value, establish safety and health goals and objectives, provide adequate resources and support for the program, and set a good example.
Worker Participation	• Workers and their representatives are involved in all aspects of the program—including setting goals, identifying and reporting hazards, investigating incidents, and tracking progress. • All workers, including contractors and temporary workers, understand their roles and responsibilities under the program and what they need to do to effectively carry them out. • Workers are encouraged and have means to communicate openly with management and to report safety and health concerns without fear of retaliation. • Any potential barriers or obstacles to worker participation in the program (for example, language, lack of information, or disincentives) are removed or addressed.
Hazard Identification and Assessment	• Procedures are put in place to continually identify workplace hazards and evaluate risks. • An initial assessment of existing hazards and control measures is followed by periodic inspections and reassessments to identify new hazards.
Hazard Prevention and Control	• Employers and workers cooperate to identify and select options for eliminating, preventing, or controlling workplace hazards. • A plan is developed that ensures controls are implemented, interim protection is provided, progress is tracked, and the effectiveness of controls is verified.
Education and Training	• All workers are trained to understand how the program works and how to carry out the responsibilities assigned to them under the program. • All workers are trained to recognize workplace hazards and to understand the control measures that have been implemented.
Program Evaluation and Improvement	• Control measures are periodically evaluated for effectiveness. • Processes are established to monitor program performance, verify program implementation, identify program deficiencies and opportunities for improvement, and take actions necessary to improve the program and overall safety and health performance.
Coordination and Communication on Multiemployer Worksites	• The host employer and all contract employers coordinate on work planning and scheduling to identify and resolve any conflicts that could impact safety or health. • Workers from both the host and contract employer are informed about the hazards present at the worksite and the hazards that work of the contract employer may create on site.

4.0 SCOPE

This program applies to all general contractors and sub-contractors and performing work for the Las Gallinas Valley Sanitary District. Before the start of any on-site work, the host employer and contractor or subcontractor shall establish their respective safety and health responsibilities and obligations, as well as procedures for coordinating these responsibilities and communicating safety and health information effectively.

Contractors or subcontractors working for the Las Gallinas Valley Sanitary District shall:

a. Comply with all applicable federal, state, and local safety orders in the performance of any work on District projects.

b. Comply with all safety regulations and procedures listed in this Contractor Health and Safety Program.

c. Take any additional precautions necessary to prevent injury or damage to persons, property, or interference with District operations.

Contractors and subcontractors are responsible for notifying employees, subcontractors, and invitees of these District Safe Work Policies. No work within District facilities or on District contract work sites shall begin prior to such notification. Contractors and subcontractors shall not allow a new employee or new subcontractor to begin work on District projects without having conducted a full and proper safety orientation.

Contractors and subcontractors performing work at the Wastewater Treatment Plant facility, lift stations or sewage conveyance systems shall schedule a safety orientation session for their site Superintendent and other contractor-designated personnel with the Authorized District Representative prior to commencing work. This orientation session shall include:

a. Emergency response and evacuation procedures.

b. An explanation of applicable District safety policies, and any unique and inherent hazards of District facilities. Site specific hazards are identified in Section 7 of this Contractor Health and Safety Program.

c. Traffic control planning and execution.

It is the responsibility of the contractor's or subcontractor’s Superintendent or designated personnel to orient and so inform all personnel under the contractor’s or subcontractor’s supervision. The District may, in its sole discretion, either temporarily or permanently remove a contractor’s or subcontractor’s employee from District work and/or terminate the contractor’s or subcontractor’s right to proceed for any violation of applicable Cal/OSHA General Industry and Construction Industry Safety Orders or these District Safe Work Policies.

5.0 FACILITY MANAGEMENT RESPONSIBILITIES

Las Gallinas Valley Sanitary District Facility Management is responsible for implementation of the Contractor Health and Safety Program. Facility Management responsibilities and duties include but are not limited to:

a. Communicate to temporary and contract employers and workers the commitment to provide the maximum level of safety and health protection.

b. Provide a copy of the Health and Safety Program to all contractors.

c. Inform contract employees of the Emergency Action Plan procedures to follow including building/facility evacuation route maps, assembly areas and the requirement to follow orders to evacuate.

d. Identify any safety and health qualifications and certifications needed by on-site workers and ensure they meet such requirements.

e. Provide sufficient resources to implement the Health and Safety program.

f. Periodically review the program for effectiveness and implement changes as needed.

g. Document these reviews in writing and maintain all records.

h. Before beginning on-site work (including, where appropriate, as part of requests for proposals, bids, and contracts), clarify each employer's responsibilities and obligations with respect to safety and health, such as:

    - Providing written copies of required safety programs and plans
    - Providing necessary training and education to workers
    - Selecting, providing, and maintaining any Personal Protective Equipment (PPE).
    - Providing any required medical surveillance or evaluations.
    - Recording and reporting any injuries or illnesses.
    - Outline the procedures and processes for coordinating safety and health responsibilities, as well as and the procedures for communicating between the host employer and contractor or subcontractor.

6.0 CONTRACTOR RESPONSIBILITIES

Contractors and subcontractors are responsible to follow the requirements and procedures outlined in this program. Responsibilities and duties include but are not limited to:

a. Provide Las Gallinas Valley Sanitary District with a copy of the employer's written Injury and Illness Prevention Program containing the key elements outlined in Cal CAL/OSHA Title 8, CCR Section 3203.

b. Provide Las Gallinas Valley Sanitary District with a copy of any other required written safety program or plan including but not limited to:

- Fall Protection
- Confined Space Entry
- Respiratory Protection
- Hot Work
- Hazard Communication
- Bloodborne Pathogen/Exposure Control
- Heat Illness Prevention
- LOTO
- Silica Exposure Control
- Traffic Control Plan
- Covid 19 Prevention

c. Before beginning on-site work, the contractor or subcontractor gives the host employer similar information about measures, programs, and procedures to be used to control hazards associated with their workers' work, and to ensure they comply with applicable Cal/OSHA standards.

d. Identify any safety and health qualifications and certifications needed by on-site workers and ensure they meet such requirements.

e. Work safely and follow Cal/OSHA safety standards and Las Gallinas Valley Sanitary District's operating policies, procedures, and safety programs.

f. Coordinate access to the facility with Las Gallinas Valley Sanitary District Facilities Management.

g. Perform periodic documented inspections to identify and correct hazards. Evidence of documented inspections shall be provided to Las Gallinas Valley Sanitary District upon request.

h. Report to Las Gallinas Valley Sanitary District Facility Management any hazard detected requiring further action to correct.

i. Report all occupational related injuries, illness or exposures to the Las Gallinas Valley Sanitary District Facility Management promptly.

j. Selecting, providing, and maintaining employee PPE.

k. Providing required medical assessments and surveillance.

l. Provide required employee safety training and education to affected and authorized employees and supervisors.

m. Provide accessible first aid supplies and if applicable, eye wash supplies spill clean-up supplies/equipment and portable fire extinguishers.

n. Ensure all tools and equipment in use is inspected periodically, complies with all applicable Cal/OSHA, ANSI, ASME, NIOSH or other regulating agency requirements.

o. Exchanging data on metrics each employer has tracked and using this data to evaluate the program's effectiveness at identifying and eliminating or controlling hazards.

7.0 SPECIFIC SITE HAZARDS

Contractors and subcontractors performing work at the Wastewater Treatment Plant facility, lift stations or sewage conveyance systems shall be informed if the site-specific hazards present. Site specific hazards include but are not limited to the following:

DISTRICT FACILITIES AND EQUIPMENT

Contractor's use of District instruments, tools, ladders, scaffolding or other equipment is not permitted except in cases of emergency as determined by a District supervisor or by permission from a senior Manager of the District.

Employee drinking water shall be supplied by the contractor or subcontractor. ***Do Not Drink Water from Hose Connections at any District Facility*.** Hose bib connections are located throughout the treatment plant. Most of these bibs supply treated wastewater and may or may not be posted with signs reading "Do Not Drink." In any case, ***never*** drink water from hose bibs or hoses.

Water lines throughout the treatment plant are color coded (when not stainless steel) and labeled as follows:

- Purple- Recycle Water Piping
- Blue- Domestic Water Piping
- Grey- Service Water Piping (Plant Effluent)

Hose connections may be used to wash down equipment. Never hose down electrical or heated equipment of any kind. If an employee has used a gray or purple water hose for wash down, he/she should, when done, immediately wash their hands in domestic water with soap and water.

NEVER make any connection to any water line without first verifying with the **Authorized District Representative** that contamination of the water lines will not occur.

ELECTRICAL SUPPLY SYSTEMS

The treatment plant's Electrical Supply System consists of one 1 MW and two 65kW Gas Microturbine Generators, one 500kW diesel oil engine driven standby generator and one 380 KW trailer mounted standby generator, and solar power. All electrical power generated in the plant and PG&E power (beyond their transformer) is 480-volt, 3-phase, 60 Hz electricity and is delivered to one 480-volt switchgear panel. This panel is interconnected by cables and protected by breakers, relays, and monitoring devices. Electricity is dispersed from the switchgear through breakers and cables to motor control centers (MCC's), to power panels, to transformers (voltage reducers), to lighting panels and to motor driven pumps and equipment. Lockable control stations are located at each piece of equipment. 480-volt, 208-volt and 120-volt electricity is used in the plant. Contact the duty operator prior to working on any piece of electrical equipment. Electricity is hazardous and can burn or kill people. All work on electrical systems shall be done in accordance with the State of California, CAL/OSHA, Article 33, Electrical Requirements for construction work, Low Voltage Electrical Safety Orders.

FERROUS CHLORIDE SYSTEMS

The Ferrous Chloride System consists of a positive displacement pump with feed rate adjustment. Shut-off valves are located before and after the pump. Before working on this system, close all valves and disconnect the pump from electricity. Ferrous Chloride is a dangerous chemical which will attack the skin, eyes and the mucous membranes of the mouth, throat, and lungs. Contact the plant duty operator prior to working on this system.

DIGESTER GAS SYSTEM

The Digester Gas System consists of one steel tank, associated piping, compressors, flare, etc. Sludge is bacterially reduced in the tanks creating principally methane (CH) and other combustible hazardous gases, including hydrogen sulfide (H2S). Hydrogen sulfide is toxic at very low concentrations. These gases are contained by the tank covers and piping which is located on overhead racks, in pipe trenches and buried throughout the plant. The gases are burned in two large turbines driving generators to make electricity for the plant. Heat from the two turbines is captured and piped to the digesters to heat the sludge, speeding up the digestion process. Digesters and the stored gases within them are hazardous. No smoking, cutting, or spark generating equipment is allowed on or within ten feet of any digester. Contact the duty operator prior to working on digesters.

HYPOCHLORITE SYSTEM

Hypochlorite, or concentrated chlorine bleach (12.5%), is used to disinfect, or kill bacteria and virus in the final effluent (water) discharged from the plant. Two tanks, each 7,000 gallons are used to store hypochlorite. Piping, valves, pumps, strainers (filters) and flow-measuring and control equipment make up the system. Hypochlorite

will attack clothing, skin, eyes and mucous membranes of the nose, mouth, throat and lungs. Contact the duty operator prior to working on the hypochlorite system.

SODIUM BISULFITE

Sodium bisulfite is used when neutralizing sodium hypochlorite. Two 4,350 gallon tanks are used to store sodium bisulfite. Piping, valves, pumps, strainers (filters) and flow-measuring and control equipment make up the system. Sodium bisulfite is an irritant to eyes, skin and mucous membranes. Inhalation of mist may cause irritation to respiratory tract. Contact the duty operator prior to working on the sodium bisulfite system.

GENERAL HAZARDS

Throughout District's treatment plant and facilities there are a number of extremely hazardous elements considered to be dangerous to humans and the environment. They include, but are not limited, to:

- Permit Required Confined Spaces
- Flammable gas and petroleum.
- H2S (hydrogen sulfite)
- Deep pools of liquid sewage which are rarely patrolled, and for which self-rescue is unlikely
- Automatic start equipment
- HBV (Hepatitis B Virus)
- Biting and stinging insects and animals

8.0 SPECIFIC SAFETY AND HEALTH PROGRAM REQUIREMENTS

CODE OF SAFE PRACTICES

All employees are expected to perform their jobs to the best of their ability as well as perform them in a safe manner. It is critical that employees do not circumvent safety features and employ unsafe work behaviors that can cause them or others to be at risk. CAL/OSHA requires that we furnish employees a place of employment "free from known and recognized hazards and unsanitary conditions that are causing or are likely to cause death or serious physical harm to employees."

Employee responsibilities for safety include the following:

a. Practice safe work habits and follow your supervisor's instructions, company safety policies and Cal/OSHA regulations.

b. Report unsafe conditions to your supervisor immediately.

c. Wear and maintain appropriate PPE and other safety equipment in sanitary and usable condition as required by your employer and in accordance with manufacturer's recommendations.

d. Maintain equipment in good condition with all safety features in place when in operation. Notify your supervisor if problems develop. Do not try to fix or jury rig equipment in the field.

e. Report all incidents, accidents and near misses to your supervisor immediately, whether or not an injury resulted.

f. Participate in safety by attending toolbox talks and other meetings as required by your supervisor. Your suggestions for improvement will assist in making our program more effective.

Emergency Action Plan (EAP)

Contractors and subcontractors shall be responsible for providing first aid and medical treatment for their employees and for compliance with the first aid requirements specified in Cal/OSHA Construction Safety Title 8 CCR Section 1512, Emergency Medical Services. Contractors shall be responsible for making prior arrangements for emergency medical care and for transportation of injured Contractor personnel.

Contractors and subcontractors shall plan and prepare for anticipated emergencies. In preparation for an on-site emergency, the contractor or subcontractor will institute the following procedures:

a. Establish a method of emergency notification at the beginning of each job so that any worker can raise the alarm, alerting their supervisor and appropriate management of an emergency.

b. Post and communicate this procedure to everyone on site. Las Gallinas Valley Sanitary District Facility Management will provide required information and resources to accomplish this.

c. Establish a method to notify all workers on site of the need to evacuate the building/facility. Fire alarm pull stations, air horns and two-way radios are common options.

d. Designate primary and secondary assembly areas for all workers to gather in the event of an emergency evacuation. This will allow each contractor to ensure that their employees have gotten out and are accounted for.

e. Post these three emergency telephone numbers. In most cases 911 will get response from all three services, but it may vary by job site location.

- Police
- Fire
- Medical Response Team

f. When cellular service is not available, install a hard wire phone. Post emergency phone numbers at the telephone's location, along with the address of the job site.

g. Designate a person to direct emergency crews from the gate to the specific emergency area.

Personal Protective Equipment (PPE)

The employer is required to instruct employees when to wear PPE. Supervisors are responsible for enforcing the use of PPE by all employees. PPE is considered the last line of defense providing limited protection to employees from injury or exposure. The contractor or subcontractor are required to perform a job hazard analysis to identify hazards and engineering and administrative hazard controls. If the hazard is not reduced to an acceptable level, PPE must be used. The following PPE may be required by the Las Gallinas Valley Sanitary District while performing work on Las Gallinas Valley Sanitary District facilities:

- Head, eye and face protection
- Body protection
- Hand protection
- Ergonomic protection
- Hearing protection
- Safety boots or shoes
- High visibility apparel
- Fall protection
- Respiratory protection

Fire Prevention

Fire prevention is of the highest priority. Contractors and subcontractors shall take appropriate measures to prevent fires at all times. Smoking is not allowed on any District facility at any time.

When work is being performed which generates sparks or open flames, the contractor or subcontractor will provide a fire watch, a person trained in the use of appropriate fire-fighting equipment, as needed, and whose only task is to observe and extinguish fires.

A District "Hot Work" permit must be filled out and turned into the Collection System / Safety Manager, or Plant Manager when the Safety Manager is not available, when work is completed. Hot Work Permits are valid for one day only.

Contractors and subcontractors shall ensure that appropriate fire extinguisher(s) are available at the specific work site for use in case of a fire. All Contractor's employees

shall be properly trained to use them. While conducting Hot Work, a minimum of a 2A-20-BC fire extinguisher shall be within 30' of the work location.

In the event of a fire, the contractor or subcontractor shall immediately notify the nearest District employee and if possible, call emergency (911) and give the location of the plant, which is 300 Smith Ranch Rd. San Rafael. A map of the wastewater plant is included in this policy (Attachment A).

The following fire prevention rules and requirements shall be followed:

a. Open flames or fires are prohibited at all times except under the Hot Work Permit System.
b. Any job or task that creates sparks, flames or heat sources enough to start a fire must be coordinated with the Las Gallinas Valley Sanitary District Facility Management and follow the Las Gallinas Valley Sanitary District Hot Work Program to determine if a Hot Work permit and fire watch is warranted.
c. Follow the Las Gallinas Valley Sanitary District fire prevention program throughout all phases of work to assure that effective firefighting equipment is immediately available and designed to effectively meet all anticipated fire hazards.
d. Store materials so they do not obstruct exits. Materials shall be stored with due regard to their fire characteristics; oxygen and acetylene cylinders shall never be stored at an exit or in emergency egress routes and must be stored at least 20' apart. Clearance of at least 36 inches shall be maintained for lights, heating units and electrical boxes.
e. When practical, objects to be welded, cut or heated should be moved to a designated safe location. If the object cannot be moved, positive means shall be taken to confine the heat, sparks and slag and protect adjacent combustible materials.
f. All extinguishers must be prominently placed, labeled for use and kept clear of obstructions at all times.
g. If a fire extinguisher is used or is found discharged, report it to the supervisor immediately so it can be serviced. A replacement extinguisher should be mounted immediately.
h. Fire extinguishers shall be inspected on a monthly basis. The date and inspector's initials on the tag document the inspection.
i. When the fire signal (alarm) sounds, exit the building/facility and gather at the designated assembly point. Do not try to take tools or personal belongings with you, exit immediately.
j. No smoking will be strictly enforced in all areas where "No Smoking" signs are posted,
k. Personal appliances including hot plates and space heaters are prohibited.

Flammable and Combustible Liquids

Flammable and combustible liquids shall be stored, transferred and used in accordance with the following requirements below:

a. Only approved containers will be used for the storage and handling of flammable and combustible liquids. Flammables, including gasoline, will be stored in approved safety cans. Containers shall be closed tightly at all times, except when transferring product.

b. Under no circumstances will gasoline or other high flash-point flammables be utilized as a cleaning solvent.

c. When not in use and at the end of the workday, all flammable liquid containers will be placed in the flammable liquid storage cabinets.

d. Flammable or combustible liquids that have leaked or spilled shall be cleaned up immediately and disposed of per the supervisor's instructions.

e. There shall be no smoking, open flame or use of flammable or combustible liquids in the area of storage. All employees must observe company restrictions on where and when smoking is acceptable.

f. Isolate all combustible and flammable materials and solvents from possible ignition sources such as open flames, heated surfaces, electric arcs and sparks, mechanical sparks, static electricity, and self-heating materials. In short, all energy sources (mechanical, electrical, chemical, thermal, radiation) should be considered as potential ignition sources.

Hazard Communication-GHS

Any contractor or subcontractor whose employees will be bringing onto Las Gallinas Valley Sanitary District Facility grounds any hazardous chemicals, products or materials shall have a written Hazard Communication Program in compliance with Title 8 CCR Section 5194. The contractor or subcontractor shall provide to the Las Gallinas Valley Sanitary District the following:

a. An inventory of hazardous products, chemicals and materials to be used.

b. Safety Data Sheets for items mentioned above.

c. A copy of the employer’s written Hazard Communication Program.

Any contractor or subcontractor whose employees will be bringing onto Las Gallinas Valley Sanitary District Facility grounds any hazardous chemicals, products or materials shall ensure the following:

a. All hazardous chemicals, products and materials are stored properly and are visibly and legibly labeled and in proper storage containers and cabinets.

b. All exposed employees are trained in the employer’s Hazard Communication Program

c. All employees have access to Safety Data Sheets.

d. Hazardous work areas are signed and barricaded with ample HAZCOM signage.

The Las Gallinas Valley Sanitary District Facility Management will provide the following to any contractor or subcontractor whose employees will be working in Las Gallinas Valley Sanitary District Facility grounds and are exposed to hazardous substances:

a. A list of the hazardous chemicals, products and materials that exist on the premises.

b. Access to Safety Data Sheets for items mentioned above.

c. Orientation to the location of facility eye wash and drenching shower facilities.

Electrical Safety

Electrical hazards shall be identified and controlled prior to conducting any work activities that expose employees to such hazards. The following safe work practices and policies shall be followed:

a. Treat all electrical circuits and equipment as energized until zero energy state has been verified.

b. Do not attempt to adjust or repair any electrical device unless it is part of your regular job assignment. Bring observed hazards and maintenance needs to the attention of your supervisor as soon as possible.

c. Follow all Las Gallinas Valley Sanitary District lockout/tagout procedures when repairs, maintenance or servicing activities are necessary. Be sure to keep machines and powered equipment in a “zero energy state” when performing service or setup.

d. Keep covers to all electrical fixtures and wiring in place at all times, unless temporarily removed for servicing by qualified persons. We consider only Electricians to be qualified persons for electrical exposures.

e. Only qualified persons may reset breakers in an open panel box or enter an electric room with open panels.

f. Do not attach flexible cords to a wall, ceiling, door or other building surface.

g. Extension cords must be a three-wire flexible cord. The grounding (third) prong must be present.

h. Do not use metal ladders when electrical hazards are present. Use a fiberglass ladder.

i. Stationary and portable electric power tools shall be double-insulated or electrically grounded via a third wire. A double-insulated tool will be identified on the tool’s label

j. Ground fault circuit interrupters (GFCI) will be used on all job sites. A breaker or outlet type GFCI will be used for all new work. If a portable GFCI is used, it will be plugged directly into an outlet that is part of the permanent wiring. Never use an extension cord between the permanent wiring and the portable GFCI

k. All temporary illumination systems shall be elevated above the working surface and all bulbs protected.

l. Never use electrical equipment in wet or damp areas unless the equipment is approved for use in these areas and suitable PPE is utilized,

Working at Elevated Locations and Fall Protection

Fall hazards are common in the construction industry and a leading cause of injuries and fatalities. The hierarchy of controls indicates that fall hazard elimination is the highest priority. Subsequently, passive fall protective systems (guardrails) shall be used to prevent falls. If this is not feasible, a fall restrain system shall be utilized. Fall arrest systems may be used at elevated work locations greater than 18' above the lower level. If fall arrest systems are in use, the contractor or subcontractor shall submit to the District representative a written comprehensive rescue plan.

It is the policy of the Las Gallinas Valley Sanitary District to maintain 100% fall protection at all times. The following basic fall protection requirements shall be followed and enforced:

a. Fall protection is required when work is conducted from elevating work platforms including scissor lifts, boom lifts, bucket trucks and any time employees are elevated in a personnel cage by crane or forklift.

b. A competent person shall calculate total fall distance and ensure that the fall protection system used will adequately protect the user.

c. Do not remove guardrails or perimeter cables without authorization from your supervisor. Once guardrails or cables are removed, fall protection is required.

d. Fall arrest or restraint equipment is required whenever you could fall more than 4 feet (General Industry) or 7.5' (Construction Industry) and there are no guard rails or other forms of fall prevention in place. Training on how to inspect, wear and attach fall arrest equipment must be completed before you are expected to use it,

e. Discuss proper anchorage points to be used with your supervisor or qualified person before starting the task.

f. Employees working below elevating work platforms, scaffolds or similar shall be protected from being struck by falling object by using toe-boards, tool lanyards, canopies, nets or other suitable protective measures.

g. Proper housekeeping practices shall be implemented at all times to prevent slip, trip and fall hazards.

h. Uncontrolled fall hazards shall be reported immediately and access to the fall hazard controlled until the hazard is eliminated.

Confined Space Entry

No employee shall enter the areas defined below until a competent person evaluates the area and authorizes entry. All confined space entry work shall be coordinated with the Las Gallinas Valley Sanitary District Facility Management in advance of the entry. All confined space entry work shall comply the Las Gallinas Valley Sanitary District written Confined Space Entry Procedures.

A confined space is:

1. Must be **large enough and configured** such that an employee can bodily enter and perform work.
2. A space that is **not designed for continuous** employee occupancy.
3. Has **limited** or **restricted** means for entry or exit.
4. Any space that may expose employees to the risk of death, incapacitation or impairment of ability to self-rescue is considered to be a Permit Required Confined Space. This includes potential **hazardous atmospheres** such as:
    a. Oxygen concentration below 19.5% or above 23.5%
    b. Flammable gas
    c. A toxic atmosphere or substance
    d. Airborne combustible dust limiting visibility to 5’ or less.
    e. Any other known and recognized serious health or safety concern.

General Confined Space Entry Procedure

Confined spaces of all types exist throughout the District and throughout the Wastewater Treatment Plant and range from open trenches and manholes, to tanks, clarifiers and digesters. Contractors are required to meet Cal/OSHA safety standards for PERMIT REQUIRED CONFINED SPACE ENTRY OPERATIONS, Title 8 Article 108 Sections 5156-5158. and to provide a safe working environment for their employees.

All Contractors directing or working in confined spaces are required to notify the Authorized District Representative prior to starting the entry operation. The District shall provide to the contractor of subcontractor a copy of the confined space assessment for the space to be entered and meet and confer with the contractor and subcontractor to discuss the known and recognized hazards of the space and entry procedures.

Contractors are responsible for all operations, testing, equipment calibration, ventilation, and entry per the Cal/OSHA standards. Contractors are responsible for all confined

space permits and all appropriate entry procedures. A copy of completed confined space permits are to be turned in to the District's safety manager upon termination.

The following confined space entry procedures and rules shall be followed:

a. An authorized person shall examine, test and evaluate the space before entry to determine that the appropriate precautions and PPE are available and will be used.
b. There shall be no unauthorized entry into a confined space by any person.
c. Top entries greater than 5' above the next level shall require fall protection.
d. Once a top portal cover has been removed, the opening shall be guarded by a temporary guardrail system or other effective means to prevent employees from falling into the space.
e. A rescue plan shall be developed and known by everyone involved in the entry.
f. An attendant knowledgeable about the rescue plan shall be stationed outside the space. They will have a means of alerting first responders should the rescue plan be initiated.
g. The attendant will **never** enter the confined space.
h. Atmospheric testing and continuous monitoring shall be used to verify that conditions do not deteriorate beyond the capabilities of the control methods being used (ventilation or respiratory protection).
i. Combustible compressed gas cylinders are not allowed in the confined space. Remove the torch from the space during breaks and at the end of the day. Changing torch heads or tips shall only be done outside the confined space.
j. A 2-A:20-BC portable dry chemical fire extinguisher shall be available whenever hot work is being done in a confined space. Carbon monoxide extinguishers are not allowed.
k. Retrieval equipment shall be worn by all entrants so that rescue can be initiated without anyone having to enter the space.
l. The Las Gallinas Valley Sanitary District Confined Space Program Administrator will coordinate entry to all confined spaces and notification of San Rafael Fire Department prior to and after the entry is completed.
m. The permit shall be closed out at the end of the workday by physically observing the space, ensuring that work is complete, and all employees have left the space.
n. If work is necessary for more than one day, a new confined space permit must be completed and submitted.

Respiratory Protection Program

Administration

Responsibility and authority for administration of a respiratory protection program is assigned to the employers Respiratory Protection Program Administrator. It is his/her responsibility to assure full compliance with all sections of this program and be in compliance with all requirements outlined in Cal/OSHA Title 8 CCR 5144 and related appendices.

Hazard Assessment

Proper assessment of the specific respiratory hazard is the first important step to determine what level of protection is required. Identification of the airborne contaminant in question, its physical state and concentration is required to determine proper protective measures.

Hazard Control

Hazard elimination shall be the primary goal. Wet methods, integrated dust collection systems, substitution, local and general exhaust systems and employee rotation are possible controls. When employees are anticipated to be exposed to harmful airborne contaminants beyond Permissible Exposure Limits (PEL), an appropriate NIOSH-approved respirator with proper filtration media shall be selected and used. The contractor or subcontractor is required to perform a job hazard analysis to identify hazards and engineering and administrative hazard controls. If the airborne contaminant hazard is not reduced to an acceptable level, respiratory protection must be used.

Respirator Selection

NIOSH-approved respirators will be selected based on the hazard assessment performed. Employees are prohibited from bringing their own respirators onto the worksite. Voluntary use of N95 filtering face-piece respirators (dust masks) for protection against dusts/mists, even though exposures are found to be below applicable exposure limits, is allowed as long as the employee has a medical evaluation, is trained and has read Appendix D of Title 8CCR 5144 and is aware of its limitations.

Medical Evaluation and Surveillance

Employees required to wear a respirator, including NIOSH approved N-95 filtering face piece, must be cleared by a Professional Licensed Health Care Provider (PLHCP) before being issued the equipment. Additional periodic evaluations, if deemed necessary due to respirator type, frequency of use or employee health, will be determined by physician's recommendation. Any employee that uses a respirator 30 or more days in a year for protection from airborne contaminants shall be enrolled in a Medical Surveillance Program.

Respirator Fit Testing

A qualitative or quantitative fit test will be performed annually on employees who wear negative-pressure respirators. This testing process will also allow the employee to become accustomed to the respirator prior to entering a hazardous atmosphere. Employees that are required to wear a NIOSH approved N-95 filtering face piece are

required to be fit tested. Fit testing shall be in compliance with Title 8CCR Section 5144 Appendix A.

Respirator Training

Each employee that uses a respirator will receive annual training that covers the following information:

a. The hazardous nature of the air contaminant.
b. Other hazard controls in effect and the reasons respirators are needed.
c. The function, limitations, and capabilities of the respirator.
d. The requirement that respirator users shall have no facial hair that interrupts the seal of the facepiece to the face or interrupts the function of valves.
e. For filter type respirators, how to determine when the filter element needs to be changed.
f. The potential consequences of overexposure caused by improper respirator use.
g. How to check proper respirator fit before entering the area of exposure and why it is important to eliminate factors that can interfere with proper fit (beards, long sideburns, etc.).
h. How and why to perform positive and negative pressure tests each time the respirator is donned.
i. Procedures for proper cleaning, maintenance, and storage of the respirator.

Respirator Maintenance

Any employee using a respirator will clean and disinfect it at the end of each day it is used. During cleaning, inspect all parts for fit and deterioration. If deficiencies are found, the parts will be replaced, or a replacement respirator will be obtained. Respirators will be assigned to individual employees as required and will not be shared with anyone else.

Respirator Storage

The employee shall store the respirator in a clean, plastic, re-sealable bag or container after it has been cleaned and disinfected. The respirator will be stored in a temperate location 40 to 90 degrees F and not subjected to freezing conditions. It must be protected from physical damage or creasing from being struck or crushed by other tools or equipment. Chemical filters shall be stored separately from the face piece.

Respiratory Protection Program Review and Revision

This program will be evaluated annually for effectiveness annually. Incident records, including first aid logs, fit test records and training records will be reviewed to identify any illness or injury associated with respiratory protection. A representative sample of

supervisors and employees who have used respirators will be surveyed for their view on the program.

Trenching, Excavation and Shoring

All trenching, excavation and shoring activities shall be conducted under the direct supervision of a competent person and in accordance with Cal/OSHA Title 8 CCR Sections 1539-1541.1 and California Government Code 4216. The following requirements shall be followed:

a. Prior to penetrating the surface, all utilities shall be marked by a qualified utility marking entity and in compliance with California Government Code 4216. Except in an emergency, digging shall not commence until utilities have been marked.

b. All digging activities shall be conducted in a manner that reduces the chance of damaging subsurface utilities. The competent person shall identify the exact location of subsurface utilities throughout the dig and enforce the use of non-powered digging methods until the exact location has been established.

c. Contractors and subcontractors shall report all damage to subsurface utilities, regardless if the excavator discovered or caused the damage.

d. Prior to digging, a competent person shall conduct an inspection of the proposed dig site. This inspection shall include a survey of the surrounding area and a soil analysis consisting of at least one visual inspection and one manual analysis of soil samples.

e. All trenches or excavations 5’ or greater in depth shall be protected from cave in by shoring, shielding, benching, or sloping. Trenches or excavations less than 5’ in depth shall be protected from cave-in using the methods mentioned above if there are signs of collapse.

f. Trenches or excavations 20’ or greater in depth shall have any protective system utilized designed under the supervision of a Professional Engineer registered in the State of California.

g. The assigned competent person shall determine the protective system to be used when employees enter the excavation or trench.

h. The excavator shall maintain on site any and all tabulated data used to make decisions for protecting employees entering the excavation or trench.

i. The competent person shall conduct an inspection daily, prior to employees entering the excavation or trench to identify and remove hazards. Subsequent inspections shall be conducted after any hazard increasing occurrence such as a rainstorm.

j. Access and egress shall be provided and positioned in trenches or excavations 4’ or greater in depth and such that an employee shall not have to travel greater than 25’ to access the route of access and egress. When ladders are used, the top of the ladder shall extend a minimum of 3’ above the landing.

k. Spoils piles and all other materials, equipment or supplies shall be staged no less than 2’ from any trench or excavation wall.

l. The competent person shall determine if there is potential for the development of a hazardous atmosphere in all trenches or excavations 4’ or greater in depth.

m. The competent person assigned to the excavation is responsible for all equipment required to dig safely and respond to anticipated emergencies.

Heat Illness Prevention

In California, employers must take steps to protect outdoor workers from heat illness with water, rest, shade and training. Heat illness prevention training is required for all outdoor workers and a written prevention plan must be available at all outdoor worksites. When outdoor temperatures are anticipated to reach the action level of 80 degrees Fahrenheit, contractors and subcontractors with exposed employees shall ensure the following:

a. All exposed employees have access to and have been trained on the employers Heat Illness Prevention Program.

b. Access to adequate supplies of suitably cool potable water.

c. Access to shade. Shade is considered to be complete blockage of the sun.

d. Cool down rest breaks are granted when requested by affected employees.

Temporary Traffic Controls

Contractors and subcontractors conducting temporary traffic controls shall do so in compliance with Cal/OSHA Title 8 CCR 1598-1599 and the California Manual on Uniform Traffic Control Devices (MUTCD). In some cases, an approved written Traffic Control Plan may be required. The following requirements shall be followed:

a. All temporary traffic controls shall be planned by a qualified person and in advance to expedite gaining control of traffic and ensuring the required number and type of traffic control devices are present.

b. All temporary traffic control devices shall be of the approved type as stipulated by the California Department of Transportation. All devices shall be of the Appropriate dimensions and retro-reflectivity based on the speed of the work zone and hours of darkness.

c. All temporary traffic control zones shall include the following component zones:

- Advanced Warning Zone
- Transition Zone
- Activity Area with Buffer Zone
- Termination Zone

d. All temporary traffic control devices shall be maintained in usable condition and inspected periodically including but not limited to, signs, warnings, strobe lights, barricades, cones, and delineators.

e. Personnel acting as flaggers shall be equipped with a STOP/SLOW paddle and dawn at minimum Class 3 retro-reflective high visibility apparel.

f. A minimum of two flaggers shall be utilized for any lane closure. In this case, a lead flagger shall be identified.

g. Any accident or emergency in the temporary traffic control zone shall be reported to 911 and District Management immediately.

General Safety Expectations

The following general safety performance expectations shall apply to all contractor and subcontractors work groups:

a. Perform only those jobs to which you have been assigned and properly instructed. If you have any doubts or questions, ask your supervisor.

b. Report damaged equipment immediately for replacement or repair.

c. First aid will be administered only by trained authorized first responders.

d. If any part of your body comes in contact with an acid or caustic substance, rush to the nearest water available and flush the affected part. Secure medical aid immediately.

e. Keep your mind on your work at all times. Horseplay is not permitted on the job.

f. Do not distract the attention of fellow workers. Do not engage in any act that would endanger another employee.

g. Watch where you are walking. Do not run or take short cuts. Use only designated access routes to work areas.

h. The use of illegal drugs or alcohol or being under the influence of the same on the project is cause for termination. Inform your supervisor if you are taking strong prescription drugs that warn against driving or using machinery.

i. The employer provides sanitation facilities for your use. Damaging or defacing these facilities is forbidden.

j. Serious injury can result when compressed air is used for personal cleaning or cooling. Use compressed air for equipment operation only.

k. Keep all fire protection equipment and exits clear of obstructions to allow ready access.

l. Riding on any material handling equipment not equipped with a seat and seat belt for each rider is prohibited and will be grounds for disciplinary action. Do not enter

any barricaded area unless you are authorized to do so and are wearing the proper required PPE.

m. Never throw anything "overboard." Someone passing below may be seriously injured.

Hand and Portable Powered Tools

Each contractor or subcontractor shall be responsible for the safe condition of tools and equipment used by employees, including tools and equipment which may be furnished by employees. All tools shall be restricted to the use for which they are intended. Unsafe hand tools shall not be used. The following rules apply to the use of hand and portable powered tools:

a. Keep tools clean, free of grease and dirt. Clean tools work better and last longer. Poorly maintained tools are less efficient and may cause damage or injuries.

b. Red tag defective tools for repair.

c. Do not use power tools and equipment until you have been properly instructed in the safe work methods and are given authority to use them.

d. Do read and understand the manufacturer’s recommendations for safe use of the tool including the recommendations for PPE.

Safe Use of Portable Ladders

The following specific requirements apply to portable ladder safety. Use of portable ladders shall comply with Cal/OSHA Title 8 CCR Section 3276:

a. Training in the safe use of portable ladders is required for all contractor and subcontractor employees that use them.

b. For any overhead work near electrical sources, use an appropriate ladder for the task (fiberglass). Metal ladders must not be used when working on or near electrical circuits.

c. Maintain a minimum of 10’ clearance distance from any energized systems or equipment.

d. Straight or extension ladders should have non-skid feet or be cleated. Secure ladders by lashing at the top and blocking at the bottom if there is chance of slippage.

e. Set up straight or extension ladders at 75.5 degrees using the label on the side rail or measuring one foot out for every four feet of length (the 4:1 rule). Only use ladders on a firm, level, and stable base, not on lumber, masonry block or other insecure materials. Never set up a ladder on a scaffold or other elevated work platform.

f. Never climb on the two highest rungs of a step, straight or extension ladder, or sit or stand on the top cap of an “A” frame ladder.

g. When straight ladders are used to access a work platform, the top must extend at least 3 feet above the landing, deck or roof area.

h. Remove defective ladders from service and tag "*Dangerous, Do Not Use*.",

i. Inspect the ladder for defects (missing cleats, cracked rungs, broken spreaders, etc.) before use. Do not use a defective ladder. Position ladders away from doors unless door is blocked, locked or guarded to prevent it from striking the ladder.

j. Stepladders will be used only when fully open with both spreader bars locked and on firm and level surface. Do not use a stepladder in the closed or semi-closed position or as a lean-to ladder.

k. Climb the front steps (not rear braces) of a stepladder. Always face the ladder when climbing or working.

l. Maintain three points of contact at all times when ascending or descending the ladder.

m. Never walk an "A" frame ladder or jump a straight ladder.

Housekeeping

During the course of construction, alteration, or repairs, form and scrap lumber with protruding nails and all other debris shall be kept reasonably cleared from work areas, passageways, and stairs in and around buildings or other structures. The following housekeeping rules shall apply at all times:

a. Dispose of oily rags, old paint cans and other containers that have held flammable liquids in the appropriate labeled receptacle.

b. Throw debris and scrap in properly labeled waste containers. Do not place combustibles or flammables in open containers.

c. Identify slip, trip and fall hazards in the work area and control them.

d. Practice good housekeeping around your work area. Everyone must look after their own area and report other areas in need of attention to the supervisor promptly.

9.0 SAFETY COMMUNICATIONS

At minimum Cal/OSHA requires all employers to provide a system of communication regarding safety issues, concerns and identified hazards. Employees that bring these concerns to their employer shall do so without fear of reprisal. In a multiemployer work environment, the host employer and the contractor or subcontractor commit to a program that will provide the same level of safety and health protection to temporary and contract workers as to permanent workers. Before the start of any on-site work, the host employer and contractor or subcontractor, establish their respective safety and health responsibilities and obligations, as well as procedures for coordinating these

responsibilities and communicating safety and health information, employee training and education.

The key elements of safety communication include:

- Management leadership
- Worker participation
- Hazard identification and assessment
- Hazard prevention and control
- Employee training and education
- Program evaluation

10.0 INJURY AND ILLNESS REPORTING

It is the policy of the Las Gallinas Valley Sanitary District that all employees report any and all occupational related injury or illness to their supervisors immediately. Supervisors shall document and investigate all reported injuries and illnesses and provide guidance to the employee in seeking medical attention beyond basic first aid.

Employers shall report immediately by telephone to the nearest District Office of the Division of Occupational Safety and Health any serious injury or illness, or death, of an employee occurring in a place of employment or in connection with any employment. If a contractor is injured, the contractor's employer must notify Cal/OSHA.

Immediately means as soon as practically possible, but not longer than 8 hours after a manager or higher knows or with diligent inquiry would have known of the death or serious injury or illness.

A serious injury is defined as: any injury or illness occurring in a place of employment or in connection with any employment that requires inpatient hospitalization for other than medical observation or diagnostic testing, or in which an employee suffers an amputation, the loss of an eye, or any serious degree of permanent disfigurement, but does not include any injury or illness or death caused by an accident on a public street or highway, unless the accident occurred in a construction zone.

11.0 PERIODIC INSPECTIONS

Periodic inspections are designed to ensure that the Code of Safe Practices is being followed and to help identify new or previously unrecognized hazards. Inspection reports will be provided to the Las Gallinas Valley Sanitary District Facility Management for the inspected area(s). All safety violations, hazards and safety concerns observed will be documented. Use of an inspection check list aids in recordkeeping.

Supervisors will conduct a morning safety walk through of their employee primary area(s) and equipment to ensure it is in safe condition. Each morning, supervisors will review with their work crews any hazards associated with work to be performed that day.

Supervisors will document periodic safety inspections of their area and may include items on the below list. In some cases, the inspection shall be conducted by a competent person or qualified person. The following inspections shall be performed:

Required Inspection Frequency	
Fire Extinguisher	*Monthly*
Eye Wash Station	*Monthly*
Emergency Shower	*Monthly*
Forklift/Scissor Lift/Aerial Lift	*Pre-shift or pre use*
Hazardous Waste Containers	*Weekly*
Respirator	*Pre use*
Fall Protection Equipment	*Semi-annually & pre use*
Confined Space Equipment	*Per Equipment Manufacturer*
Portable Ladders	*Pre use*
Scaffold System	*Daily Prior to Employee Access*
Trench/Excavation	*Daily Prior to Employee Access. After Any Hazard Increasing Occurrence*
Work Areas	*Daily before work begins*

Managers and Supervisors shall conduct inspections as often as possible and at intervals sufficient to ensure safe and sanitary working conditions are maintained at all times.

12.0 HAZARD IDENTIFICATION AND CORRECTION

Hazard identification and assessment means that all contractors or subcontractors shall:

a. Collect and review information about the hazards likely to be present in the workplace.

b. Periodically inspect the workplace to identify new or recurring hazards.

c. Investigate injuries, illnesses, incidents, and close calls/near misses to identify the underlying hazards.

d. Identify and address any trends in injuries, illnesses, and hazard reports. Consider hazards associated with emergency or non-routine situations.

e. Determine the severity and likelihood of incidents that could result from each hazard identified and use this information to prioritize corrective actions.

Note: employers have an ongoing obligation to control serious, recognized hazards.

13.0 RECORDKEEPING REQUIREMENTS

Record	Minimum Retention (yrs)	Code citation
Workplace inspections	1	8CCR3203(b)(1)

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Training records (See below for exceptions)	1	8CCR3203(b)(2)
Safety committee meeting records	1	8CCR3203(c)(2)
Accident investigation records	None	
OSHA300, 300A, 301	5	8CCR14300.33
Employee medical records	Termination of employment + 30 yrs	8CCR3204(d)(1)(A)
Employee exposure records (Includes all workplace monitoring data, MSDSs, Chemical inventories)	"At least" 30 yrs	8CCR3204(d)(1)(B)
Bloodborne Pathogens Training	3	8CCR5193(h)(2)(B)
Sharps injury log	5	8CCR5193(h)(3)
Hazwaste manifest receipts	3	HSC25160.2(b)(3)&(4)
Asbestos training records	Termination of employment + 1 year	8CCR1529(n)(4)
Notification of identification, location and quantity of asbestos	Duration of ownership of building; must be transferred to new owner	8CCR1529(n)(6)
Noise exposure measurements	2	8CCR5100(d)(1)
Audiometric test records	Duration of employment	8CCR5100(d)(2)
Maintenance of fire extinguishing systems	5	19CCR904.1(b)
MSDS & SDS, and employee hazardous material exposure records	30 years	8,CCR 5194
Reports of testing on mechanical ventilation systems such as fume hoods	5 yrs	8 CCR 5143
Reports of testing on HVAC systems for building ventilation	5 yrs	8 CCR 5142(b)(2)

14.0 PERIODIC PROGRAM EVALUATION

Program evaluation and improvement means that the Las Gallinas Valley Sanitary District Facility Management will:

a. Establish, report, and track metrics that indicate whether the program is effective.

b. Evaluate the overall program, initially and periodically, to identify deficiencies and opportunities for improvement.

c. Monitor progress and performance of contractors or subcontractors.

d. Verify that the program is implemented and is operating.

e. Correct program deficiencies and identify opportunities to improve.

Appendix A- Wastewater Treatment Plant Map

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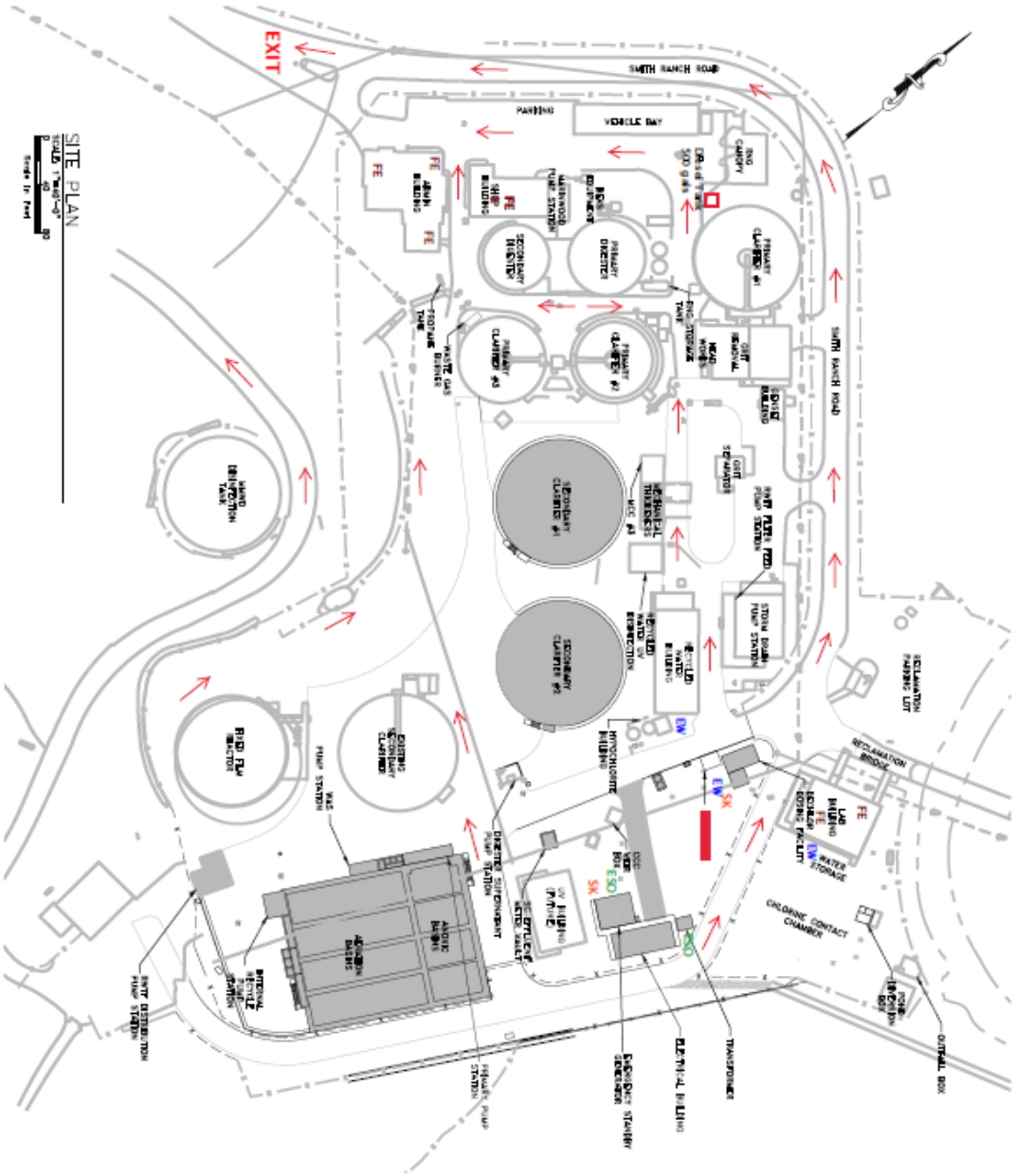

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Appendix B- Definitions

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Appendix B- Definitions

PARTS AND MATERIALS:

All products, materials, devices, systems, or installations installed by Contractor shall have been approved, listed, labeled, or certified as conforming to applicable governmental or other nationally recognized standards, or applicable scientific principles. The listing, labeling, or certification of conformity shall be based upon an evaluation performed by a person, firm, or entity with appropriate registered engineering competence; or by a person, firm, or entity, independent of the manufacturer or supplier of the product, with demonstrated competence in the field of such evaluation.

CONTRACTOR:

Designates “Contractor”, “Contractors”, “Sub-Contractors”, “Suppliers”, and all employees of each.

AUTHORIZED DISTRICT REPRESENTATIVE:

The District’s Authorized Representatives shall be the employee(s) designated by the District to be responsible for communicating with the Contractor or subcontractor.

COMPETENT PERSON:

One who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.

QUALIFIED PERSON:

Qualified Person, Attendant or Operator. A person designated by the employer who by reason of training, experience or instruction has demonstrated the ability to safely perform all assigned duties and, when required, is properly licensed in accordance with federal, state, or local laws and regulations.

DISTRICT JURISDICTION:

For the purposes of these regulations, “District” Shall mean the Las Gallinas Valley Sanitary District.

TREATMENT PLANT AND FACILITIES:

For the purposes of these regulations, “Treatment Plant & Facilities” shall include the District's Wastewater Treatment Plant, lift stations and sewage conveyance systems located within the boundaries of the District.

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APPENDIX B

INSURANCE FORMS

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APPENDIX B:
Common Insurance Industry Forms

- ACORD Certificates of Insurance:
  - Standard form
  - Annotated form
- Primary and Non-Contributory Endorsement
- ISO standard endorsements
  - CG 20 10, CG 20 33, CG 20 37, CG 20 38, CG 20 26, CG 20 39, CG 20 40, CG 20 42, CG 20 43, CG 35 08, CG 40 47 and CG 40 48
- ISO endorsement: State or Political Subdivisions
- ISO endorsement: Waiver of Subrogation
- Four ISO endorsements used to amend policy limits:
  - Amendment of Limits of Insurance (Designated Project or Premises)
  - Amendment of Limits of Insurance
  - Amendment – Aggregate Limits of Insurance (Per Project)
  - Amendment – Aggregate Limits of Insurance (Per Location)
- Four State Compensation Insurance Fund Forms:
  - Certificate of Workers' Compensation Insurance
  - Additional Insured Employer
  - Waiver of Subrogation
  - Certificate Holders' Notice (Cancellation Notice)
- ISO policy for General Liability on an "Occurrence" basis
- Form MCS-90 – Endorsement for Motor Carrier Policies of Insurance for Public Liability
- Railroad Protective Liability Coverage Form
- Performance Bond
- Payment Bond Public Works

Certificate of Liability Insurance (Standard Form)

ACORD

CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YYYY)

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must have ADDITIONAL INSURED provisions or be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

PRODUCER	CONTACT NAME:	
	PHONE (A/C, No, Ext):	FAX (A/C, No):
	E-MAIL ADDRESS:	
	INSURER(S) AFFORDING COVERAGE	NAIC #
INSURED	INSURER A :	
	INSURER B :	
	INSURER C :	
	INSURER D :	
	INSURER E :	
	INSURER F :	

COVERAGES **CERTIFICATE NUMBER:** **REVISION NUMBER:**

THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

INSR LTR	TYPE OF INSURANCE	ADDL INSD	SUBR WVD	POLICY NUMBER	POLICY EFF (MM/DD/YYYY)	POLICY EXP (MM/DD/YYYY)	LIMITS	
	COMMERCIAL GENERAL LIABILITY						EACH OCCURRENCE	$
	☐ CLAIMS-MADE ☐ OCCUR						DAMAGE TO RENTED PREMISES (Ea occurrence)	$
							MED EXP (Any one person)	$
							PERSONAL & ADV INJURY	$
	GEN'L AGGREGATE LIMIT APPLIES PER:						GENERAL AGGREGATE	$
	☐ POLICY ☐ PRO-JECT ☐ LOC						PRODUCTS - COMP/OP AGG	$
	OTHER:							$
	AUTOMOBILE LIABILITY						COMBINED SINGLE LIMIT (Ea accident)	$
	☐ ANY AUTO						BODILY INJURY (Per person)	$
	☐ OWNED AUTOS ONLY ☐ SCHEDULED AUTOS						BODILY INJURY (Per accident)	$
	☐ HIRED AUTOS ONLY ☐ NON-OWNED AUTOS ONLY						PROPERTY DAMAGE (Per accident)	$
								$
	☐ UMBRELLA LIAB ☐ OCCUR						EACH OCCURRENCE	$
	☐ EXCESS LIAB ☐ CLAIMS-MADE						AGGREGATE	$
	☐ DED ☐ RETENTION $							$
	WORKERS COMPENSATION AND EMPLOYERS' LIABILITY Y / N						☐ PER STATUTE ☐ OTH-ER	
	ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? ☐ N/A						E.L. EACH ACCIDENT	$
	(Mandatory in NH) If yes, describe under DESCRIPTION OF OPERATIONS below						E.L. DISEASE - EA EMPLOYEE	$
							E.L. DISEASE - POLICY LIMIT	$

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (ACORD 101, Additional Remarks Schedule, may be attached if more space is required)

CERTIFICATE HOLDER

CANCELLATION

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.

AUTHORIZED REPRESENTATIVE

SAMPLE

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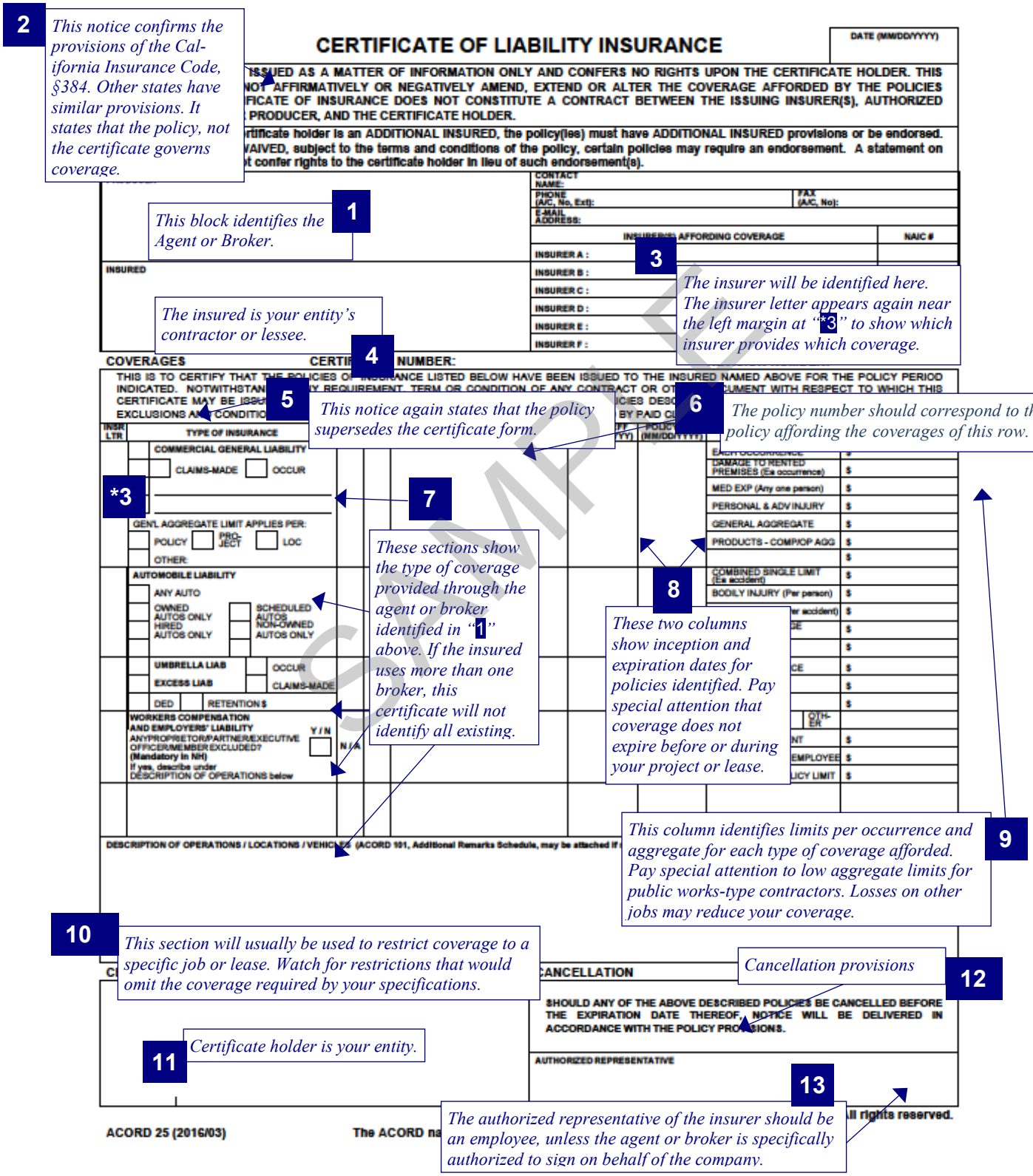
Certificate of Liability Insurance (Annotated Form)



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COMMERCIAL GENERAL LIABILITY
CG 20 01 04 13

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

PRIMARY AND NONCONTRIBUTORY – OTHER INSURANCE CONDITION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

The following is added to the **Other Insurance** Condition and supersedes any provision to the contrary:

Primary And Noncontributory Insurance

This insurance is primary to and will not seek contribution from any other insurance available to an additional insured under your policy provided that:

(1) The additional insured is a Named Insured under such other insurance; and

(2) You have agreed in writing in a contract or agreement that this insurance would be primary and would not seek contribution from any other insurance available to the additional insured.

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POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 20 10 04 13

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – SCHEDULED PERSON OR ORGANIZATION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name Of Additional Insured Person(s) Or Organization(s)	Location(s) Of Covered Operations
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.	

A. **Section II – Who Is An Insured** is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:

1. Your acts or omissions; or
2. The acts or omissions of those acting on your behalf;

in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.

However:

1. The insurance afforded to such additional insured only applies to the extent permitted by law; and
2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

B. With respect to the insurance afforded to these additional insureds, the following additional exclusions apply:

This insurance does not apply to "bodily injury" or "property damage" occurring after:

1. All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the location of the covered operations has been completed; or
2. That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

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C. With respect to the insurance afforded to these additional insureds, the following is added to **Section III – Limits Of Insurance:**

If coverage provided to the additional insured is required by a contract or agreement, the most we will pay on behalf of the additional insured is the amount of insurance:

1. Required by the contract or agreement; or

2. Available under the applicable Limits of Insurance shown in the Declarations;

whichever is less.

This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations.

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POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 20 10 07 04

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – SCHEDULED PERSON OR ORGANIZATION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name Of Additional Insured Person(s) Or Organization(s):	Location(s) Of Covered Operations
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.	

A. **Section II – Who Is An Insured** is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:

1. Your acts or omissions; or
2. The acts or omissions of those acting on your behalf;

in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.

B. With respect to the insurance afforded to these additional insureds, the following additional exclusions apply:

This insurance does not apply to "bodily injury" or "property damage" occurring after:

1. All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the location of the covered operations has been completed; or
2. That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

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POLICY NUMBER: COMMERCIAL GENERAL LIABILITY

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – (FORM B)

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART.

SCHEDULE

Name of Person or Organization:

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of "your work" for that insured by or for you.

SAMPLE

Modifications to ISO form CG 20 10 11 85:

1. The Insured scheduled above includes the Insured's officers, officials, employees and volunteers.
2. This insurance shall be primary as respects the Insured shown in the schedule above, or if excess, shall stand in an unbroken chain of coverage excess of the Named Insured's scheduled underlying primary coverage. In either event, any other insurance maintained by the Insured scheduled above shall be in excess of this insurance and shall not be called upon to contribute with it.
3. The insurance afforded by this policy shall not be canceled except after thirty days prior written notice by certified mail return receipt requested has been given to the Entity.

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COMMERCIAL GENERAL LIABILITY
CG 20 33 04 13

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – AUTOMATIC STATUS WHEN REQUIRED IN CONSTRUCTION AGREEMENT WITH YOU

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

A. **Section II – Who Is An Insured** is amended to include as an additional insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:

1. Your acts or omissions; or
2. The acts or omissions of those acting on your behalf;

in the performance of your ongoing operations for the additional insured.

However, the insurance afforded to such additional insured:

1. Only applies to the extent permitted by law; and
2. Will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

A person's or organization's status as an additional insured under this endorsement ends when your operations for that additional insured are completed.

B. With respect to the insurance afforded to these additional insureds, the following additional exclusions apply:

This insurance does not apply to:

1. "Bodily injury", "property damage" or "personal and advertising injury" arising out of the rendering of, or the failure to render, any professional architectural, engineering or surveying services, including:
   a. The preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or
   b. Supervisory, inspection, architectural or engineering activities.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage", or the offense which caused the "personal and advertising injury", involved the rendering of or the failure to render any professional architectural, engineering or surveying services.

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2. "Bodily injury" or "property damage" occurring after:
   a. All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the location of the covered operations has been completed; or
   b. That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

C. With respect to the insurance afforded to these additional insureds, the following is added to **Section III – Limits Of Insurance:**

The most we will pay on behalf of the additional insured is the amount of insurance:

1. Required by the contract or agreement you have entered into with the additional insured; or
2. Available under the applicable Limits of Insurance shown in the Declarations;

whichever is less.

This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations.

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POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 20 37 07 04

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – COMPLETED OPERATIONS

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name Of Additional Insured Person(s) Or Organization(s):	Location And Description Of Completed Operations
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.	

Section II – Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury" or "property damage" caused, in whole or in part, by "your work" at the location designated and described in the schedule of this endorsement performed for that additional insured and included in the "products-completed operations hazard".

SAMPLE

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POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 20 37 04 13

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – COMPLETED OPERATIONS

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

SCHEDULE

Name Of Additional Insured Person(s) Or Organization(s)	Location And Description Of Completed Operations
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.	

SAMPLE

A. **Section II – Who Is An Insured** is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury" or "property damage" caused, in whole or in part, by "your work" at the location designated and described in the Schedule of this endorsement performed for that additional insured and included in the "products-completed operations hazard".

However:

1. The insurance afforded to such additional insured only applies to the extent permitted by law; and
2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

B. With respect to the insurance afforded to these additional insureds, the following is added to **Section III – Limits Of Insurance:**

If coverage provided to the additional insured is required by a contract or agreement, the most we will pay on behalf of the additional insured is the amount of insurance:

1. Required by the contract or agreement; or
2. Available under the applicable Limits of Insurance shown in the Declarations;

whichever is less.

This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations.

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COMMERCIAL GENERAL LIABILITY
CG 20 38 04 13

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – AUTOMATIC STATUS FOR OTHER PARTIES WHEN REQUIRED IN WRITTEN CONSTRUCTION AGREEMENT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

A. Section II – Who Is An Insured is amended to include as an additional insured:

1. Any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy; and

2. Any other person or organization you are required to add as an additional insured under the contract or agreement described in Paragraph **1.** above.

Such person(s) or organization(s) is an additional insured only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:

a. Your acts or omissions; or

b. The acts or omissions of those acting on your behalf;

in the performance of your ongoing operations for the additional insured.

However, the insurance afforded to such additional insured described above:

a. Only applies to the extent permitted by law; and

b. Will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

A person's or organization's status as an additional insured under this endorsement ends when your operations for the person or organization described in Paragraph **1.** above are completed.

B. With respect to the insurance afforded to these additional insureds, the following additional exclusions apply:

This insurance does not apply to:

1. "Bodily injury", "property damage" or "personal and advertising injury" arising out of the rendering of, or the failure to render, any professional architectural, engineering or surveying services, including:

a. The preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or

b. Supervisory, inspection, architectural or engineering activities.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage", or the offense which caused the "personal and advertising injury", involved the rendering of, or the failure to render, any professional architectural, engineering or surveying services.

2. "Bodily injury" or "property damage" occurring after:

a. All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the location of the covered operations has been completed; or

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b. That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

C. With respect to the insurance afforded to these additional insureds, the following is added to **Section III – Limits Of Insurance:**

The most we will pay on behalf of the additional insured is the amount of insurance:

1. Required by the contract or agreement described in Paragraph **A.1.;** or

2. Available under the applicable Limits of Insurance shown in the Declarations;

whichever is less.

This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations.

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POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 20 42 12 19

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED - AUTOMATIC STATUS FOR DESIGNATED OPERATIONS

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Description Of Operation(s):
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

A. **Section II - Who Is An Insured** is amended to include as an additional insured any person(s) or organization(s) for whom you have agreed to add under any contract or agreement, but only with respect to liability for:

1. "Bodily injury" or "property damage" not included in the "products-completed operations hazard"; or
2. "Personal and advertising injury";

caused by, in whole or in part, your acts or omissions or the acts or omissions of those acting on your behalf in the performance of your operations as described in the Schedule above.

B. The insurance afforded to such additional insured described in Paragraph **A.** above:

1. Only applies to the extent permitted by law; and
2. Will not be broader than any coverage requirement in a contract or agreement to provide for such additional insured.

C. With respect to insurance afforded to these additional insureds, the following additional exclusion applies:

This insurance does not apply to "bodily injury", "property damage" or "personal and advertising injury" due to rendering of or failure to render any professional service. This includes but is not limited to:

1. Legal, accounting or advertising services;
2. Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings or specifications;
3. Inspection, supervision, quality control, architectural or engineering activities done by or for you on a project on which you serve as construction manager;
4. Engineering services, including related supervisory or inspection services;
5. Medical, surgical, dental, X-ray or nursing services treatment, advice or instruction;
6. Any health or therapeutic service treatment, advice or instruction;
7. Any service, treatment, advice or instruction for the purpose of appearance or skin enhancement, hair removal or replacement, or personal grooming or therapy;
8. Any service, treatment, advice or instruction relating to physical fitness, including service, treatment, advice or instruction in connection with diet, cardiovascular fitness, bodybuilding or physical training programs;
9. Optometry or optical or hearing aid services including the prescribing, preparation, fitting, demonstration or distribution of ophthalmic lenses and similar products or hearing aid devices;
10. Body piercing services;
11. Services in the practice of pharmacy;
12. Law enforcement or firefighting services; and
13. Handling, embalming, disposal, burial, cremation or disinterment of dead bodies.

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This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage", or the offense which caused the "personal and advertising injury", involved the rendering of or failure to render any professional service.

D. With respect to the insurance afforded to these additional insureds, the following is added to **Section III - Limits Of Insurance:**

The most we will pay on behalf of the additional insured is the amount of insurance:

1. Required by the contract or agreement described in Paragraph **A.** above; or
2. Available under the applicable limits of insurance;

whichever is less.

This endorsement shall not increase the applicable limits of insurance.

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COMMERCIAL GENERAL LIABILITY
CG 20 43 12 19

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – AUTOMATIC STATUS WHEN REQUIRED IN WRITTEN CONTRACT OR AGREEMENT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

A. Section II – Who Is An Insured is amended to include as an additional insured any person(s) or organization(s) for whom you have agreed in writing in a contract or agreement that such person(s) or organization(s) be added as an additional insured on your policy. Such person(s) or organization(s) is an additional insured only with respect to liability for:

1. "Bodily injury" or "property damage" not included in the "products-completed operations hazard"; or
2. "Personal and advertising injury";

caused by, in whole or in part, your acts or omissions or the acts or omissions of those acting on your behalf in the performance of your operations.

B. The insurance afforded to such additional insured described in Paragraph **A.** of this endorsement:

1. Only applies to the extent permitted by law; and
2. Will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

C. With respect to insurance afforded to these additional insureds, the following additional exclusion applies:

This insurance does not apply to "bodily injury", "property damage" or "personal and advertising injury" due to rendering of or failure to render any professional service. This includes but is not limited to:

1. Legal, accounting or advertising services;
2. Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings or specifications;
3. Inspection, supervision, quality control, architectural or engineering activities done by or for you on a project on which you serve as construction manager;
4. Engineering services, including related supervisory or inspection services;
5. Medical, surgical, dental, X-ray or nursing services treatment, advice or instruction;
6. Any health or therapeutic service treatment, advice or instruction;
7. Any service, treatment, advice or instruction for the purpose of appearance or skin enhancement, hair removal or replacement, or personal grooming or therapy;
8. Any service, treatment, advice or instruction relating to physical fitness, including service, treatment, advice or instruction in connection with diet, cardiovascular fitness, bodybuilding or physical training programs;
9. Optometry or optical or hearing aid services including the prescribing, preparation, fitting, demonstration or distribution of ophthalmic lenses and similar products or hearing aid devices;
10. Body piercing services;
11. Services in the practice of pharmacy;
12. Law enforcement or firefighting services; and
13. Handling, embalming, disposal, burial, cremation or disinterment of dead bodies.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage", or the offense which caused the "personal and advertising injury", involved the rendering of or failure to render any professional service.

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D. With respect to the insurance afforded to these additional insureds, the following is added to **Section III . Limits Of Insurance:**

The most we will pay on behalf of the additional insured is the amount of insurance:

1. Required by the contract or agreement described in Paragraph **A.**; or

2. Available under the applicable limits of insurance;

whichever is less.

This endorsement shall not increase the applicable limits of insurance.

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COMMERCIAL GENERAL LIABILITY
CG 35 08 01 26

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION – GENERATIVE ARTIFICIAL INTELLIGENCE

This endorsement modifies insurance provided under the following:

PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

A. The following is added to Paragraph 2. **Exclusions** of **Section I – Coverages – Bodily Injury And Property Damage Liability:**

This insurance does not apply to:

"Bodily injury" or "property damage" arising out of "generative artificial intelligence".

B. For the purposes of this endorsement, the following definition is added to the **Definitions** section:

"Generative artificial intelligence" means a machine-based learning system or model that is trained on data with the ability to create content or responses, including but not limited to text, images, audio, video or code.

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ISO | Commercial General Liability Forms | 01/01/26

COMMERCIAL GENERAL LIABILITY
CG 40 47 01 26

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION - GENERATIVE ARTIFICIAL INTELLIGENCE

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

A. The following exclusion is added to Paragraph 2. Exclusions of Section I - Coverage A - Bodily Injury And Property Damage Liability:

This insurance does not apply to:

"Bodily injury" or "property damage" arising out of "generative artificial intelligence".

B. The following exclusion is added to Paragraph 2. Exclusions of Section I - Coverage B - Personal And Advertising Injury Liability:

This insurance does not apply to:

"Personal and advertising injury" arising out of "generative artificial intelligence".

C. The following definition is added to the Definitions section:

"Generative artificial intelligence" means a machine-based learning system or model that is trained on data with the ability to create content or responses, including but not limited to text, images, audio, video or code.

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COMMERCIAL GENERAL LIABILITY
CG 40 48 01 26

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION – GENERATIVE ARTIFICIAL INTELLIGENCE (COVERAGE B ONLY)

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

A. The following exclusion is added to Paragraph 2. **Exclusions** of **Section I – Coverage B – Personal And Advertising Injury Liability**:

This insurance does not apply to:

"Personal and advertising injury" arising out of "generative artificial intelligence".

B. The following definition is added to the **Definitions** section:

"Generative artificial intelligence" means a machine-based learning system or model that is trained on data with the ability to create content or responses, including but not limited to text, images, audio, video or code.

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POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 20 12 04 13

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – STATE OR GOVERNMENTAL AGENCY OR SUBDIVISION OR POLITICAL SUBDIVISION – PERMITS OR AUTHORIZATIONS

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

State Or Governmental Agency Or Subdivision Or Political Subdivision:
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

A. **Section II – Who Is An Insured** is amended to include as an additional insured any state or governmental agency or subdivision or political subdivision shown in the Schedule, subject to the following provisions:

1. This insurance applies only with respect to operations performed by you or on your behalf for which the state or governmental agency or subdivision or political subdivision has issued a permit or authorization.

   However:

   a. The insurance afforded to such additional insured only applies to the extent permitted by law; and

   b. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

2. This insurance does not apply to:

   a. "Bodily injury", "property damage" or "personal and advertising injury" arising out of operations performed for the federal government, state or municipality; or

   b. "Bodily injury" or "property damage" included within the "products-completed operations hazard".

B. With respect to the insurance afforded to these additional insureds, the following is added to **Section III – Limits Of Insurance:**

If coverage provided to the additional insured is required by a contract or agreement, the most we will pay on behalf of the additional insured is the amount of insurance:

1. Required by the contract or agreement; or
2. Available under the applicable Limits of Insurance shown in the Declarations;

whichever is less.

This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations.

SAMPLE

Reproduction of Insurance Services Office, Inc. Form

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 20 13 04 13

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – STATE OR GOVERNMENTAL AGENCY OR SUBDIVISION OR POLITICAL SUBDIVISION – PERMITS OR AUTHORIZATIONS RELATING TO PREMISES

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

State Or Governmental Agency Or Subdivision Or Political Subdivision:
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

A. **Section II – Who Is An Insured** is amended to include as an additional insured any state or governmental agency or subdivision or political subdivision shown in the Schedule, subject to the following additional provision:

This insurance applies only with respect to the following hazards for which the state or governmental agency or subdivision or political subdivision has issued a permit or authorization in connection with premises you own, rent or control and to which this insurance applies:

1. The existence, maintenance, repair, construction, erection or removal of advertising signs, awnings, canopies, cellar entrances, coal holes, driveways, manholes, marquees, hoist away openings, sidewalk vaults, street banners or decorations and similar exposures; or
2. The construction, erection or removal of elevators; or
3. The ownership, maintenance or use of any elevators covered by this insurance.

However:

1. The insurance afforded to such additional insured only applies to the extent permitted by law; and
2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

B. With respect to the insurance afforded to these additional insureds, the following is added to **Section III – Limits Of Insurance:**

If coverage provided to the additional insured is required by a contract or agreement, the most we will pay on behalf of the additional insured is the amount of insurance:

1. Required by the contract or agreement; or
2. Available under the applicable Limits of Insurance shown in the Declarations;

whichever is less.

This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations.

SAMPLE

Reproduction of Insurance Services Office, Inc. Form

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 20 26 12 19

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – DESIGNATED PERSON OR ORGANIZATION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name Of Additional Insured Person(s) Or Organization(s):
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

A. Section II – Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by your acts or omissions or the acts or omissions of those acting on your behalf:

1. In the performance of your ongoing operations; or
2. In connection with your premises owned by or rented to you.

However:

1. The insurance afforded to such additional insured only applies to the extent permitted by law; and
2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

B. With respect to the insurance afforded to these additional insureds, the following is added to **Section III – Limits Of Insurance:**

If coverage provided to the additional insured is required by a contract or agreement, the most we will pay on behalf of the additional insured is the amount of insurance:

1. Required by the contract or agreement; or
2. Available under the applicable limits of insurance;

whichever is less.

This endorsement shall not increase the applicable limits of insurance.

SAMPLE

Reproduction of Insurance Services Office, Inc. Form

COMMERCIAL GENERAL LIABILITY
CG 20 39 12 19

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – AUTOMATIC STATUS WHEN REQUIRED IN WRITTEN CONSTRUCTION AGREEMENT WITH YOU (COMPLETED OPERATIONS)

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

A. Section **II** – Who Is An Insured is amended to include as an additional insured any person or organization for whom you have performed operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability for "bodily injury" or "property damage" caused, in whole or in part, by "your work" performed for that additional insured and included in the "products-completed operations hazard".

However, the insurance afforded to such additional insured:

1. Only applies to the extent permitted by law; and
2. Will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

B. With respect to the insurance afforded to these additional insureds, the following additional exclusion applies:

This insurance does not apply to:

"Bodily injury" or "property damage" arising out of the rendering of, or the failure to render, any professional architectural, engineering or surveying services, including:

1. The preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or
2. Supervisory, inspection, architectural or engineering activities.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage" involved the rendering of or the failure to render any professional architectural, engineering or surveying services.

C. With respect to the insurance afforded to these additional insureds, the following is added to **Section III – Limits Of Insurance:**

The most we will pay on behalf of the additional insured is the amount of insurance:

1. Required by the contract or agreement you have entered into with the additional insured; or
2. Available under the applicable limits of insurance;

whichever is less.

This endorsement shall not increase the applicable limits of insurance.

SAMPLE

Reproduction of Insurance Services Office, Inc. Form

COMMERCIAL GENERAL LIABILITY
CG 20 40 12 19

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – AUTOMATIC STATUS FOR OTHER PARTIES WHEN REQUIRED IN WRITTEN CONSTRUCTION AGREEMENT (COMPLETED OPERATIONS)

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

A. Section II – Who Is An Insured is amended to include as an additional insured:

1. Any person or organization for whom you have performed operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy; and
2. Any other person or organization you are required to add as an additional insured under the contract or agreement described in Paragraph **1.** above.

Such person(s) or organization(s) is an additional insured only with respect to liability for "bodily injury" or "property damage" caused, in whole or in part, by "your work" performed for the additional insured described in Paragraph **1.** or **2.** above and included in the "products-completed operations hazard".

However, the insurance afforded to such additional insured described above:

a. Only applies to the extent permitted by law; and
b. Will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

B. With respect to the insurance afforded to these additional insureds, the following additional exclusion applies:

This insurance does not apply to:

"Bodily injury" or "property damage" arising out of the rendering of, or the failure to render, any professional architectural, engineering or surveying services, including:

1. The preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or
2. Supervisory, inspection, architectural or engineering activities.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage" involved the rendering of, or the failure to render, any professional architectural, engineering or surveying services.

SAMPLE

Reproduction of Insurance Services Office, Inc. Form

C. With respect to the insurance afforded to these additional insureds, the following is added to **Section III – Limits Of Insurance:**

The most we will pay on behalf of the additional insured is the amount of insurance:

1. Required by the contract or agreement described in Paragraph **A.1.**; or

2. Available under the applicable limits of insurance;

whichever is less.

This endorsement shall not increase the applicable limits of insurance.

SAMPLE

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Reproduction of Insurance Services Office, Inc. Form

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 24 04 05 09

WAIVER OF TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

SCHEDULE

Name Of Person Or Organization:
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

The following is added to Paragraph **8. Transfer Of Rights Of Recovery Against Others To Us** of **Section IV – Conditions:**

We waive any right of recovery we may have against the person or organization shown in the Schedule above because of payments we make for injury or damage arising out of your ongoing operations or "your work" done under a contract with that person or organization and included in the "products-completed operations hazard". This waiver applies only to the person or organization shown in the Schedule above.

SAMPLE

Reproduction of Insurance Services Office, Inc. Form

COMMERCIAL GENERAL LIABILITY
CG 24 53 12 19

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

WAIVER OF TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US (WAIVER OF SUBROGATION) – AUTOMATIC

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
ELECTRONIC DATA LIABILITY COVERAGE PART
LIQUOR LIABILITY COVERAGE PART
POLLUTION LIABILITY COVERAGE PART DESIGNATED SITES
POLLUTION LIABILITY LIMITED COVERAGE PART DESIGNATED SITES
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART
RAILROAD PROTECTIVE LIABILITY COVERAGE PART
UNDERGROUND STORAGE TANK POLICY DESIGNATED TANKS

The following is added to Paragraph **8. Transfer Of Rights Of Recovery Against Others To Us** of **Section IV – Conditions:**

We waive any right of recovery against any person or organization, because of any payment we make under this Coverage Part, to whom the insured has waived its right of recovery in a written contract or agreement. Such waiver by us applies only to the extent that the insured has waived its right of recovery against such person or organization prior to loss.

SAMPLE

Reproduction of Insurance Services Office, Inc. Form

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 25 01 07 98

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

AMENDMENT OF LIMITS OF INSURANCE (DESIGNATED PROJECT OR PREMISES)

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

	Limits Of Insurance	
General Aggregate Limit	$	
Products-Completed Operations Aggregate Limit	$	
Personal & Advertising Injury Limit	$	
Each Occurrence Limit	$	
Damage To Premises Rented To You Limit	$	Any One Premises
Medical Expense Limit	$	Any One Person
Designation Of Project Or Premises:		

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

The limits of insurance shown in the Declarations are replaced by the limits designated in the Schedule with respect to the project or premises entered above. These limits are inclusive of and are not in addition to the limits being replaced.

SAMPLE

Reproduction of Insurance Services Office, Inc. Form

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 25 02 07 98

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

AMENDMENT OF LIMITS OF INSURANCE

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

	Limits Of Insurance	
General Aggregate Limit	$ _____	
Products-Completed Operations Aggregate Limit	$ _____	
Personal & Advertising Injury Limit	$ _____	
Each Occurrence Limit	$ _____	
Damage To Premises Rented To You Limit	$ _____	Any One Premises
Medical Expense Limit	$ _____	Any One Person

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

The limits of insurance shown in the Declarations are replaced by the limits designated in the Schedule or in the Declarations as subject to this endorsement with respect to which an entry is made.

SAMPLE

Reproduction of Insurance Services Office, Inc. Form

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 25 03 05 09

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

DESIGNATED CONSTRUCTION PROJECT(S) GENERAL AGGREGATE LIMIT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Designated Construction Project(s):
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

A. For all sums which the insured becomes legally obligated to pay as damages caused by "occurrences" under Section **I** – Coverage **A**, and for all medical expenses caused by accidents under Section **I** – Coverage **C**, which can be attributed only to ongoing operations at a single designated construction project shown in the Schedule above:

1. A separate Designated Construction Project General Aggregate Limit applies to each designated construction project, and that limit is equal to the amount of the General Aggregate Limit shown in the Declarations.
2. The Designated Construction Project General Aggregate Limit is the most we will pay for the sum of all damages under Coverage **A**, except damages because of "bodily injury" or "property damage" included in the "products-completed operations hazard", and for medical expenses under Coverage **C** regardless of the number of:
   a. Insureds;
   b. Claims made or "suits" brought; or
   c. Persons or organizations making claims or bringing "suits".
3. Any payments made under Coverage **A** for damages or under Coverage **C** for medical expenses shall reduce the Designated Construction Project General Aggregate Limit for that designated construction project. Such payments shall not reduce the General Aggregate Limit shown in the Declarations nor shall they reduce any other Designated Construction Project General Aggregate Limit for any other designated construction project shown in the Schedule above.
4. The limits shown in the Declarations for Each Occurrence, Damage To Premises Rented To You and Medical Expense continue to apply. However, instead of being subject to the General Aggregate Limit shown in the Declarations, such limits will be subject to the applicable Designated Construction Project General Aggregate Limit.

SAMPLE

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B. For all sums which the insured becomes legally obligated to pay as damages caused by "occurrences" under Section **I** – Coverage **A**, and for all medical expenses caused by accidents under Section **I** – Coverage **C**, which cannot be attributed only to ongoing operations at a single designated construction project shown in the Schedule above:

1. Any payments made under Coverage **A** for damages or under Coverage **C** for medical expenses shall reduce the amount available under the General Aggregate Limit or the Products-completed Operations Aggregate Limit, whichever is applicable; and
2. Such payments shall not reduce any Designated Construction Project General Aggregate Limit.

C. When coverage for liability arising out of the "products-completed operations hazard" is provided, any payments for damages because of "bodily injury" or "property damage" included in the "products-completed operations hazard" will reduce the Products-completed Operations Aggregate Limit, and not reduce the General Aggregate Limit nor the Designated Construction Project General Aggregate Limit.

D. If the applicable designated construction project has been abandoned, delayed, or abandoned and then restarted, or if the authorized contracting parties deviate from plans, blueprints, designs, specifications or timetables, the project will still be deemed to be the same construction project.

E. The provisions of Section **III** – Limits Of Insurance not otherwise modified by this endorsement shall continue to apply as stipulated.

SAMPLE

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Reproduction of Insurance Services Office, Inc. Form

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 25 04 05 09

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

DESIGNATED LOCATION(S) GENERAL AGGREGATE LIMIT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Designated Location(s):
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

A. For all sums which the insured becomes legally obligated to pay as damages caused by "occurrences" under Section **I** – Coverage **A**, and for all medical expenses caused by accidents under Section **I** – Coverage **C**, which can be attributed only to operations at a single designated "location" shown in the Schedule above:

1. A separate Designated Location General Aggregate Limit applies to each designated "location", and that limit is equal to the amount of the General Aggregate Limit shown in the Declarations.
2. The Designated Location General Aggregate Limit is the most we will pay for the sum of all damages under Coverage **A**, except damages because of "bodily injury" or "property damage" included in the "products-completed operations hazard", and for medical expenses under Coverage **C** regardless of the number of:
   a. Insureds;
   b. Claims made or "suits" brought; or
   c. Persons or organizations making claims or bringing "suits".
3. Any payments made under Coverage **A** for damages or under Coverage **C** for medical expenses shall reduce the Designated Location General Aggregate Limit for that designated "location". Such payments shall not reduce the General Aggregate Limit shown in the Declarations nor shall they reduce any other Designated Location General Aggregate Limit for any other designated "location" shown in the Schedule above.
4. The limits shown in the Declarations for Each Occurrence, Damage To Premises Rented To You and Medical Expense continue to apply. However, instead of being subject to the General Aggregate Limit shown in the Declarations, such limits will be subject to the applicable Designated Location General Aggregate Limit.

SAMPLE

Reproduction of Insurance Services Office, Inc. Form

B. For all sums which the insured becomes legally obligated to pay as damages caused by "occurrences" under Section **I** – Coverage **A**, and for all medical expenses caused by accidents under Section **I** – Coverage **C**, which cannot be attributed only to operations at a single designated "location" shown in the Schedule above:

1. Any payments made under Coverage **A** for damages or under Coverage **C** for medical expenses shall reduce the amount available under the General Aggregate Limit or the Products-completed Operations Aggregate Limit, whichever is applicable; and
2. Such payments shall not reduce any Designated Location General Aggregate Limit.

C. When coverage for liability arising out of the "products-completed operations hazard" is provided, any payments for damages because of "bodily injury" or "property damage" included in the "products-completed operations hazard" will reduce the Products-completed Operations Aggregate Limit, and not reduce the General Aggregate Limit nor the Designated Location General Aggregate Limit.

D. For the purposes of this endorsement, the **Definitions** Section is amended by the addition of the following definition:

"Location" means premises involving the same or connecting lots, or premises whose connection is interrupted only by a street, roadway, waterway or right-of-way of a railroad.

E. The provisions of Section **III** – Limits Of Insurance not otherwise modified by this endorsement shall continue to apply as stipulated.

SAMPLE

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Reproduction of State Compensation Insurance Fund Form

STATE COMPENSATION INSURANCE FUND	**P.O. BOX 807, SAN FRANCISCO, CALIFORNIA 94101** **CERTIFICATE OF WORKERS' COMPENSATION INSURANCE**
	POLICY NUMBER: **CERTIFICATE EXPIRES:**

This is to certify that we have issued a valid Workers' Compensation insurance policy in a form approved by the California Insurance Commissioner to the employer named below for the policy period indicated.

This policy is not subject to cancellation by the Fund except upon 30 day's written notice to the employer.

We will give you 30 day's advance notice should this policy be canceled prior to its normal expiration.

This certificate of insurance is not an insurance policy and does not amend, extend or alter the coverage afforded by the policies listed herein. Notwithstanding any requirement, term or condition of any contract or other document with respect to which this certificate may be issued or may pertain, the insurance afforded by the policies described herein is subject to all the terms, exclusions and conditions of such policies.

_____
PRESIDENT

(Note: following text is typewritten addition to printed form)

THE STATE COMPENSATION INSURANCE FUND WAIVES ANY RIGHT OF SUBROGATION ENDORSEMENT #2570. AGAINST (ENTITY) _____, ITS OFFICIALS, EMPLOYEES AND VOLUNTEERS BY REASON OF ANY PAYMENT UNDER THIS POLICY.

ENDORSEMENT #0015 ENTITLED ADDITIONAL INSURED EMPLOYER EFFECTIVE 07-20-87 IS ATTACHED TO AND FORMS A PART OF THIS POLICY. ADDITIONAL INSURED EMPLOYER: _____.

ENDORSEMENT #2065 ENTITLED 30 DAY CANCELLATION NOTICE EFFECTIVE 07-20-87 IS ATTACHED TO AND FORMS A PART OF THIS POLICY.

LIABILITY OF THE STATE COMPENSATION INSURANCE FUND IS LIMITED TO $3,000,000 FOR ALL DAMAGES FOR ONE OR MORE CLAIMS RESULTING FROM EACH ACCIDENT OF OCCURRENCE ARISING OUT OF ANY ONE EVENT.

_____
EMPLOYER

SAMPLE

Reproduction of State Compensation Insurance Fund Form

STATE COMPENSATION INSURANCE FUND	**ADDITIONAL INSURED EMPLOYER ENDORSEMENT AGREEMENT**
Home Office San Francisco	All Effective Dates are at 12:01 AM Pacific Standard Time or the Time Indicated at Pacific Standard Time

ANYTHING IN THIS POLICY TO THE CONTRACT NOTWITHSTANDING, IT IS AGREED THAT

EMPLOYER:	NAMED OF ADDITIONAL INSURED (ONE NAME PER ENDORSEMENT)

IS HEREBY NAMED AS AN ADDITIONAL INSURED EMPLOYER ON THIS POLICY BUT ONLY AS RESPECTS EMPLOYEES WHOSE NAMES APPEAR ON THE PAYROLL RECORDS OF

(POLICY NAME)

(HEREIN CALLED THE PRIMARY INSURED) WHILE THOSE EMPLOYEES ARE ENGAGED IN WORK UNDER THE SIMULTANEOUS DIRECTION AND CONTROL OF THE PRIMARY INSURED AND THE ADDITIONAL INSURED EMPLOYER.

IT IS FURTHER AGREED THAT THE PAYMENT OF THE FULL PREMIUM DUE AND PAYABLE UNDER THIS POLICY SHALL REMAIN THE SOLE RESPONSIBILITY OF THE PRIMARY INSURED.

NOTHING IN THIS ENDORSEMENT CONTAINED SHALL BE HALED TO VARY, ALTER, WAIVE OR EXTEND ANY OF THE TERMS, CONDITIONS, AGREEMENTS OR LIMITATIONS OF THIS POLICY OTHER THAN AS STATED. NOTHING ELSEWHERE IN THIS POLICY SHALL BE HELD TO VARY, ALTER, WAIVE OR LIMIT THE TERMS, CONDITIONS, AGREEMENTS OR LIMITATIONS OF THIS ENDORSEMENT.

COUNTERSIGNED AND ISSUED AT SAN FRANCISCO 0015

SAMPLE

Reproduction of State Compensation Insurance Fund Form

STATE COMPENSATION INSURANCE FUND	**ADDITIONAL INSURED EMPLOYER ENDORSEMENT AGREEMENT**
Home Office San Francisco	All Effective Dates are at 12:01 AM Pacific Standard Time or the Time Indicated at Pacific Standard Time

ANYTHING IN THIS POLICY TO THE CONTRARY NOTWITHSTANDING, IT IS AGREED THAT THE STATE COMPENSATION INSURANCE FUND WAIVES ANY RIGHT OF SUBROGATION AGAINST:

(SPECIFY 3RD PARTY REQUESTING WAIVER: ONE NAME PER ENDORSEMENT)

WHICH MIGHT ARISE BY REASON OF ANY PAYMENT UNDER THIS POLICY IN CONNECTION WITH WORK PERFORMED BY:

(POLICY NAME)

IT IS FURTHER AGREED THAT THE INSURED SHALL MAINTAIN PAYROLL RECORDS ACCURATELY SEGREGATING THE REMUNERATION OF EMPLOYEES WHILE ENGAGED IN WORK FOR THE ABOVE EMPLOYER.

IT IS FURTHER AGREED THAT PREMIUM ON THE EARNINGS OF SUCH EMPLOYEES SHALL BE INCREASED BY _____%.

NOTHING IN THIS ENDORSEMENT CONTAINED SHALL BE HALED TO VARY, ALTER, WAIVE OR EXTEND ANY OF THE TERMS, CONDITIONS, AGREEMENTS OR LIMITATIONS OF THIS POLICY OTHER THAN AS STATED. NOTHING ELSEWHERE IN THIS POLICY SHALL BEHELD TO VARY, ALTER, WAIVE OR LIMIT THE TERMS, CONDITIONS, AGREEMENTS OR LIMITATIONS OF THIS ENDORSEMENT.

COUNTERSIGNED AND ISSUED AT SAN FRANCISCO 2570

SAMPLE

Reproduction of State Compensation Insurance Fund Form

STATE COMPENSATION INSURANCE FUND	**ADDITIONAL INSURED EMPLOYER ENDORSEMENT AGREEMENT**
Home Office San Francisco	All Effective Dates are at 12:01 AM Pacific Standard Time or the Time Indicated at Pacific Standard Time

ANYTHING IN THIS POLICY TO THE CONTRARY NOTWITHSTANDING, IT IS AGREED THAT THIS POLICY SHALL NOT BE CANCELED UNTIL:

(SPECIFY NUMBER) _____ DAYS

AFTER WRITTEN NOTICE OF SUCH CANCELLATION HAS BEEN PLACED IN THE MAIL BY STATE FUND TO CURRENT HOLDERS OF CERTIFICATE OF WORKERS' COMPENSATION INSURANCE.

NOTHING IN THIS ENDORSEMENT CONTAINED SHALL BE HALED TO VARY, ALTER, WAIVE OR EXTEND ANY OF THE TERMS, CONDITIONS, AGREEMENTS OR LIMITATIONS OF THIS POLICY OTHER THAN AS STATED. NOTHING ELSEWHERE IN THIS POLICY SHALL BEHELD TO VARY, ALTER, WAIVE OR LIMIT THE TERMS, CONDITIONS, AGREEMENTS OR LIMITATIONS OF THIS ENDORSEMENT.

COUNTERSIGNED AND ISSUED AT SAN FRANCISCO 0015

SAMPLE

Reproduction of Insurance Services Office, Inc. Form

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we", "us" and "our" refer to the company providing this insurance.

The word "insured" means any person or organization qualifying as such under Section **II** – Who Is An Insured.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section **V** – Definitions.

SECTION I – COVERAGES

COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in Section **III** – Limits Of Insurance; and

(2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages **A** or **B** or medical expenses under Coverage **C.**

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages **A** and **B.**

b. This insurance applies to "bodily injury" and "property damage" only if:

(1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";

(2) The "bodily injury" or "property damage" occurs during the policy period; and

(3) Prior to the policy period, no insured listed under Paragraph **1.** of Section **II** – Who Is An Insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.

c. "Bodily injury" or "property damage" which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph **1.** of Section **II** – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim, includes any continuation, change or resumption of that "bodily injury" or "property damage" after the end of the policy period.

d. "Bodily injury" or "property damage" will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph **1.** of Section **II** – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim:

(1) Reports all, or any part, of the "bodily injury" or "property damage" to us or any other insurer;

(2) Receives a written or verbal demand or claim for damages because of the "bodily injury" or "property damage"; or

(3) Becomes aware by any other means that "bodily injury" or "property damage" has occurred or has begun to occur.

e. Damages because of "bodily injury" include damages claimed by any person or organization for care, loss of services or death resulting at any time from the "bodily injury".

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2. Exclusions

This insurance does not apply to:

a. Expected Or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

b. Contractual Liability

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

(1) That the insured would have in the absence of the contract or agreement; or

(2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorneys' fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:

(a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and

(b) Such attorneys' fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

c. Liquor Liability

"Bodily injury" or "property damage" for which any insured may be held liable by reason of:

(1) Causing or contributing to the intoxication of any person;

(2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or

(3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in:

(a) The supervision, hiring, employment, training or monitoring of others by that insured; or

(b) Providing or failing to provide transportation with respect to any person that may be under the influence of alcohol;

if the "occurrence" which caused the "bodily injury" or "property damage", involved that which is described in Paragraph **(1), (2)** or **(3)** above.

However, this exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages. For the purposes of this exclusion, permitting a person to bring alcoholic beverages on your premises, for consumption on your premises, whether or not a fee is charged or a license is required for such activity, is not by itself considered the business of selling, serving or furnishing alcoholic beverages.

d. Workers' Compensation And Similar Laws

Any obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law.

e. Employer's Liability

"Bodily injury" to:

(1) An "employee" of the insured arising out of and in the course of:

(a) Employment by the insured; or

(b) Performing duties related to the conduct of the insured's business; or

(2) The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph **(1)** above.

This exclusion applies whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury.

This exclusion does not apply to liability assumed by the insured under an "insured contract".

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f. Pollution

(1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":

(a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured. However, this subparagraph does not apply to:

(i) "Bodily injury" if sustained within a building and caused by smoke, fumes, vapor or soot produced by or originating from equipment that is used to heat, cool or dehumidify the building, or equipment that is used to heat water for personal use, by the building's occupants or their guests;

(ii) "Bodily injury" or "property damage" for which you may be held liable, if you are a contractor and the owner or lessee of such premises, site or location has been added to your policy as an additional insured with respect to your ongoing operations performed for that additional insured at that premises, site or location and such premises, site or location is not and never was owned or occupied by, or rented or loaned to, any insured, other than that additional insured; or

(iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire";

(b) At or from any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste;

(c) Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for:

(i) Any insured; or

(ii) Any person or organization for whom you may be legally responsible; or

(d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the "pollutants" are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor. However, this subparagraph does not apply to:

(i) "Bodily injury" or "property damage" arising out of the escape of fuels, lubricants or other operating fluids which are needed to perform the normal electrical, hydraulic or mechanical functions necessary for the operation of "mobile equipment" or its parts, if such fuels, lubricants or other operating fluids escape from a vehicle part designed to hold, store or receive them. This exception does not apply if the "bodily injury" or "property damage" arises out of the intentional discharge, dispersal or release of the fuels, lubricants or other operating fluids, or if such fuels, lubricants or other operating fluids are brought on or to the premises, site or location with the intent that they be discharged, dispersed or released as part of the operations being performed by such insured, contractor or subcontractor;

(ii) "Bodily injury" or "property damage" sustained within a building and caused by the release of gases, fumes or vapors from materials brought into that building in connection with operations being performed by you or on your behalf by a contractor or subcontractor; or

(iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire".

(e) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants".

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(2) Any loss, cost or expense arising out of any:

(a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or

(b) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

However, this paragraph does not apply to liability for damages because of "property damage" that the insured would have in the absence of such request, demand, order or statutory or regulatory requirement, or such claim or "suit" by or on behalf of a governmental authority.

g. Aircraft, Auto Or Watercraft

"Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unloading".

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage" involved the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft that is owned or operated by or rented or loaned to any insured.

This exclusion does not apply to:

(1) A watercraft while ashore on premises you own or rent;

(2) A watercraft you do not own that is:

(a) Less than 26 feet long; and

(b) Not being used to carry persons or property for a charge;

(3) Parking an "auto" on, or on the ways next to, premises you own or rent, provided the "auto" is not owned by or rented or loaned to you or the insured;

(4) Liability assumed under any "insured contract" for the ownership, maintenance or use of aircraft or watercraft; or

(5) "Bodily injury" or "property damage" arising out of:

(a) The operation of machinery or equipment that is attached to, or part of, a land vehicle that would qualify under the definition of "mobile equipment" if it were not subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged; or

(b) The operation of any of the machinery or equipment listed in Paragraph **f.(2)** or **f.(3)** of the definition of "mobile equipment".

h. Mobile Equipment

"Bodily injury" or "property damage" arising out of:

(1) The transportation of "mobile equipment" by an "auto" owned or operated by or rented or loaned to any insured; or

(2) The use of "mobile equipment" in, or while in practice for, or while being prepared for, any prearranged racing, speed, demolition, or stunting activity.

i. War

"Bodily injury" or "property damage", however caused, arising, directly or indirectly, out of:

(1) War, including undeclared or civil war;

(2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or

(3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

j. Damage To Property

"Property damage" to:

(1) Property you own, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property;

(2) Premises you sell, give away or abandon, if the "property damage" arises out of any part of those premises;

(3) Property loaned to you;

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(4) Personal property in the care, custody or control of the insured;

(5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or

(6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

Paragraphs **(1), (3)** and **(4)** of this exclusion do not apply to "property damage" (other than damage by fire) to premises, including the contents of such premises, rented to you for a period of seven or fewer consecutive days. A separate limit of insurance applies to Damage To Premises Rented To You as described in Section **III** – Limits Of Insurance.

Paragraph **(2)** of this exclusion does not apply if the premises are "your work" and were never occupied, rented or held for rental by you.

Paragraphs **(3), (4), (5)** and **(6)** of this exclusion do not apply to liability assumed under a sidetrack agreement.

Paragraph **(6)** of this exclusion does not apply to "property damage" included in the "products-completed operations hazard".

k. Damage To Your Product

"Property damage" to "your product" arising out of it or any part of it.

l. Damage To Your Work

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

m. Damage To Impaired Property Or Property Not Physically Injured

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

(1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or

(2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

n. Recall Of Products, Work Or Impaired Property

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

(1) "Your product";

(2) "Your work"; or

(3) "Impaired property";

if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

o. Personal And Advertising Injury

"Bodily injury" arising out of "personal and advertising injury".

p. Electronic Data

Damages arising out of the loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate electronic data.

However, this exclusion does not apply to liability for damages because of "bodily injury".

As used in this exclusion, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMs, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

q. Recording And Distribution Of Material Or Information In Violation Of Law

"Bodily injury" or "property damage" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

(1) The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law;

(2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law;

(3) The Fair Credit Reporting Act (FCRA), and any amendment of or addition to such law, including the Fair and Accurate Credit Transactions Act (FACTA); or

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(4) Any federal, state or local statute, ordinance or regulation, other than the TCPA, CAN-SPAM Act of 2003 or FCRA and their amendments and additions, that addresses, prohibits, or limits the printing, dissemination, disposal, collecting, recording, sending, transmitting, communicating or distribution of material or information.

Exclusions **c.** through **n.** do not apply to damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner. A separate limit of insurance applies to this coverage as described in Section **III** – Limits Of Insurance.

COVERAGE B – PERSONAL AND ADVERTISING INJURY LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "personal and advertising injury" to which this insurance does not apply. We may, at our discretion, investigate any offense and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in Section **III** – Limits Of Insurance; and

(2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages **A** or **B** or medical expenses under Coverage **C.**

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages **A** and **B.**

b. This insurance applies to "personal and advertising injury" caused by an offense arising out of your business but only if the offense was committed in the "coverage territory" during the policy period.

2. Exclusions

This insurance does not apply to:

a. Knowing Violation Of Rights Of Another

"Personal and advertising injury" caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury".

b. Material Published With Knowledge Of Falsity

"Personal and advertising injury" arising out of oral or written publication, in any manner, of material, if done by or at the direction of the insured with knowledge of its falsity.

c. Material Published Prior To Policy Period

"Personal and advertising injury" arising out of oral or written publication, in any manner, of material whose first publication took place before the beginning of the policy period.

d. Criminal Acts

"Personal and advertising injury" arising out of a criminal act committed by or at the direction of the insured.

e. Contractual Liability

"Personal and advertising injury" for which the insured has assumed liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement.

f. Breach Of Contract

"Personal and advertising injury" arising out of a breach of contract, except an implied contract to use another's advertising idea in your "advertisement".

g. Quality Or Performance Of Goods – Failure To Conform To Statements

"Personal and advertising injury" arising out of the failure of goods, products or services to conform with any statement of quality or performance made in your "advertisement".

h. Wrong Description Of Prices

"Personal and advertising injury" arising out of the wrong description of the price of goods, products or services stated in your "advertisement".

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i. Infringement Of Copyright, Patent, Trademark Or Trade Secret

"Personal and advertising injury" arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights. Under this exclusion, such other intellectual property rights do not include the use of another's advertising idea in your "advertisement".

However, this exclusion does not apply to infringement, in your "advertisement", of copyright, trade dress or slogan.

j. Insureds In Media And Internet Type Businesses

"Personal and advertising injury" committed by an insured whose business is:

(1) Advertising, broadcasting, publishing or telecasting;

(2) Designing or determining content of web sites for others; or

(3) An Internet search, access, content or service provider.

However, this exclusion does not apply to Paragraphs **14.a., b.** and **c.** of "personal and advertising injury" under the Definitions section.

For the purposes of this exclusion, the placing of frames, borders or links, or advertising, for you or others anywhere on the Internet, is not by itself, considered the business of advertising, broadcasting, publishing or telecasting.

k. Electronic Chatrooms Or Bulletin Boards

"Personal and advertising injury" arising out of an electronic chatroom or bulletin board the insured hosts, owns, or over which the insured exercises control.

l. Unauthorized Use Of Another's Name Or Product

"Personal and advertising injury" arising out of the unauthorized use of another's name or product in your e-mail address, domain name or metatag, or any other similar tactics to mislead another's potential customers.

m. Pollution

"Personal and advertising injury" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time.

n. Pollution-related

Any loss, cost or expense arising out of any:

(1) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or

(2) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

o. War

"Personal and advertising injury", however caused, arising, directly or indirectly, out of:

(1) War, including undeclared or civil war;

(2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or

(3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

p. Recording And Distribution Of Material Or Information In Violation Of Law

"Personal and advertising injury" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

(1) The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law;

(2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law;

(3) The Fair Credit Reporting Act (FCRA), and any amendment of or addition to such law, including the Fair and Accurate Credit Transactions Act (FACTA); or

(4) Any federal, state or local statute, ordinance or regulation, other than the TCPA, CAN-SPAM Act of 2003 or FCRA and their amendments and additions, that addresses, prohibits, or limits the printing, dissemination, disposal, collecting, recording, sending, transmitting, communicating or distribution of material or information.

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COVERAGE C – MEDICAL PAYMENTS

1. Insuring Agreement

a. We will pay medical expenses as described below for "bodily injury" caused by an accident:

(1) On premises you own or rent;

(2) On ways next to premises you own or rent; or

(3) Because of your operations;

provided that:

(a) The accident takes place in the "coverage territory" and during the policy period;

(b) The expenses are incurred and reported to us within one year of the date of the accident; and

(c) The injured person submits to examination, at our expense, by physicians of our choice as often as we reasonably require.

b. We will make these payments regardless of fault. These payments will not exceed the applicable limit of insurance. We will pay reasonable expenses for:

(1) First aid administered at the time of an accident;

(2) Necessary medical, surgical, X-ray and dental services, including prosthetic devices; and

(3) Necessary ambulance, hospital, professional nursing and funeral services.

2. Exclusions

We will not pay expenses for "bodily injury":

a. Any Insured

To any insured, except "volunteer workers".

b. Hired Person

To a person hired to do work for or on behalf of any insured or a tenant of any insured.

c. Injury On Normally Occupied Premises

To a person injured on that part of premises you own or rent that the person normally occupies.

d. Workers' Compensation And Similar Laws

To a person, whether or not an "employee" of any insured, if benefits for the "bodily injury" are payable or must be provided under a workers' compensation or disability benefits law or a similar law.

e. Athletics Activities

To a person injured while practicing, instructing or participating in any physical exercises or games, sports, or athletic contests.

f. Products-Completed Operations Hazard

Included within the "products-completed operations hazard".

g. Coverage A Exclusions

Excluded under Coverage **A.**

SUPPLEMENTARY PAYMENTS – COVERAGES A AND B

1. We will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend:

a. All expenses we incur.

b. Up to $250 for cost of bail bonds required because of accidents or traffic law violations arising out of the use of any vehicle to which the Bodily Injury Liability Coverage applies. We do not have to furnish these bonds.

c. The cost of bonds to release attachments, but only for bond amounts within the applicable limit of insurance. We do not have to furnish these bonds.

d. All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the claim or "suit", including actual loss of earnings up to $250 a day because of time off from work.

e. All court costs taxed against the insured in the "suit". However, these payments do not include attorneys' fees or attorneys' expenses taxed against the insured.

f. Prejudgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of insurance, we will not pay any prejudgment interest based on that period of time after the offer.

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g. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.

These payments will not reduce the limits of insurance.

2. If we defend an insured against a "suit" and an indemnitee of the insured is also named as a party to the "suit", we will defend that indemnitee if all of the following conditions are met:

a. The "suit" against the indemnitee seeks damages for which the insured has assumed the liability of the indemnitee in a contract or agreement that is an "insured contract";

b. This insurance applies to such liability assumed by the insured;

c. The obligation to defend, or the cost of the defense of, that indemnitee, has also been assumed by the insured in the same "insured contract";

d. The allegations in the "suit" and the information we know about the "occurrence" are such that no conflict appears to exist between the interests of the insured and the interests of the indemnitee;

e. The indemnitee and the insured ask us to conduct and control the defense of that indemnitee against such "suit" and agree that we can assign the same counsel to defend the insured and the indemnitee; and

f. The indemnitee:

(1) Agrees in writing to:

(a) Cooperate with us in the investigation, settlement or defense of the "suit";

(b) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the "suit";

(c) Notify any other insurer whose coverage is available to the indemnitee; and

(d) Cooperate with us with respect to coordinating other applicable insurance available to the indemnitee; and

(2) Provides us with written authorization to:

(a) Obtain records and other information related to the "suit"; and

(b) Conduct and control the defense of the indemnitee in such "suit".

So long as the above conditions are met, attorneys' fees incurred by us in the defense of that indemnitee, necessary litigation expenses incurred by us and necessary litigation expenses incurred by the indemnitee at our request will be paid as Supplementary Payments. Notwithstanding the provisions of Paragraph **2.b.(2)** of Section **I** – Coverage **A** – Bodily Injury And Property Damage Liability, such payments will not be deemed to be damages for "bodily injury" and "property damage" and will not reduce the limits of insurance.

Our obligation to defend an insured's indemnitee and to pay for attorneys' fees and necessary litigation expenses as Supplementary Payments ends when we have used up the applicable limit of insurance in the payment of judgments or settlements or the conditions set forth above, or the terms of the agreement described in Paragraph **f.** above, are no longer met.

SECTION II – WHO IS AN INSURED

1. If you are designated in the Declarations as:

a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.

b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.

c. A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.

d. An organization other than a partnership, joint venture or limited liability company, you are an insured. Your "executive officers" and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.

e. A trust, you are an insured. Your trustees are also insureds, but only with respect to their duties as trustees.

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2. Each of the following is also an insured:

a. Your "volunteer workers" only while performing duties related to the conduct of your business, or your "employees", other than either your "executive officers" (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability company), but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business. However, none of these "employees" or "volunteer workers" are insureds for:

(1) "Bodily injury" or "personal and advertising injury":

(a) To you, to your partners or members (if you are a partnership or joint venture), to your members (if you are a limited liability company), to a co-"employee" while in the course of his or her employment or performing duties related to the conduct of your business, or to your other "volunteer workers" while performing duties related to the conduct of your business;

(b) To the spouse, child, parent, brother or sister of that co-"employee" or "volunteer worker" as a consequence of Paragraph **(1)(a)** above;

(c) For which there is any obligation to share damages with or repay someone else who must pay damages because of the injury described in Paragraph **(1)(a)** or **(b)** above; or

(d) Arising out of his or her providing or failing to provide professional health care services.

(2) "Property damage" to property:

(a) Owned, occupied or used by;

(b) Rented to, in the care, custody or control of, or over which physical control is being exercised for any purpose by;

you, any of your "employees", "volunteer workers", any partner or member (if you are a partnership or joint venture), or any member (if you are a limited liability company).

b. Any person (other than your "employee" or "volunteer worker"), or any organization while acting as your real estate manager.

c. Any person or organization having proper temporary custody of your property if you die, but only:

(1) With respect to liability arising out of the maintenance or use of that property; and

(2) Until your legal representative has been appointed.

d. Your legal representative if you die, but only with respect to duties as such. That representative will have all your rights and duties under this Coverage Part.

3. Any organization you newly acquire or form, other than a partnership, joint venture or limited liability company, and over which you maintain ownership or majority interest, will qualify as a Named Insured if there is no other similar insurance available to that organization. However:

a. Coverage under this provision is afforded only until the 90th day after you acquire or form the organization or the end of the policy period, whichever is earlier;

b. Coverage **A** does not apply to "bodily injury" or "property damage" that occurred before you acquired or formed the organization; and

c. Coverage **B** does not apply to "personal and advertising injury" arising out of an offense committed before you acquired or formed the organization.

No person or organization is an insured with respect to the conduct of any current or past partnership, joint venture or limited liability company that is not shown as a Named Insured in the Declarations.

SECTION III – LIMITS OF INSURANCE

1. The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:

a. Insureds;

b. Claims made or "suits" brought; or

c. Persons or organizations making claims or bringing "suits".

2. The General Aggregate Limit is the most we will pay for the sum of:

a. Medical expenses under Coverage **C;**

b. Damages under Coverage **A,** except damages because of "bodily injury" or "property damage" included in the "products-completed operations hazard"; and

c. Damages under Coverage **B.**

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3. The Products-Completed Operations Aggregate Limit is the most we will pay under Coverage **A** for damages because of "bodily injury" and "property damage" included in the "products-completed operations hazard".
4. Subject to Paragraph **2.** above, the Personal And Advertising Injury Limit is the most we will pay under Coverage **B** for the sum of all damages because of all "personal and advertising injury" sustained by any one person or organization.
5. Subject to Paragraph **2.** or **3.** above, whichever applies, the Each Occurrence Limit is the most we will pay for the sum of:
   a. Damages under Coverage **A;** and
   b. Medical expenses under Coverage **C**
   because of all "bodily injury" and "property damage" arising out of any one "occurrence".
6. Subject to Paragraph **5.** above, the Damage To Premises Rented To You Limit is the most we will pay under Coverage **A** for damages because of "property damage" to any one premises, while rented to you, or in the case of damage by fire, while rented to you or temporarily occupied by you with permission of the owner.
7. Subject to Paragraph **5.** above, the Medical Expense Limit is the most we will pay under Coverage **C** for all medical expenses because of "bodily injury" sustained by any one person.

The Limits of Insurance of this Coverage Part apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations, unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the Limits of Insurance.

SECTION IV – COMMERCIAL GENERAL LIABILITY CONDITIONS

1. **Bankruptcy**
   Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations under this Coverage Part.
2. **Duties In The Event Of Occurrence, Offense, Claim Or Suit**
   a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:
      (1) How, when and where the "occurrence" or offense took place;
      (2) The names and addresses of any injured persons and witnesses; and
      (3) The nature and location of any injury or damage arising out of the "occurrence" or offense.
   b. If a claim is made or "suit" is brought against any insured, you must:
      (1) Immediately record the specifics of the claim or "suit" and the date received; and
      (2) Notify us as soon as practicable.
      You must see to it that we receive written notice of the claim or "suit" as soon as practicable.
   c. You and any other involved insured must:
      (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";
      (2) Authorize us to obtain records and other information;
      (3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and
      (4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.
   d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.
3. **Legal Action Against Us**
   No person or organization has a right under this Coverage Part:
   a. To join us as a party or otherwise bring us into a "suit" asking for damages from an insured; or
   b. To sue us on this Coverage Part unless all of its terms have been fully complied with.
   A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured; but we will not be liable for damages that are not payable under the terms of this Coverage Part or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.

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4. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages **A** or **B** of this Coverage Part, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when Paragraph **b.** below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in Paragraph **c.** below.

b. Excess Insurance

(1) This insurance is excess over:

(a) Any of the other insurance, whether primary, excess, contingent or on any other basis:

(i) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";

(ii) That is Fire insurance for premises rented to you or temporarily occupied by you with permission of the owner;

(iii) That is insurance purchased by you to cover your liability as a tenant for "property damage" to premises rented to you or temporarily occupied by you with permission of the owner; or

(iv) If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion **g.** of Section **I** – Coverage **A** – Bodily Injury And Property Damage Liability.

(b) Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured.

(2) When this insurance is excess, we will have no duty under Coverages **A** or **B** to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit". If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

(3) When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:

(a) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and

(b) The total of all deductible and self-insured amounts under all that other insurance.

(4) We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part.

c. Method Of Sharing

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

5. Premium Audit

a. We will compute all premiums for this Coverage Part in accordance with our rules and rates.

b. Premium shown in this Coverage Part as advance premium is a deposit premium only. At the close of each audit period we will compute the earned premium for that period and send notice to the first Named Insured. The due date for audit and retrospective premiums is the date shown as the due date on the bill. If the sum of the advance and audit premiums paid for the policy period is greater than the earned premium, we will return the excess to the first Named Insured.

c. The first Named Insured must keep records of the information we need for premium computation, and send us copies at such times as we may request.

6. Representations

By accepting this policy, you agree:

a. The statements in the Declarations are accurate and complete;

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b. Those statements are based upon representations you made to us; and

c. We have issued this policy in reliance upon your representations.

7. Separation Of Insureds

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:

a. As if each Named Insured were the only Named Insured; and

b. Separately to each insured against whom claim is made or "suit" is brought.

8. Transfer Of Rights Of Recovery Against Others To Us

If the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring "suit" or transfer those rights to us and help us enforce them.

9. When We Do Not Renew

If we decide not to renew this Coverage Part, we will mail or deliver to the first Named Insured shown in the Declarations written notice of the nonrenewal not less than 30 days before the expiration date.

If notice is mailed, proof of mailing will be sufficient proof of notice.

SECTION V – DEFINITIONS

1. "Advertisement" means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters. For the purposes of this definition:

a. Notices that are published include material placed on the Internet or on similar electronic means of communication; and

b. Regarding web sites, only that part of a web site that is about your goods, products or services for the purposes of attracting customers or supporters is considered an advertisement.

2. "Auto" means:

a. A land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment; or

b. Any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged.

However, "auto" does not include "mobile equipment".

3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

4. "Coverage territory" means:

a. The United States of America (including its territories and possessions), Puerto Rico and Canada;

b. International waters or airspace, but only if the injury or damage occurs in the course of travel or transportation between any places included in Paragraph **a.** above; or

c. All other parts of the world if the injury or damage arises out of:

(1) Goods or products made or sold by you in the territory described in Paragraph **a.** above;

(2) The activities of a person whose home is in the territory described in Paragraph **a.** above, but is away for a short time on your business; or

(3) "Personal and advertising injury" offenses that take place through the Internet or similar electronic means of communication;

provided the insured's responsibility to pay damages is determined in a "suit" on the merits, in the territory described in Paragraph **a.** above or in a settlement we agree to.

5. "Employee" includes a "leased worker". "Employee" does not include a "temporary worker".

6. "Executive officer" means a person holding any of the officer positions created by your charter, constitution, bylaws or any other similar governing document.

7. "Hostile fire" means one which becomes uncontrollable or breaks out from where it was intended to be.

8. "Impaired property" means tangible property, other than "your product" or "your work", that cannot be used or is less useful because:

a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or

b. You have failed to fulfill the terms of a contract or agreement;

if such property can be restored to use by the repair, replacement, adjustment or removal of "your product" or "your work" or your fulfilling the terms of the contract or agreement.

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9. "Insured contract" means:

a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";

b. A sidetrack agreement;

c. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;

d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;

e. An elevator maintenance agreement;

f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Paragraph **f.** does not include that part of any contract or agreement:

(1) That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road-beds, tunnel, underpass or crossing;

(2) That indemnifies an architect, engineer or surveyor for injury or damage arising out of:

(a) Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or

(b) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or

(3) Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in **(2)** above and supervisory, inspection, architectural or engineering activities.

10. "Leased worker" means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker".

11. "Loading or unloading" means the handling of property:

a. After it is moved from the place where it is accepted for movement into or onto an aircraft, watercraft or "auto";

b. While it is in or on an aircraft, watercraft or "auto"; or

c. While it is being moved from an aircraft, watercraft or "auto" to the place where it is finally delivered;

but "loading or unloading" does not include the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the aircraft, watercraft or "auto".

12. "Mobile equipment" means any of the following types of land vehicles, including any attached machinery or equipment:

a. Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;

b. Vehicles maintained for use solely on or next to premises you own or rent;

c. Vehicles that travel on crawler treads;

d. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:

(1) Power cranes, shovels, loaders, diggers or drills; or

(2) Road construction or resurfacing equipment such as graders, scrapers or rollers;

e. Vehicles not described in Paragraph **a., b., c.** or **d.** above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:

(1) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or

(2) Cherry pickers and similar devices used to raise or lower workers;

f. Vehicles not described in Paragraph **a., b., c.** or **d.** above maintained primarily for purposes other than the transportation of persons or cargo.

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However, self-propelled vehicles with the following types of permanently attached equipment are not "mobile equipment" but will be considered "autos":

(1) Equipment designed primarily for:

(a) Snow removal;

(b) Road maintenance, but not construction or resurfacing; or

(c) Street cleaning;

(2) Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and

(3) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment.

However, "mobile equipment" does not include any land vehicles that are subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged. Land vehicles subject to a compulsory or financial responsibility law or other motor vehicle insurance law are considered "autos".

13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

14. "Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:

a. False arrest, detention or imprisonment;

b. Malicious prosecution;

c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;

d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;

e. Oral or written publication, in any manner, of material that violates a person's right of privacy;

f. The use of another's advertising idea in your "advertisement"; or

g. Infringing upon another's copyright, trade dress or slogan in your "advertisement".

15. "Pollutants" mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

16. "Products-completed operations hazard":

a. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:

(1) Products that are still in your physical possession; or

(2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:

(a) When all of the work called for in your contract has been completed.

(b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.

(c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

b. Does not include "bodily injury" or "property damage" arising out of:

(1) The transportation of property, unless the injury or damage arises out of a condition in or on a vehicle not owned or operated by you, and that condition was created by the "loading or unloading" of that vehicle by any insured;

(2) The existence of tools, uninstalled equipment or abandoned or unused materials; or

(3) Products or operations for which the classification, listed in the Declarations or in a policy Schedule, states that products-completed operations are subject to the General Aggregate Limit.

17. "Property damage" means:

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

For the purposes of this insurance, electronic data is not tangible property.

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As used in this definition, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMs, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

18. "Suit" means a civil proceeding in which damages because of "bodily injury", "property damage" or "personal and advertising injury" to which this insurance applies are alleged. "Suit" includes:

a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or

b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.

19. "Temporary worker" means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short-term workload conditions.

20. "Volunteer worker" means a person who is not your "employee", and who donates his or her work and acts at the direction of and within the scope of duties determined by you, and is not paid a fee, salary or other compensation by you or anyone else for their work performed for you.

21. "Your product":

a. Means:

(1) Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:

(a) You;

(b) Others trading under your name; or

(c) A person or organization whose business or assets you have acquired; and

(2) Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product"; and

(2) The providing of or failure to provide warnings or instructions.

c. Does not include vending machines or other property rented to or located for the use of others but not sold.

22. "Your work":

a. Means:

(1) Work or operations performed by you or on your behalf; and

(2) Materials, parts or equipment furnished in connection with such work or operations.

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work"; and

(2) The providing of or failure to provide warnings or instructions.

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MCS-90: Motor Carrier Public Liability

FORM MCS-90 Revised 01/05/2017 **OMB No.: 2126-0008 Expiration: 01/31/2020**

USDOT Number: _____ **Date Received:** _____

A Federal Agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2126-0008. Public reporting for this collection of information is estimated to be approximately 2 minutes per response, including the time for reviewing instructions, gathering the data needed, and completing and reviewing the collection of information. All responses to this collection of information are mandatory. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to: Information Collection Clearance Officer, Federal Motor Carrier Safety Administration, MC-RRA, Washington, D.C. 20590.

United States Department of Transportation
Federal Motor Carrier Safety Administration

Endorsement for Motor Carrier Policies of Insurance for Public Liability under Sections 29 and 30 of the Motor Carrier Act of 1980

FORM MCS-90

Issued to _____ **of** _____
(Motor Carrier name) *(Motor Carrier state or province)*

Dated at _____ **on this** _____ **day of** _____, _____

Amending Policy Number: _____ **Effective Date:** _____

Name of Insurance Company: _____

Countersigned by: _____
(authorized company representative)

The policy to which this endorsement is attached provides primary or excess insurance, as indicated for the limits shown *(check only one)*:

- ○ *This insurance is primary and the company shall not be liable for amounts in excess of $* _____ *for each accident.*
- ○ *This insurance is excess and the company shall not be liable for amounts in excess of $* _____ *for each accident in excess of the underlying limit of $* _____ *for each accident.*

Whenever required by the Federal Motor Carrier Safety Administration (FMCSA), the company agrees to furnish the FMCSA a duplicate of said policy and all its endorsements. The company also agrees, upon telephone request by an authorized representative of the FMCSA , to verify that the policy is in force as of a particular date. The telephone number to call is: _____.

Cancellation of this endorsement may be effected by the company of the insured by giving (1) thirty-five (35) days notice in writing to the other party (said 35 days notice to commence from the date the notice is mailed, proof of mailing shall be sufficient proof of notice), and (2) if the insured is subject to the FMCSA's registration requirements under 49 U.S.C. 13901, by providing thirty (30) days notice to the FMCSA (said 30 days notice to commence from the date the notice is received by the FMCSA at its office in Washington, DC).

Filings must be transmitted online via the Internet at http://www.fmcsa.dot.gov/urs.

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MCS-90: Motor Carrier Public Liability (cont'd)

FORM MCS-90 Revised 01/05/2017 **OMB No.: 2126-0008 Expiration: 01/31/2020**

DEFINITIONS AS USED IN THIS ENDORSEMENT

Accident includes continuous or repeated exposure to conditions or which results in bodily injury, property damage, or environmental damage which the insured neither expected nor intended.

Motor Vehicle means a land vehicle, machine, truck, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used on a highway for transporting property, or any combination thereof.

Bodily Injury means injury to the body, sickness, or disease to any person, including death resulting from any of these.

Property Damage means damage to or loss of use of tangible property.

Environmental Restoration means restitution for the loss, damage, or destruction of natural resources arising out of the accidental discharge, dispersal, release or escape into or upon the land, atmosphere, watercourse, or body of water, of any commodity transported by a motor carrier. This shall include the cost of removal and the cost of necessary measures taken to minimize or mitigate damage to human health, the natural environment, fish, shellfish, and wildlife.

Public Liability means liability for bodily injury, property damage, and environmental restoration.

The insurance policy to which this endorsement is attached provides automobile liability insurance and is amended to assure compliance by the insured, within the limits stated herein, as a motor carrier of property, with Sections 29 and 30 of the Motor Carrier Act of 1980 and the rules and regulations of the Federal Motor Carrier Safety Administration (FMCSA).

In consideration of the premium stated in the policy to which this endorsement is attached, the insurer (the company) agrees to pay, within the limits of liability described herein, any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles subject to the financial responsibility requirements of Sections 29 and 30 of the Motor Carrier Act of 1980 regardless of whether or not each motor vehicle is specifically described in the policy and whether or not such negligence occurs on any route or in any territory authorized to be served by the insured or elsewhere. Such insurance as is afforded, for public liability, does not apply to injury to or death of the insured's employees while engaged in the course of their employment, or property transported by the insured, designated as cargo. It is understood and agreed that no condition, provision, stipulation, or limitation contained in the policy, this endorsement, or any other endorsement thereon, or violation thereof, shall relieve the company from liability or from the payment of any final judgment, within the limits of liability herein described, irrespective of the financial condition, insolvency or bankruptcy of the insured. However, all terms, conditions, and limitations in the policy to which the endorsement is attached shall remain in full force and effect as binding between the insured and the company. The insured agrees to reimburse the company for any payment made by the company on account of any accident, claim, or suit involving a breach of the terms of the policy, and for any payment that the company would not have been obligated to make under the provisions of the policy except for the agreement contained in this endorsement.

It is further understood and agreed that, upon failure of the company to pay any final judgment recovered against the insured as provided herein, the judgment creditor may maintain an action in any court of competent jurisdiction against the company to compel such payment.

The limits of the company's liability for the amounts prescribed in this endorsement apply separately to each accident and any payment under the policy because of anyone accident shall not operate to reduce the liability of the company for the payment of final judgments resulting from any other accident.

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(continued on next page)

MCS-90: Motor Carrier Public Liability (cont'd)

FORM MCS-90 Revised 01/05/2017 **OMB No.: 2126-0008 Expiration: 01/31/2020**

SCHEDULE OF LIMITS — PUBLIC LIABILITY

Type of carriage	Commodity transported	January 1, 1985
(1) For-hire (in interstate or foreign commerce, with a gross vehicle weight rating of 10,000 or more pounds).	Property (nonhazardous)	$750,000
(2) For-hire and Private (in interstate, foreign, or intrastate commerce, with a gross vehicle weight rating of 10,000 or more pounds).	Hazardous substances, as defined in 49 CFR 171.8, transported in cargo tanks, portable tanks, or hopper-type vehicles with capacities in excess of 3,500 water gallons; or in bulk Division 1.1, 1.2, and 1.3 materials, Division 2.3, Hazard Zone A, or Division 6.1, Packing Group I, Hazard Zone A material; in bulk Division 2.1 or 2.2; or highway route controlled quantities of a Class 7 material, as defined in 49 CFR 173.403.	$5,000,000
(3) For-hire and Private (in interstate or foreign commerce, in any quantity; or in intrastate commerce, in bulk only; with a gross vehicle weight rating of 10,000 or more pounds).	Oil listed in 49 CFR 172.101; hazardous waste, hazardous materials, and hazardous substances defined in 49 CFR 171.8 and listed in 49 CFR 172.101, but not mentioned in (2) above or (4) below.	$1,000,000
(4) For-hire and Private (In interstate or foreign commerce, with a gross vehicle weight rating of less than 10,000 pounds).	Any quantity of Division 1.1, 1.2, or 1.3 material; any quantity of a Division 2.3, Hazard Zone A, or Division 6.1, Packing Group I, Hazard Zone A material; or highway route controlled quantities of a Class 7 material as defined in 49 CFR 173.403.	$5,000,000

*The schedule of limits shown does not provide coverage. The limits shown in the schedule are for information purposes only.

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FORM MCS-90 Page 3 of 3

COMMERCIAL GENERAL LIABILITY
CG 00 35 04 13

RAILROAD PROTECTIVE LIABILITY COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations. The words "we", "us" and "our" refer to the company providing this insurance.

The word "insured" means any person or organization qualifying as such under Section **II** – Who Is An Insured.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section **V** – Definitions.

SECTION I – COVERAGES

COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any occurrence and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in Section **III** – Limits Of Insurance; and

(2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverage **A**.

b. This insurance applies to "bodily injury" and "property damage" only if:

(1) The "bodily injury" or "property damage" occurs during the policy period; and

(2) The "bodily injury" or "property damage" arises out of acts or omissions at the "job location" which are related to or are in connection with the "work" described in the Declarations.

c. Damages because of "bodily injury" include damages claimed by any person or organization for care, loss of services or death resulting at any time from the "bodily injury".

2. Exclusions

This insurance does not apply to:

a. **Expected Or Intended Injury**

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

b. **Contractual Liability**

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages assumed in a contract or agreement that is a "covered contract".

c. **Completed Work**

"Bodily injury" or "property damage" occurring after the "work" is completed. The "work" will be deemed completed at the earliest of the following times:

(1) When all the "work" called for in the "contractor's" contract has been completed.

(2) When all the "work" to be done at the "job location" has been completed.

(3) When that part of the "work" done at the "job location" has been put to its intended use by you, the governmental authority or other contracting party.

This exclusion does not apply to "bodily injury" or "property damage" resulting from the existence of or removal of tools, uninstalled equipment or abandoned or unused materials.

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d. Acts Or Omissions Of Insured

"Bodily injury" or "property damage", the sole proximate cause of which is an act or omission of any insured other than acts or omissions of any of "your designated employees". This exclusion does not apply to injury or damage sustained at the "job location" by any of "your designated employees" or employee of the "contractor", or by any employee of the governmental authority or any other contracting party (other than you) specified in the Declarations.

e. Workers' Compensation And Similar Laws

Any obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law. This exclusion does not apply to any obligation of the insured under the Federal Employers Liability Act, as amended.

f. Pollution

"Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at or from the "job location":

(1) Due to the past or present use of the "job location" by you or for you or others for the handling, storage, disposal, processing or treatment of waste; or

(2) Due to the dumping or disposal of waste on the "job location" by the "contractor" with the knowledge of you or any of "your designated employees"; or

(3) On which you or "contractors" working directly or indirectly on any insured's behalf are performing operations if the "pollutants" are brought on or to the "job location" in connection with such operations by you, the "contractor" or "your designated employee". However, this subparagraph does not apply to:

(a) "Bodily injury" or "property damage" arising out of fuels or lubricants for equipment used at the "job location".

(b) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire".

(4) On which you or "contractors" working directly or indirectly on any insured's behalf are performing operations if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants".

g. Damage To Owned, Leased Or Entrusted Property

"Property damage" to property owned by you or leased or entrusted to you under a lease or trust agreement.

h. War

"Bodily injury" or "property damage", however caused, arising, directly or indirectly, out of:

(1) War, including undeclared or civil war;

(2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or

(3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

COVERAGE B -- PHYSICAL DAMAGE TO PROPERTY

1. Insuring Agreement

We will pay for "physical damage to property" to which this insurance applies. The "physical damage to property" must occur during the policy period. The "physical damage to property" must arise out of acts or omissions at the "job location" which are related to or in connection with the "work" described in the Declarations. The property must be owned by or leased or entrusted to you under a lease or trust agreement.

2. Exclusions

This insurance does not apply to "physical damage to property":

a. Completed Work

Occurring after the "work" is completed. The "work" will be deemed completed at the earliest of the following times:

(1) When all the "work" called for in the "contractor's" contract has been completed.

(2) When all the "work" to be done at the "job location" has been completed.

(3) When that part of the "work" done at the "job location" has been put to its intended use by you, the governmental authority or other contracting party.

This exclusion does not apply to "physical damage to property" resulting from the existence of tools, uninstalled equipment or abandoned or unused materials.

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b. Acts Or Omissions Of Insured

The sole proximate cause of which is an act or omission of any insured other than acts or omissions of any of "your designated employees".

c. Nuclear Incidents Or Conditions

Due to nuclear reaction, nuclear radiation or radioactive contamination or to any related act or condition.

d. Pollution

Due to the discharge, dispersal, seepage, migration, release or escape of "pollutants" excluded under Exclusion f. Pollution, Coverage **A**.

SUPPLEMENTARY PAYMENTS – COVERAGE A

We will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend:

1. All expenses we incur.
2. All court costs taxed against the insured in the "suit". However, these payments do not include attorneys' fees or attorneys' expenses taxed against the insured.
3. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.
4. The cost of bonds to release attachments, but only for bond amounts within the applicable limit of insurance. We do not have to furnish these bonds.
5. Expenses incurred by the insured for first aid administered to others at the time of an accident, for "bodily injury" to which this insurance applies.
6. All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the claim or "suit", including actual loss of earnings up to $250 a day because of time off from work.
7. Prejudgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of insurance, we will not pay any prejudgment interest based on that period of time after the offer.

These payments will not reduce the limits of insurance.

SECTION II – WHO IS AN INSURED

1. You are an insured.
2. Your "executive officers" and directors are insureds, but only with respect to their duties as your officers and directors.
3. Your stockholders are insureds, but only with respect to their liability as stockholders.
4. Any railroad operating over your tracks is an insured.

SECTION III – LIMITS OF INSURANCE

1. The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:
   a. Insureds;
   b. Claims made or "suits" brought; or
   c. Persons or organizations making claims or bringing "suits".
2. The Aggregate Limit is the most we will pay for the sum of all damages because of all "bodily injury", all "property damage" and all "physical damage to property".
3. Subject to Paragraph 2. above, the Each Occurrence Limit is the most we will pay for the sum of all damages because of all "bodily injury", all "property damage" and all "physical damage to property" arising out of any one occurrence.
4. Subject to Paragraph 3. above, the payment for "physical damage to property" shall not exceed the lesser of:
   a. The actual cash value of the property at the time of loss; or
   b. The cost to repair or replace the property with other property of like kind or quality.

The Limits of Insurance of this Coverage Part apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations, unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the Limits of Insurance.

SECTION IV – CONDITIONS

A. The following Conditions apply to Coverages **A** and **B**:

1. Assignment

Assignment of interest under this Coverage Part shall not bind us unless we issue an endorsement consenting to the assignment.

2. Bankruptcy

Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations under this Coverage Part.

3. Cancellation

a. You may cancel this policy by mailing or delivering to us advance written notice of cancellation.

SAMPLE

b. We may cancel this policy by mailing or delivering to you, the "contractor" and any involved governmental authority or other contracting party designated in the Declarations, at the respective mailing addresses last known to us, written notice of cancellation at least 60 days before the effective date of cancellation.

c. Notice of cancellation will state the effective date of cancellation. The policy period will end on that date.

d. If this policy is cancelled, any unearned premium will be refunded. If we cancel, the refund will be pro rata. If you cancel, the refund may be less than pro rata. The cancellation will be effective even if we have not made or offered a refund.

e. If notice is mailed, proof of mailing will be sufficient proof of notice.

4. **Changes**

This policy contains all the agreements between you and us concerning the insurance afforded. You are authorized to make changes in the terms of this policy with our consent. This policy's terms can be amended or waived only by endorsement issued by us and made a part of this policy.

5. **Inspections And Surveys**

a. We have the right to:

(1) Make inspections and surveys at any time;

(2) Give you reports on the conditions we find; and

(3) Recommend changes.

b. We are not obligated to make inspections, surveys, reports or recommendations and any such actions we do undertake relate only to insurability and the premiums to be charged. We do not make safety inspections. We do not undertake to perform the duty of any person or organization to provide for the health or safety of workers or the public. And we do not warrant that conditions:

(1) Are safe or healthful; or

(2) Comply with laws, regulations, codes or standards.

c. Paragraphs a. and b. of this condition apply not only to us, but also to any rating, advisory, rate service or similar organization which makes insurance inspections, surveys, reports or recommendations.

d. Paragraph b. of this condition does not apply to any inspections, surveys, reports or recommendations we may make relative to certification, under state or municipal statutes, ordinances or regulations, of boilers, pressure vessels or elevators.

6. **Other Insurance**

The insurance afforded by this policy is:

a. Primary insurance and we will not seek contribution from any other insurance available to you except if the other insurance is provided by a contractor other than the designated contractor for the same operation and "job location"; and

b. If the other insurance is available, we will share with that other insurance by the method described below.

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach, each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

7. **Premium And Premium Audit**

a. We will compute all premiums for this Coverage Part in accordance with our rules and rates.

b. Contract cost, the premium base shown in the Declarations, means the total cost of the operations described in the Declarations.

c. The premium shown in the Declarations as advance premium is a deposit premium only. At the close of each audit period we will compute the earned premium for that period and send notice to the "contractor" designated in the Declarations. The due date for audit and retrospective premiums is the date shown as the due date on the bill. If the sum of the advance and audit premiums paid for the policy period is greater than the earned premium, we will return the excess to the contractor designated in the Declarations.

In no event shall the payment of premium be your obligation.

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8. **Transfer Of Rights Of Recovery Against Others To Us**

   If the insured has rights to recover all or part of any payment we have made under this policy, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring "suit" or transfer those rights to us and help us enforce them.

9. **When We Do Not Renew**

   If we decide not to renew this Coverage Part, we will mail or deliver to the first Named Insured shown in the Declarations written notice of the nonrenewal not less than 30 days before the expiration date.

   If notice is mailed, proof of mailing will be sufficient proof of notice.

B. The following Conditions apply to Coverage **A** only:

1. **Legal Action Against Us**

   No person or organization has a right under this policy:

   a. To join us as a party or otherwise bring us into a "suit" asking for damages from an insured; or

   b. To sue us on this policy unless all of its terms have been fully complied with.

   A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured; but we will not be liable for damages that are not payable under the terms of this policy or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.

2. **Duties In The Event Of Occurrence, Claim Or Suit**

   a. You must see to it that we are notified as soon as practicable of an occurrence which may result in a claim. To the extent possible, notice should include:

      (1) How, when and where the occurrence took place;

      (2) The names and addresses of any injured persons and witnesses; and

      (3) The nature and location of any injury or damage arising out of the occurrence.

   b. If a claim is made or "suit" is brought against any insured, you must:

      (1) Immediately record the specifics of the claim or "suit" and the date received; and

      (2) Notify us as soon as practicable.

      You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

   c. You and any other involved insured must:

      (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";

      (2) Authorize us to obtain records and other information;

      (3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and

      (4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.

   d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

3. **Separation Of Insureds**

   Except with respect to the Limits of Insurance, this insurance applies:

   a. As if each Named Insured were the only Named Insured; and

   b. Separately to each insured against whom claim is made or "suit" is brought.

C. The following Conditions apply to Coverage **B** only:

1. **Appraisal**

   If you fail to agree with us on the value of the property, or the amount of loss, either you or we may make written demand for an appraisal of the loss within 60 days after proof of loss is filed. In this event, each party will select a competent appraiser. The two appraisers will select a competent and impartial umpire. The appraisers will state separately the value of the property and the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:

   a. Pay its chosen appraiser; and

   b. Bear the other expenses of the appraisal and umpire equally.

   If we submit to an appraisal, we still retain our right to deny the claim.

SAMPLE

2. **No Benefit To Bailee**

   No person or organization, other than you, having custody of the property will benefit from this insurance.

3. **Insured's Duties In The Event Of A Loss**

   You must:

   a. Protect the property, whether or not the loss is covered by this policy. Any further loss due to your failure to protect the property shall not be recoverable under this policy. Reasonable expenses incurred in affording such protection shall be deemed to be incurred at our request; and

   b. Submit to us, as soon after the loss as possible, your sworn proof of loss containing the information we request to settle the loss and, at our request, make available the damaged property for examination.

4. **Legal Action Against Us**

   No person or organization has a right under this policy to sue us on this policy unless all of its terms have been fully complied with and until 30 days after proof of loss is filed and the amount of loss is determined as provided in this policy.

5. **Payment Of Loss**

   We may pay for the loss in money, but there can be no abandonment of any property to us.

SECTION V – DEFINITIONS

1. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.
2. "Contractor" means the contractor designated in the Declarations and includes all subcontractors working directly or indirectly for that "contractor" but does not include you.
3. "Covered contract" means any contract or agreement to carry a person or property for a charge or any interchange contract or agreement respecting motive power, or rolling stock equipment.
4. "Executive officer" means a person holding any of the officer positions created by your charter, constitution, bylaws or any other similar governing document.
5. "Hostile fire" means one which becomes uncontrollable or breaks out from where it was intended to be.
6. "Job location" means the job location designated in the Declarations including any area directly related to the "work" designated in the Declarations. "Job location" includes the ways next to it.
7. "Physical damage to property" means direct and accidental loss of or damage to rolling stock and their contents, mechanical construction equipment or motive power equipment, railroad tracks, roadbeds, catenaries, signals, bridges or buildings.
8. "Pollutants" means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes material to be recycled, reconditioned or reclaimed.
9. "Property damage" means:

   a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

   b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the occurrence that caused it.

10. "Suit" means a civil proceeding in which damages because of "bodily injury" or "property damage" to which this insurance applies are alleged. "Suit" includes:

    a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or

    b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.

11. "Work" means work or operations performed by the "contractor" including materials, parts or equipment furnished in connection with the work or operations.
12. "Your designated employee" means:

    a. Any supervisory employee of yours at the "job location";

    b. Any employee of yours while operating, attached to or engaged on work trains or other railroad equipment at the "job location" which are assigned exclusively to the "contractor"; or

    c. Any employee of yours not described in Paragraph a. or b. above who is specifically loaned or assigned to the work of the "contractor" for the prevention of accidents or protection of property.

SAMPLE

Performance Bond

BOND NO. _____
PREMIUM: _____

WHEREAS, The _____, (hereinafter designated as "Obligee") and _____ (hereinafter designated as "Principal") have entered into an agreement whereby principal agrees to install and complete certain designated public improvements, which said agreement, dated _____ , and identified as project _____ is hereby referred to and made a part hereof; and

WHEREAS, Said principal is required under the terms of said agreement to furnish a bond for the faithful performance of said agreement;

NOW, THEREFORE, We, the principal and _____ as surety, are held and firmly bound unto the hereinafter called "The Obligee," in the penal sum of _____ dollars ($ _____) lawful money of the United States for the payment of which sum well and truly to be made, we bind ourselves, our heirs, successors, executors and administrators, jointly and severally firmly by these presents.

The condition of this obligation is such that if the above bound principal, his or its heirs, executors, administrators, successors or assigns, shall in all things stand to and abide by, and well and truly keep and perform the covenants, conditions and provisions in the said agreement and any alteration thereof made as therein provided, on his or their part, to be kept and perform and at the time and in the manner therein specified, and in all respects according to their true intent and meaning, and shall indemnify and save harmless the Obligee, its officers, agents and employees, as therein stipulated, then this obligation shall become null and void; otherwise it shall be and remain in full force and effect.

As part of the obligation secured hereby and in addition to the face amount specified therefore, there shall be included costs and reasonable expenses and fees, including reasonable attorney's fees, incurred by county in successfully enforcing such obligation, all to be taxed as costs and included in any judgment rendered.

The surety hereby stipulates and agrees that no change, extension of time, alteration or addition to the terms of the agreement or to the work to be performed thereunder or the specification accompanying the same shall in any wise affect its obligations on this bond, and it does hereby waive notice of any such change, extension of time, alteration or addition to the terms of the agreement or to the work or to the specifications.

IN WITNESS WHEREOF, this instrument has been duly executed by the principal and surety above named, on

By _____
PRINCIPAL
By: _____
PRINCIPAL
By: _____
ATTORNEY-IN-FACT

SAMPLE

Payment (Labor & Materials) Bond

BOND NO._____

KNOW ALL MEN/WOMEN BY THESE PRESENT that we,_____ as Principal (also referred to herein as "CONTRACTOR"), and _____ as Surety, are held and firmly bound unto _____, hereinafter called "OWNER," in the sum of _____Dollars ($_____), for the payment of which sum, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these present.

The condition of the above obligation is such that, whereas said Principal has been awarded and is about to enter into the annexed Contract for the _____ [NAME OF PROJECT], in accordance with OWNER's Call for Bids documents and Principal's Bid Dated _____, and to which reference is hereby made for all particulars, and is required by said "OWNER" to give this bond in connection with the execution of said Contract;

NOW, THEREFORE, if said CONTRACTOR, its Subcontractors, its heirs, executors, administrators, successors, or assigns, shall fail to pay (a) for any materials, provisions, equipment, or other supplies used in, upon, for or about the performance of the WORK contracted to be done under the Contract, or (b) for any work or labor thereon of any kind contracted to be done under the Contract, or (c) for amounts due under the Unemployment Insurance Code with respect to work or labor performed pursuant to the Contract, or (d) for any amounts required to be deducted, withheld, and paid over to the Employment Development Department from the wages of employees of the CONTRACTOR and its Subcontractors under Section 13020 of the Unemployment Insurance Code with respect to such work and labor, in each case, as required by the provisions of Sections 9550-9566 inclusive, of the Civil Code of the State of California and acts amendatory thereof, and sections of other codes of the State of California referred to therein and acts amendatory thereof, and provided that the persons, companies, corporations or other entities so furnishing said materials, provisions, provender, equipment, or other supplies, appliances, or power used in, upon, for, or about performance of the Work contracted to be executed or performed, or any person, company, corporation or entity renting or hiring implements or machinery or power for or contributing to said Work to be done, or any person who performs work or labor upon the same, or any person, company, corporation or entity who supplies both work and materials therefor, shall have complied with the provisions of said laws, then said Surety will pay in full the same in an amount not exceeding the sum hereinabove set forth and also will pay, in case suit is brought upon this bond, a reasonable attorney's fee, as shall be fixed by the Court. This bond shall inure to the benefit of any and all persons named in Section 9100 of the Civil Code of the State of California so as to give a right of action to them or their assigns in any suit brought upon this bond.

PROVIDED, that any alterations in the WORK to be done or the materials to be furnished, or changes in the time of completion, which may be made pursuant to the terms of said Contract Documents, shall not in any way release said CONTRACTOR or said Surety thereunder, nor shall any extensions of time granted under the provisions of said Contract Documents release either said

SAMPLE

CONTRACTOR or said Surety, and notice of such alterations or extensions of the Agreement is hereby waived by said Surety.

IN WITNESS WHEREOF, the Principal and the Surety have executed this instrument in duplicate this _____ day of _____, 20_____.

_____	_____
Surety	Principal
By: _____	By: _____
_____	_____
Print Name/Title	Print Name/Title
_____	_____
Address	Address
(_____)_____	(_____)_____
Telephone Number	Telephone Number
_____	_____
Email Address	Email Address

SAMPLE

NOTARIAL CERTIFICATE OF ATTORNEY IN FACT AND SEAL OF SURETY MUST BE ATTACHED.

(Optional Form)

This blanket endorsement modifies insurance provided under the following:

Project Name: _____

Named Insured: Las Gallinas Valley Sanitary District, its officers, officials, employees and volunteers, 300 Smith Ranch Road, San Rafael, CA 94903

Effective Work Date(s): _____

Insuring Company: _____ Policy No.: _____

Description of Work/Locations/Vehicles:

_____

AGENCY NAME AND ADDRESS:

ADDITIONAL INSURED:

The Agency, its elected or appointed officers, officials, employees and, volunteers are included as insureds with regard to damages and defense of claims arising from: (Check all that apply)

General Liability: (a) activities performed by or on behalf of the Named Insured, (b) products and completed operations of the Named Insured, (c) premises owned, leased occupied or used by the Named Insured, and/or (d) permits issued for operations performed by the Named Insured. {Note: MEETS OR EXCEEDS ISO Form # CG 20 10 11 85}

Auto Liability**: the ownership, operation, maintenance, use, loading or unloading of any auto owned, leased, hired or borrowed by the Named Insured, regardless of whether liability is attributable to the Named Insured or a combination of the Named Insured and the Agency, its elected or appointed officers, officials, employees or volunteers.**

Other: _____

PRIMARY/NON-CONTRIBUTORY: This insurance is primary and is not additional to or contributing with any other insurance carried by or for the benefit of Additional Insureds.

PROVISIONS REGARDING THE INSURED'S DUTIES AFTER ACCIDENT OR LOSS: Any failure to comply with reporting provisions of the policy shall not affect coverage provided to the Agency, its elected or appointed officers, officials, employees, or volunteers.

CANCELLATION NOTICE: The insurance afforded by this policy shall not be suspended, voided, canceled, reduced in coverage or in limits except after thirty (30) days' prior written notice (ten (10) days if canceled due to non-payment) by certified mail return receipt requested has been given to the Agency. Such notice shall be addressed as shown above.

WAIVER OF SUBROGATION: The insurer(s) named above agree to waive all rights of subrogation against the Agency, its elected or appointed officers, officials, agents, volunteers and employees for losses paid under the terms of this policy which arise from work performed by the Named Insured for the Agency.

Nothing herein contained shall vary, alter or extend any provision or condition of the Policy other than as above stated.

SIGNATURE OF INSURER OR AUTHORIZED REPRESENTATIVE OF THE INSURER

I, _____, (print/type name), warrant that I have authority to bind the above-named insurance company and by my signature hereon do so bind this company.

SIGNATURE OF AUTHORIZED REPRESENTATIVE (original signature required on endorsement furnished to the Agency)

ORGANIZATION: _____

TITLE: _____

ADDRESS: _____

TELEPHONE: (_____)_____ DATE ISSUED: _____

APPENDIX C

MISCELLANEOUS CONTRACT FORMS

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300 SMITH RANCH ROAD, SAN RAFAEL, CA 94903

Change Order No. __

Project No:	**Date:**
Project:	
Contractor:	**Phone**:
	Fax:

The following change is hereby made to the contract:

Description of Change:

Reason for Change:

Pricing Data:

Contract Extension:

This Change Order added __ working days to contract completion date.

Las Gallinas Valley Sanitary District (LGVSD), Owner, and the Contractor hereby agree that this change order constitutes full and mutual accord and satisfaction for all time, all costs, and all impacts related to this revision. In accepting this change order, the Contractor agrees that it represents a full and equitable adjustment to the contract, and further agrees to waive all rights to file claim with respect to any difficulties arising from, or as a result of, this change.

Accounting Summary:

Original Contract:	**$0.00**	
Previous Additions:	**$0.00**	
Previous Deductions (-):	**$0.00**	
This Change Order (+/-):	**$0.00**	
Contract to Date:	**$0.00**	

APPROVED:

Michael Cortez, PE Date
District Engineer

Curtis Paxton, PE Date
General Manager

Contractor Date

Change Order Proposal
No. __

To:

Project Name:
Project No:
Contractor:
Reference:

Date Submitted By Contractor:

Description: _____

COST BREAKDOWN FOR CHANGE ORDER PROPOSAL								
Description	**Qty**	**Unit**	**Labor**	**Material**	**Equip**	**Rental**	**Sub**	**Total**
Subtotal:								
Markup Rate for Self Performed Labor/Mat. & Suppliers/Equipment:								
Markup on Subcontractors:								
Total:								

Time extension required for this change: ____

Change Order Pricing
Paragraph 4.5.2 of the General Conditions, Page 1-28 states: "Indirect costs added under a change order **may not exceed an allowance of fifteen (15) percent of the total of combined Contractor and subcontractor direct costs added under the change order**. Such allowance covers Contractor overhead and profit under the change order and includes the cost of insurance in addition to that required pursuant to Section 8.8, bond premiums, superintendent labor, clerical labor, home office expenses, worksite office expenses, and utility costs under the change order. Such costs may not be itemized as direct costs under a change order."

See General Conditions, Paragraph 4 CHANGES IN WORK for more information.

SAMPLE

UNCONDITIONAL WAIVER AND RELEASE ON PROGRESS PAYMENT

NOTICE TO CLAIMANT: THIS DOCUMENT WAIVES AND RELEASES LIEN, STOP PAYMENT NOTICE, AND PAYMENT BOND RIGHTS UNCONDITIONALLY AND STATES THAT YOU HAVE BEEN PAID FOR GIVING UP THOSE RIGHTS. THIS DOCUMENT IS ENFORCEABLE AGAINST YOU IF YOU SIGN IT, EVEN IF YOU HAVE NOT BEEN PAID. IF YOU HAVE NOT BEEN PAID, USE A CONDITIONAL WAIVER AND RELEASE FORM.

Identifying Information
Name of Claimant:
Name of Customer:
Job Location:
Owner: Las Gallinas Valley Sanitary District
Through Date:

Unconditional Waiver and Release

This document waives and releases lien, stop payment notice, and payment bond rights the claimant has for labor and service provided, and equipment and material delivered, to the customer on this job through the Through Date of this document. Rights based upon labor or service provided, or equipment or material delivered, pursuant to a written change order that has been fully executed by the parties prior to the date that this document is signed by the claimant, are waived and released by this document, unless listed as an Exception below. The claimant has received the following progress payment:

$_____

Exceptions

This document does not affect any of the following:
(1) Retentions.
(2) Extras for which the claimant has not received payment.
(3) Contract rights, including (A) a right based on rescission, abandonment, or breach of contract, and (B) the right to recover compensation for work not compensated by the payment.

Signature
Claimant's Signature:
Claimant's Title:
Date of Signature:

UNCONDITIONAL WAIVER AND RELEASE ON FINAL PAYMENT

NOTICE TO CLAIMANT: THIS DOCUMENT WAIVES AND RELEASES LIEN, STOP PAYMENT NOTICE, AND PAYMENT BOND RIGHTS UNCONDITIONALLY AND STATES THAT YOU HAVE BEEN PAID FOR GIVING UP THOSE RIGHTS. THIS DOCUMENT IS ENFORCEABLE AGAINST YOU IF YOU SIGN IT, EVEN IF YOU HAVE NOT BEEN PAID. IF YOU HAVE NOT BEEN PAID, USE A CONDITIONAL WAIVER AND RELEASE FORM.

Identifying Information
Name of Claimant:
Name of Customer:
Job Location:
Owner: Las Gallinas Valley Sanitary District

Unconditional Waiver and Release

This document waives and releases lien, stop payment notice, and payment bond rights the claimant has for all labor and service provided, and equipment and material delivered, to the customer on this job. Rights based upon labor or service provided, or equipment or material delivered, pursuant to a written change order that has been fully executed by the parties prior to the date that this document is signed by the claimant, are waived and released by this document, unless listed as an Exception below. The claimant has been paid in full.

Exceptions
This document does not affect any of the following: Disputed claims for extras in the amount of: $

Signature
Claimant's Signature:
Claimant's Title:
Date of Signature:

CONDITIONAL WAIVER AND RELEASE ON PROGRESS PAYMENT

NOTICE: THIS DOCUMENT WAIVES THE CLAIMANT'S LIEN, STOP PAYMENT NOTICE, AND PAYMENT BOND RIGHTS EFFECTIVE ON RECEIPT OF PAYMENT. A PERSON SHOULD NOT RELY ON THIS DOCUMENT UNLESS SATISFIED THAT THE CLAIMANT HAS RECEIVED PAYMENT.

Identifying Information

Name of Claimant:

Name of Customer:

Job Location:

Owner: Las Gallinas Valley Sanitary District

Through Date:

Conditional Waiver and Release

This document waives and releases lien, stop payment notice, and payment bond rights the claimant has for labor and service provided, and equipment and material delivered, to the customer on this job through the Through Date of this document. Rights based upon labor or service provided, or equipment or material delivered, pursuant to a written change order that has been fully executed by the parties prior to the date that this document is signed by the claimant, are waived and released by this document, unless listed as an Exception below. This document is effective only on the claimant's receipt of payment from the financial institution on which the following check is drawn:

Maker of Check:

Amount of Check: $

Check Payable to:

Exceptions

This document does not affect any of the following:
(1) Retentions.
(2) Extras for which the claimant has not received payment.
(3) The following progress payments for which the claimant has previously given a conditional waiver and release but has not received payment:
Date(s) of waiver and release:_____
Amount(s) of unpaid progress payment(s): $_____
(4) Contract rights, including (A) a right based on rescission, abandonment, or breach of contract, and (B) the right to recover compensation for work not compensated by the payment.

Signature

Claimant's Signature:

Claimant's Title:

Date of Signature:

CONDITIONAL WAIVER AND RELEASE ON FINAL PAYMENT

NOTICE: THIS DOCUMENT WAIVES THE CLAIMANT'S LIEN, STOP PAYMENT NOTICE, AND PAYMENT BOND RIGHTS EFFECTIVE ON RECEIPT OF PAYMENT. A PERSON SHOULD NOT RELY ON THIS DOCUMENT UNLESS SATISFIED THAT THE CLAIMANT HAS RECEIVED PAYMENT.

Identifying Information
Name of Claimant:
Name of Customer:
Job Location:
Owner: Las Gallinas Valley Sanitary District

Conditional Waiver and Release

This document waives and releases lien, stop payment notice, and payment bond rights the claimant has for labor and service provided, and equipment and material delivered, to the customer on this job. Rights based upon labor or service provided, or equipment or material delivered, pursuant to a written change order that has been fully executed by the parties prior to the date that this document is signed by the claimant, are waived and released by this document, unless listed as an Exception below. This document is effective only on the claimant's receipt of payment from the financial institution on which the following check is drawn:

Maker of Check:
Amount of Check: $
Check Payable to:

Exceptions
This document does not affect any of the following: Disputed claims for extras in the amount of: $

Signature
Claimant's Signature:
Claimant's Title:
Date of Signature:

Project: _____

Project No. _____

Progress Payment No:	☐ **Contract**	**Period to:**	
	☐ **Change Order**	***Attach Detail Sheet by Bid Line Item***	

To Owner:	**Las Gallinas Valley Sanitary District**	**Contract Time working days)**	
From Contractor:		Orig. Contract:	0
Via Construction Manager:		Added by CCOs:	0
		Revised Total:	0 days

Contract Summary:

Original Contract Amount:		Previous Total Change Orders:	
Net Change by Change Orders:		Change Orders This Month:	
Total Contract Amount	$0	**Total Change Orders:**	$0

CONTRACT AND CHANGE ORDER WORK

Previous Total Work Completed:			
Previous Total Completed and Stored:	$0.00		
Previous Total Earned Less Retainage:			
Work Completed This Period*:			
Work Completed Retention this Period (5%):	$0.00 **(a)**		
Payment For Work Completed:	**$0.00 (b)**		
Total Work Completed to Date	$0.00 *		

reference only - no progress payment toward matls stored until included as work complete; use other template if pymt for matls stored is contracted

Previous Materials Stored:	
Materials Added This Period:	
Materials Moved to Work Completed:	
Total Materials Stored:	$0.00
Total Work Completed and Stored to Date:	$0.00

Balance to Finish (incl CO's/NIC matls stored):	$0.00	Previous Retainage:	
		Current Total Retainage:	$0.00 *
		Retainage / Escrow for this Period:	**$0.00 (e)**
Percent Work Completed:	0.0%		
Percent Completed and Stored:	0.0%	Percent to Finish:	100.0%
Percent Paid to Contractor:	0%	Percent Change Orders:	0.00%
Current Payment Due to Contractor:	**$0.00**	**Current Amount Retained/to Escrow:**	**$0.00**
	(b)		**(a) / not to exceed (e)**

CONTRACTOR CERTIFICATION

The Undersigned Contractor certifies that to the best of the Contractor's knowledge, information, and belief, the Work covered by this application for Payment has been completed in accordance with the Contract Documents, that all amounts have been paid by the Contractor for Work which previous Certificates for Payment were issued and Payments received from the Owner, and the current payment shown herein is no due.

Contractor _____ Date: _____

CONSTRUCTION MANAGER'S CERTIFICATE FOR PAYMENT

In accordance with the Contract Documents, based on on-site observations and the data comprising this application, the Construction Manager certifies to the Owner that to the best of the Construction Manager's knowledge, information, and belief, the Work has progressed as indicated, the quality of the Work is in accordance with the Contract Documents, and the Contractor is entitled to payment of the AMOUNT CERTIFIED.

AMOUNT CERTIFIED: **$0.00**

Construction Management _____ Date: _____

OWNER APPROVAL

Las Gallinas Valley Sanitary District _____ Date: _____

Las Gallinas VALLEY SANITARY DISTRICT

300 SMITH RANCH ROAD, SAN RAFAEL, CA 94903

System Outage Request Form No. __

Project Name:
Project No:
Item:

Requested By: _____ **Company:** _____

Date Submitted By Contractor:

*Note: Non-emergency outage requests should be made no later than **72 hours** prior to the requested date.*

1. **Shutdown is requested on the following system:**

2. **Proposed Start Date:** _____ **Time:** _____ **AM / PM (circle)**
   Estimated Duration: _____ **days / hours (circle)**

3. **Reason for Outage:**

4. **Operations staff assistance required: Yes / No (circle)**
   If yes, please describe:

5. **Method of Approach/Sequence of Events:**

6. **Equipment to be used during shutdown:**

7. **Contingency Plan:**

FOR LGVSD USE ONLY

District Comments:

Other Comments:

☐ **SOR Approved** ☐ **SOR Acceptable with Comments as Noted** ☐ **SOR NOT Approved/Resubmit**

Date of Final Transmission to Contractor: _____

APPROVED:

_____

Mel Liebmann Date
Plant Manager

Project: _____

Project No. _____

Progress Payment No: **Period to:**

Item No.	Description	Quantity	Units	Unit Price	Bid Price	Units To Date	Cost To Date
1							
2							
3							
4							
5							
6							
7							
8							
9							
10							
11							
12							
13							
14							
15							
	BASE CONTRACT						
	ALTERNATES						
	BASE CONTRACT INCLUDING ALTERNATES						
	CHANGE ORDERS						
1							
2							
	TOTAL CHANGE ORDERS						

	Contract to Date	
BASE CONTRACT		
CHANGE ORDERS / WORK ORDERS / MISC.	Less 5% Retention	
TOTAL CONTRACT	Net Contract to Date	
PERCENT COMPLETED TO DATE		
	Less Previous Payments	
	Amount Due	

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APPENDIX D

LABOR COMPLIANCE PROGRAM

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LABOR COMPLIANCE PROGRAM HANDOUT

The Agency is committed to enforcing State prevailing wage requirements. The provisions of this law require all contractors to comply with the current prevailing wage rate requirements and all apprenticeship requirements.

The submission of complete and accurate certified payrolls records, including fringe benefit statements, DAS-140, DAS-142, CAC2 and similar forms are a prerequisite to receiving progress payments. Failure to comply with these rules and regulations can result in monies being withheld and penalties imposed. Contractors are advised to be familiar with Labor Code Section 1720 et. seq. For all projects advertised for bid after March 1st 2015 and all projects awarded after April 1, 2015 certified payrolls must be also be submitted to the CMU using eCPR.

- Prime contractor must set up all subcontractors in the eCPR system.
- Any subcontractor must also add all of their subtiers to the eCPR system.

At the time the General Contractor submits any progress payment to the Agency, the following documents are to be submitted by the General Contractor **directly to the CCMI** for all work performed, including work by subcontractors:

- 1 copy of the progress payment request
- A copy of the certified payroll report submitted to the eCPR
- PW26 or similar form listing fringe benefits being paid.
- CAC2 form or equivalent relating to monthly training contributions
- DAS-140 form for each craft employed on the project
- DAS-142 request to train apprentices
- Electrician Certification – Those employing electricians may need to submit additional data to verify the certification status of those employed

Subcontractors are to submit all documentation directly to the General Contractor in a timely (not less than monthly) basis. The General Contractor will then forward all information to CCMI. Failure to submit these documents to CCMI may result in the progress payment being delayed.

Should you have any questions or concerns, you are welcome to contact:
Contractor Compliance and Monitoring (CCMI) directly at:

CONTRACTOR COMPLIANCE AND MONITORING
635 Mariners Island Blvd. Suite 200
San Mateo, CA 94404
Phone (650) 522-4403
Fax (650) 522-4402

SAMPLE

FOR REVIEW AT JOB START MEETINGS

The state labor law requirements applicable to the contract are composed of, but not limited to, the following:

1. Payment of Prevailing Wage Rates
   The award of a public works contract requires that all workers employed on the project be paid not less than the specified general prevailing wage rates by the contractor and its subcontractors. Prevailing wage determinations for this project can be obtained at: **www.dir.ca.gov.** This includes a total package including fringe benefits and training contributions which are paid to the employee or for the benefit of the employee to a bona fide ERISA approved or otherwise unconditionally paid for the benefit of the employee Trust Fund.

   The contractor is responsible for obtaining and complying with all applicable general prevailing wage rates for trades workers and any rate changes, which may occur during the term of the contract. Prevailing wage rates and rate changes are to be posted at the job site for workers to view. Or the contractor may post a notice stating where the prevailing wage determinations are available on the jobsite and the contractor shall provide access to such information upon reasonable notice.

2. All individuals or companies performing prevailing wage work on this project must be registered as a public works contractor and pay an annual fee of $300 to the Department of Industrial Relations (DIR). This includes all work covered by prevailing wage such as trucking, surveying, building inspection and so on.

3. Apprentices
   It is the duty of the contractor and subcontractors to employ registered apprentices on public works projects per Labor Code Section 1777.5; Contractors and subcontractors must submit proof of Public Works Contract Award Information (DAS140) or other documentation for Division of Apprenticeship Standards approved apprenticeship programs. Apprentices are to be employed in all crafts and in all trades with approved training programs. Contactors are to employ apprentices on a ratio of 1 apprentice hour for every 5 journeymen hours or as otherwise approved by the DAS approved Apprenticeship Training Committee. Contractors and subcontractors who do not meet this ratio must submit documentation that apprentices were requested and were not provided and/or not available in sufficient number to meet this ratio. The submission of an accurate DAS142(s) meets this requirement. Additional documentation may be required to verify the apprenticeship status of employees.

4. Penalties
   Penalties, including forfeitures and debarment, shall be imposed for contractor/subcontractor failure to pay prevailing wages, failure to maintain and submit accurate certified payroll records upon request, failure to employ apprentices, and for failure to pay employees for all hours worked at the correct prevailing wage rate, in accordance with Labor Code Sections 1775, 1776, 1777.7, and 1813. Monetary penalties of $200 per day per worker shall be imposed for failure to pay correct prevailing wage; $25 per day per worker shall be imposed for overtime violated; $100 per day per worker for failure to provide certified payroll information; $100-$300 per calendar day for noncompliance of Apprenticeship issues.

5. Certified Payroll Records
   Per Labor Code Section 1776, contractors and subcontractors are required to keep accurate payroll records which reflect the name, address, social security number, and work classification of each employee; the straight time and overtime hours worked each day and each week; the fringe benefits; and the actual per diem wages paid to each journeyperson, apprentice, worker, or other employee hired in connection with a public works project. A listing of all current prevailing wage determinations can be obtained from the Agency's main office or by accessing the Department of Industrial Relation's website at: www.dir.ca.gov

SAMPLE

Employee payroll records shall be certified (signed under penalty of perjury by someone in authority at the company) and shall be made available for inspection at all reasonable hours at the principal office of the contractor/subcontractor, or shall be furnished to any employee, or to his or her authorized representative on request. Disclosure of certified payroll information to anyone other than the Awarding Body, its agent, or the Department of Industrial Relations requires that personal information about the employees (name, address and social security number) listed on the forms be redacted (omitted) to protect employee privacy.

Contractors and subcontractors shall maintain their certified payrolls on a weekly basis and shall submit said payrolls on a monthly basis in conjunction with contractor's requests progress or final payment. In the event that there has been no work performed during a given week, the Certified Payroll Record shall be annotated "No Work" for that week. The Agency or its authorized representative is also authorized to request and review all related payroll records such as time cards, cancelled checks, etc. For all projects awarded after April 1, 2015, certified payrolls must also be submitted to the DIR the electronically through their eCPR system.

While the DIR accepts electronic versions of your certified payroll, the DIR and this agency may also request copies of the original certified payroll and supporting documentation at any time.

6. Nondiscrimination in Employment
   Prohibitions against employment discrimination are contained in Labor Code Sections 1735 and 1777.6; the Government Code; the Public Contracts Code; and Title VII of the Civil Rights Act of 1964, as amended. All contractors and subcontractors are required to implement equal employment opportunities as delineated below:

   a. Equal Employment Poster
      The equal employment poster shall be posted at the job site in a conspicuous place visible to employees and employment applicants for the duration of the project. All other labor and employment related posters are also to be properly displayed on the jobsite.

7. Kickback Prohibited
   Per Labor Code Section 1778, contractors and subcontractors are prohibited from accepting, taking wages illegally, or extracting "kickback" from employee wages;

8. Acceptance of Fees Prohibited
   Contractors and subcontractors are prohibited from exacting any type of fee for registering individuals for public work (Labor Code Section 1779); or for filling work orders on public works contracts (Labor Code Section 1780);

9. Listing of Subcontractors
   Contractors are required to list all subcontractors hired to perform work on a public works project when that work is equivalent to more than one-half of one percent of the total contract amount or $10,000 whichever is greater. (Public Contract Code Section 4100, et seq.);

10. Proper Licensing
    Contractors and subcontractors are required to be properly licensed. Penalties will be imposed for employing workers while unlicensed (Labor Code Section 1021 and Business and Professions Code Section 7000, et seq. under California Contractors License Law);

11. Unfair Competition Prohibited
    Contractors and subcontractors are prohibited from engaging in unfair competition (Business and Professions Code Sections 17200-17208);

12. Workers' Compensation Insurance

SAMPLE

All contractors and subcontractors are required to be insured against liability for workers' compensation, or to undertake self-insurance in accordance with the provisions of Labor Code Section 3700 (Labor Code Section 1861);

13. OSHA
Contractors and subcontractors are required to comply with the Occupational, Safety and Health laws and regulations applicable to the particular public works project.

14. Prompt Payment of Subcontractors and Suppliers
Contractors are required by law to promptly pay their subcontractors and suppliers within seven (7) days of receipt of any progress or final payment from the Public Agency. Likewise the subcontractor and supplier are required to pay their respective subcontractors and suppliers within seven (7) days of receipt of payment from the general contractor. When the payment to the contractor is a release of final retention on the project, those funds must be paid within seven (7) days of receipt.

15. IRCA
Pursuant to the Immigration Reform and Control Act of 1986, employers are required to verify that all employees working on public works contracts are legally able to work in the United States. Employers shall keep on file appropriate I-9 forms and documentation for all workers employed on the jobsite and make such forms available to inspection and review by the LCO upon request.

16. Jobsite Interviews
Jobsite interviews are not required on this project. If the need arises, CCMI may conduct random jobsite interviews on this project.

17. Certification of Electricians
Those employing electricians must comply with employment testing and certification requirements for electricians. Additional information may be required to verify the certification status of those employed.

18. Employee Wage Statements - It is required to provide itemized wage statements (pay stubs) to Employees under Labor Code Section 226.

19. Public Works Contractor Registration – Only those businesses who have registered and paid the applicable fee to the Department of Industrial Relations as a Public Works Contractor will be allowed to work on the project.

SAMPLE

In accordance with federal and state laws, and with the Public Agency's policy and contract documents, the undersigned contractor herein certifies that they will comply with the foregoing labor law requirements; and fully understands that failure to comply with these requirements will subject them to the penalties cited herein.

The contractor also herein certifies that it has been provided with a copy of the Labor Compliance Program Package for Contractors with includes:

1. Labor Law Requirements Checklist (included herein)
2. The Location of Applicable General Prevailing Wage Rate Determinations
3. Blank Certified Payroll Record form
4. Fringe Benefit Statements
5. State apprenticeship contribution form (CAC2)
6. State apprenticeship requirements and form to register apprentices (DAS-140)
7. Request for apprentices (DAS-142)
8. Copy of the Labor Code relating to Public Works and Public Agencies (Part 7, Chapter 1, Sections 1720-1816 can be found at www.dir.ca.gov.

IT IS THE CONTRACTOR'S RESPONSIBILITY TO PROVIDE COPIES OF THE LABOR COMPLIANCE PROGRAM PACKAGE TO ALL LISTED SUBCONTRACTORS AND TO ANY SUBSTITUTED SUBCONTRACTORS.

Project Name and Number:_____

Public Agency:_____

Contractor: Name _____

Contractor Address: _____

Contractor Phone:_____ Fax:_____

License Number: _____Date: _____

I acknowledge that I have been informed and am aware of the foregoing requirements and that I am authorized to make this certification on behalf of _____.
(Name of Contractor)

_____
Signature/Name/Title of Contractor Authorized Representative

SAMPLE

Additional Explanation And Instructions Relating To Required LCP Forms and Information

Certified payroll or non performance documentation - is required for each week from the beginning of the contractor's /subcontractor's work on the project until completion of that contractor's/subcontractor's work. These documents need to reflect a consistent 7 day work week for the entirety of the project. The certified payroll forms need to be complete, listing the employee's correct name, address, social security number, hours worked per day, total hours worked per week, wages, deductions and check number. It is critical that the employee's craft classification be listed correctly. Just listing "Journeyman" or "Laborer" is

not sufficient. Many trades have sub-classifications and it is the contractor's obligation to correctly classify the employees. Employees must be classified and paid based on what type of work they are performing, not merely by title. It is acceptable for an employee to work in more than one trade category per day, but it is the employer's obligation to keep accurate records of the different type of work performed by the employee.

Please be aware non performance statements must be submitted for weeks in which no work is performed. More information about trade classifications and wage rates can be found at www.dir.ca.gov.

Fringe Benefit Statement - In order to complete a payroll audit, we need a copy of the fringe benefit statement listing the fringes being paid to each employee or employees on each trade. You are not required to use the worksheet in the packet, however all the information on that worksheet needs to be included in the documentation we receive. This should show an hourly breakdown of the specific contributions (health, pension, etc.) for each trade and the addresses of the plans being paid into. For contractors who pay medical benefits directly to a medical plan, such as Kaiser or Blue Shield, the monthly payment for each employee must be amortized into an hourly rate. (For example: Joe's health premium is $300 a month, that rate multiplied by 12 (months) divided by 2080 (hours) yields an hourly rate of $1.72 per hour). Similar amortization is allowed for vacation and holiday time paid. Training contributions paid to an approved apprenticeship committee needs to be listed as a separate item on this form (i.e. not just training/other together).

Apprenticeship

Submit contract award information- DAS-140

Submit the contract award information in writing to each of the apprenticeship program sponsors in the area of your public works project within 10 days of the prime execution of the contract or subcontract, but in no event later than the first day in which the contractor has workers employed on the public work. This is simply a notification of award, it is not automatically a request for dispatch of a registered apprentice.

If you are not already approved to train apprentices with an approved apprenticeship committee and you are not willing to abide by the terms of and conditions of an apprenticeship program for this project, then (check Box 3) you must send a copy of the DAS-140 form to ALL approved apprenticeship Training Committee for that craft in the County in which the work is being performed.

Request to employ registered apprentices- DAS-142

A contractor on a public works project must employ one (1) hour of apprentice work for every five (5) hours performed by a journeyman.

All contractors must request for dispatch of an apprentice from an apprenticeship program (for each apprenticeable craft or trade) by giving the program actual notice of the request at least 72 hours (business days only) before the date on which apprentices are required. Contractors who do not receive sufficient number of apprentices from their initial request must continue to request apprentices from all other approved apprenticeship committees in the county, if more than one exists, until the proper ratio of apprentices is reached or until all apprenticeship committees (for that trade) have been contacted at least once.

When an apprentice is dispatched, the employer is required to employ the apprentice for at least one full day of work (8 hours) or 20% of the total apprenticeship hours calculated for the project- unless the total number of journeyman hours total under 40 hours for that craft.

Make training fund contributions – CAC 2

SAMPLE

Contractors who are awarded public works jobs must make training fund contributions in the amount established in the prevailing wage rate publication for journeymen and apprentices. This nominal fee contributes to the assurance that new apprentices coming into the craft will be guaranteed the highest level of training and as those skilled craftsmen retire, the trade will survive.

Contractors who contribute to an apprenticeship program are entitled to a full credit in the amount of those contributions for each apprentice working on the project and to not more than the specified training contribution amount for journeyman.. Contractors who do not contribute to an apprenticeship program must submit their contributions to the California Apprenticeship Council, PO Box 511283, Los Angeles, CA 90051-7838.

Training fund contributions to the Council are due and payable on the 15th day of the month for work performed during the preceding month. The contribution should be paid by check and be accompanied by a computer generated training fund contribution form (CAC – 2) or a letter containing the following information:

1. The name, address and telephone number of the contractor making the contribution.
2. The contractor's license number.
3. The name and address of the public agency that awarded the contract.
4. The jobsite location, including the county where the work was performed.
5. The contract or project number.
6. The time period covered by the enclosed contributions.
7. The contribution rate and total hours worked by apprenticeable occupation.
8. The name of the program(s) that provide apprentices if any.
9. The number if apprentice hours worked, by apprenticeable occupations and by program.

Comments, suggestions and questions welcome. Email to daspublicworks@dir.ca.gov or call your local district office.

* * * * *

* DAS-140 and DAS-142 forms are not required when the Prime contract is less than $30,000 or when the company performing the work is a sole proprietor and is the only worker employed by that company on the project.

SAMPLE

PUBLIC WORKS CONTRACT AWARD INFORMATION

Contract award information must be sent to your Apprenticeship Committee if you are approved to train. If you are not approved to train, you must send the information (which may be this form) to ALL applicable Apprenticeship Committees in your craft or trade in the area of the site of the public work. Go to: http://www.dir.ca.gov/das/PublicWorksForms.htm for information about programs in your area and trade. You may also consult your local Division of Apprenticeship Standards (DAS) office whose telephone number may be found in your local directory under California, State of, Industrial Relations, Division of Apprenticeship Standards.

Do not send this form to the Division of Apprenticeship Standards.

NAME OF YOUR COMPANY	CONTRACTOR'S STATE LICENSE NO
MAILING ADDRESS- NUMBER & STREET, CITY, ZIP CODE	AREA CODE & TELEPHONE NO.
NAME & ADDRESS OF PUBLIC WORKS PROJECT	ATE YOUR CONTRACT EXECUTED
	TE OF EXPECTED OR ACTUAL START OF PROJECT
NAME & ADDRESS OF PUBLIC AGENCY AWARDING CONTRACT	ESTI LD NUMBER OF JO NEYMEN HOURS
	CUPA OF APPRENTICE
THIS FORM IS BEING SENT TO: (NAME & ADDRESS OF APPRENTICESHIP PROGRAM(S))	ESTIMATED NUMBER OF APPRENTICE HOURS
	APPROXIMATE DATES TO BE EMPLOYED

This is not a request for dispatch of apprentices.

Contractors must make a separate request for actual dispatch, in accordance with Section 230.1(a) California Code of Regulations

Check One Of The Boxes Below

1. ☐ We are already approved to train apprentices by the _____ Apprenticeship Committee. We will employ and train under their Standards. Enter name of the Committee

2. ☐ We will comply with the standards of _____ Apprenticeship Committee for the duration of this job only. Enter name of the Committee

3. ☐ We will employ and train apprentices in accordance with the California Apprenticeship Council regulations, including § 230.1 (c) which requires that apprentices employed on public projects can only be assigned to perform work of the craft or trade to which the apprentice is registered and that the apprentices must at all times work with or under the direct supervision of journeyman/men.

Signature _____ *Date* _____

Typed Name _____

Title _____

State of California - Department of Industrial Relations DIVISION OF APPRENTICESHIP STANDARDS

DAS 140 (REV. 1/04)

SAMPLE

REQUEST FOR DISPATCH OF AN APPRENTICE – DAS 142 FORM

DO NOT SEND THIS FORM TO DAS

You may use this form to request dispatch of an apprentice from the Apprenticeship Committee in the craft or trade in the area of the public work. Go to: http://www.dir.ca.gov/DAS/PublicWorksForms.htm for information about programs in your area and trade. You may also consult your local Division Apprenticeship Standards (DAS) office whose telephone number may be found in your local directory under California, State of, Industrial Relations, Division of Apprenticeship Standards. **Except for projects with less than 40 hours of journeyman work, you must request and employ apprentices in no less than 8 hour increments.**

Date:	**Contractor Requesting Dispatch:**
To Applicable Apprenticeship Committee: **Name: _____** **Address:_____** **_____** **Tel. No. _____Fax No._____**	**Name: _____** **Address: _____** **_____** **License No. _____** **Tel. No. _____Fax No._____**

Project Information:

Contract No. _____

Name of the Project: _____

Address:_____

Dispatch Request Information:

Number of Apprentice(s) Needed: _____Craft or Trade:_____

Date Apprentice(s) to Report:_____ (72 hrs. notice required) Time to Report:_____

Name of Person to Report to:_____

Address to Report to:_____

You may use this form to make your written request for the dispatch of an apprentice. Requests for dispatch must be in writing and submitted at least 72 hours in advance (excluding weekends and holidays) via either first class mail, fax or email. ***Proof of submission may be required.*** *Please take note of California Code of Regulations, Title 8, § 230.1 (a) for all applicable requirements regarding apprenticeship requests and/or visit*
http://www.dir.ca.gov/DAS/DASApprenticesOnPublicWorksSummaryOfRequirements.htm
DAS 142 (Revised 12/11)

SAMPLE

GENERAL PREVAILING WAGE DETERMINATION MADE BY THE DIRECTOR OF INDUSTRIAL RELATIONS
PURSUANT TO CALIFORNIA LABOR CODE PART 7, CHAPTER 1, ARTICLE 2, SECTIONS 1770, 1773 AND 1773.1

FOR COMMERCIAL BUILDING, HIGHWAY, HEAVY CONSTRUCTION AND DREDGING PROJECTS

CRAFT: # CEMENT MASON

DETERMINATION: NC-23-203-1-2014-2
ISSUE DATE: August 22, 2014
EXPIRATION DATE OF DETERMINATION: June 28, 2015** The rate to be paid for work performed after this date has been determined. If work will extend past this date, the new rate must be paid and should be incorporated in contracts entered into now. Contact the Office of the Director – Research Unit for specific rates at (415) 703-4774.

LOCALITY: All localities within Alameda, Alpine, Amador, Butte, Calaveras, Colusa, Contra Costa, Del Norte, El Dorado, Fresno, Glenn, Humboldt, Kings, Lake, Lassen, Madera, Marin, Mariposa, Mendocino, Merced, Modoc, Monterey, Napa, Nevada, Placer, Plumas, Sacramento, San Benito, San Francisco, San Joaquin, San Mateo, Santa Clara, Santa Cruz, Shasta, Sierra, Siskiyou, Solano, Sonoma, Stanislaus, Sutter, Tehama, Trinity, Tulare, Tuolumne, Yolo, and Yuba counties.

		Employer Payments				Straight-Time		Overtime Hourly Rate		
CLASSIFICATION (JOURNEYPERSON)	Basic Hourly Rate	Health and Welfare	Pension	Vacation and Holiday	Training	Hours[d]	Total Hourly Rate	Daily 1 1/2X	Saturday[a] 1 1/2X	Sunday and Holiday
Cement Mason	$30.00	8.15	9.80	5.24[b]	0.47	8	53.66	68.660	68.660[c]	83.66
Mastic Magnesite Gypsum, Epoxy, Polyester, Resin and all composition masons, swing or slip form scaffolds	$30.75	8.15	9.80	5.24[b]	0.47	8	54.41	69.785	69.785[c]	85.16

# Indicates an apprenticeable craft. The current apprentice wage rates are available on the Internet @ http://www.dir.ca.gov/OPRL/PWAppWage/PWAppWageStart.asp. To obtain any apprentice wage rates as of July 1, 2008 and prior to September 27, 2012, please contact the Division of Apprenticeship Standards or refer to the Division of Apprenticeship Standards' website at http://www.dir.ca.gov/das/das.html.

[a] Saturdays in the same work week may be worked at straight time if a job is shut down during the normal work week due to inclement weather or major mechanical breakdown (limited to curb and gutter machine, concrete pump, and concrete plant).

[b] Includes an amount for supplemental dues.

[c] Rate applies to the first 8 hours of work on Saturday. All other hours worked on Saturday are paid at the Sunday/Holiday rate.

[d] Where multiple shifts are worked, the day shift shall work eight (8) hours and for such work they shall be paid the regular straight time rate for eight (8) hours; the second (2nd) shift shall work seven and one-half (7 ½) hours, and for such work they shall be paid the regular straight time rate for eight (8) hours; if a third (3rd) shift is worked, they shall work seven (7) hours and for such work they shall be paid eight (8) hours regular straight time pay. No multiple shift shall be started for less than five (5) consecutive days.

RECOGNIZED HOLIDAYS: Holidays upon which the general prevailing hourly wage rate for Holiday work shall be paid, shall be all holidays in the collective bargaining agreement, applicable to the particular craft, classification, or type of worker employed on the project, which is on file with the Director of Industrial Relations. If the prevailing rate is not based on a collectively bargained rate, the holidays upon which the prevailing rate shall be paid shall be as provided in Section 6700 of the Government Code. You may obtain the holiday provisions for the current determinations on the Internet at http://www.dir.ca.gov/OPRL/PWD. Holiday provisions for current or superseded determinations may be obtained by contacting the Office of the Director – Research Unit at (415) 703-4774.

TRAVEL AND/OR SUBSISTENCE PAYMENT: In accordance with Labor Code Sections 1773.1 and 1773.9, contractors shall make travel and/or subsistence payments to each worker to execute the work. You may obtain the travel and/or subsistence provisions for the current determinations on the Internet at http://www.dir.ca.gov/OPRL/PWD. Travel and/or subsistence requirements for current or superseded determinations may be obtained by contacting the Office of the Director – Research Unit at (415) 703-4774.

SAMPLE

California Apprenticeship Council - Training Fund Contributions

1. Go to this web link: https://www.dir.ca.gov/DAS/tf/cac2.asp and add it to your favorites.

2. Fill out the New Easy Web App with the necessary information.

3. Please use your Contractor's License Number without the alpha digit. This number can also be used to look up your contributions on the website at: http://www.dir.ca.gov/CA/trainingfund/Tfsearch.html

4. Select the County and Occupation, then fill in the hours and rate and when you hit "tab" the amount is calculated for you.

5. Once you are done filling out the form and verified your information, print out your invoice.

6. *VERY IMPORTANT*: Mail **both** the **invoice** and your **check** payable to: **California Apprenticeship Council** to:

Remit to: ***CALIFORNIA APPRENTICESHIP COUNCIL***
PO BOX 511283
Los Angeles, CA 90051-7838

SAMPLE

CONTRACTOR FRINGE BENEFIT STATEMENT

Contract Number / Name:	Contract Location:	Today's Date:

Contractor / Subcontractor Name:	Business Address:

In order that the proper Fringe Benefit rates can be verified when checking payrolls on the above contract, the hourly rates for fringe benefits, subsistence and/or travel allowance payment made for employees on the various classes of work are tabulated below.

Classification:	Effective Date:	Subsistence or Travel Pay: $_____

FRINGE BENEFITS		
Health & Welfare $_____	PAID TO:	Name: _____ Address: _____
Pension $_____	PAID TO:	Name: _____ Address: _____
Vacation/ Holiday $_____	PAID TO:	Name: _____ Address: _____
Training $_____ Other $_____	PAID TO:	Name: _____ Address: _____

Classification:	Effective Date:	Subsistence or Travel Pay: $_____

FRINGE BENEFITS		
Health & Welfare $_____	PAID TO:	Name: _____ Address: _____
Pension $_____	PAID TO:	Name: _____ Address: _____
Vacation/ Holiday $_____	PAID TO:	Name: _____ Address: _____
Training $_____ Other $_____	PAID TO:	Name: _____ Address: _____

Classification:	Effective Date:	Subsistence or Travel Pay: $_____

FRINGE BENEFITS		
Health & Welfare $_____	PAID TO:	Name: _____ Address: _____
Pension $_____	PAID TO:	Name: _____ Address: _____
Vacation/ Holiday $_____	PAID TO:	Name: _____ Address: _____
Training $_____ Other $_____	PAID TO:	Name: _____ Address: _____

Submitted: Contractor / Subcontractor	By: Name / Title

Supplemental statements must be submitted during the progress of work should a change in rate of any of the classifications be made.

SAMPLE

California Department of Industrial Relations

(Reduced by Antioch Unified Public Agency)

PUBLIC WORKS PAYROLL REPORTING FORM

Page of

NAME OF CONTRACTOR OR SUB CONTRACTOR | CONTRACTORS LICENSE # SPECIALTY LICENSE # | ADDRESS

PAYROLL NO. | FOR WEEK ENDING | SELF-INSURED CERTIFICATE # WORKERS' COMPENSATION POLICY # | PROJECT OR CONTRACT NO. PROJECT AND LOCATION

(1) NAME, ADDRESS AND SOCIAL SECURITY NUMBER OF EMPLOYEE	(2) NO. OF WITH-HOLDING EXEMPTIONS	(3) WORK CLASSIFICATION		(4) Day / Date / Hours Worked Each Day: M	T	W	TH	F	S	S	(5) TOTAL HOURS	(6) HOURLY RATE OF PAY	(7) GROSS AMOUNT EARNED: THIS PROJECT	ALL PROJECTS	(8) DEDUCTIONS, CONTRIBUTIONS AND PAYMENTS							(9) NET WGS PAID FOR WEEK	(9) CHECK NO.
			S												FED TAX	FICA (SOC SEC)	STATE TAX	SDI	VAC/ HOL	HEALTH & WELF	PENSION		
			O												TRANING	FUND ADMIN	DUES	TRV/ SUBS	SAVINGS	OTHER*	TOTAL DED-UCTIONS		
			S												FED TAX	FICA (SOC SEC)	STATE TAX	SDI	VAC/ HOL	HEALTH & WELF	PENSION		
			O												TRANING	FUND ADMIN	DUES	TRV/ SUBS	SAVINGS	OTHER*	TOTAL DED-UCTIONS		
			S												FED TAX	FICA (SOC SEC)	STATE TAX	SDI	VAC/ HOL	HEALTH & WELF	PENSION		
			O												TRANING	FUND ADMIN	DUES	TRV/ SUBS	SAVINGS	OTHER*	TOTAL DED-UCTIONS		
			S												FED TAX	FICA (SOC SEC)	STATE TAX	SDI	VAC/ HOL	HEALTH & WELF	PENSION		
			O												TRANING	FUND ADMIN	DUES	TRV/ SUBS	SAVINGS	OTHER*	TOTAL DED-UCTIONS		

SAMPLE

Form A 1-131 (New 2-80)
(form has been reduced to fit page)

S = Straight Time
O = Overtime
SDI = State Disability Insurance

*OTHER - Any other deductions, contributions and/or payment whether or not included or required by prevailing wage determinations must be separately listed. Use extra sheet if necessary

CERTIFICATION must be completed

I, _____ (Name - Print), the undersigned, am _____ (position with business) with the authority to act for and on behalf of _____ (name of business and/or contractor), certify under penalty of perjury that the records or copies thereof submitted and consisting of _____ (description, no. of pages) are the originals or true, full and correct copies of the originals which depict the payroll record(s) of the actual disbursements by way of cash, check,or whatever form to the individual or individuals named.

Date: _____ Signature: _____

A public entity may require a more strict and/or more extensive form of certification.

In accordance with federal and state laws, and with the Public Agency's policy and contract documents, the undersigned contractor herein certifies that they will comply with the foregoing labor law requirements; and fully understands that failure to comply with these requirements will subject them to the penalties cited herein.

The contractor also herein certifies that it has been provided with a copy of the Labor Compliance Program Package for Contractors with includes:

1. Labor Law Requirements Checklist (included herein)
2. The Location of Applicable General Prevailing Wage Rate Determinations
3. Blank Certified Payroll Record form
4. Fringe Benefit Statements
5. State apprenticeship contribution form (CAC2)
6. State apprenticeship requirements and form to register apprentices (DAS-140)
7. Request for apprentices (DAS-142)
8. Copy of the Labor Code relating to Public Works and Public Agencies (Part 7, Chapter 1, Sections 1720-1816 can be found at www.dir.ca.gov.

IT IS THE CONTRACTOR'S RESPONSIBILITY TO PROVIDE COPIES OF THE LABOR COMPLIANCE PROGRAM PACKAGE TO ALL LISTED SUBCONTRACTORS AND TO ANY SUBSTITUTED SUBCONTRACTORS.

Project Name and Number:_____

Public Agency:_____

Contractor: Name _____

Contractor Address: _____

Contractor Phone:_____ Fax:_____

License Number: _____Date: _____

I acknowledge that I have been informed and am aware of the foregoing requirements and that I am authorized to make this certification on behalf of _____.
(Name of Contractor)

_____

Signature/Name/Title of Contractor Authorized Representative

SAMPLE

APPENDIX E

FEMA REQUIREMENTS

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FEMA

FIELD MANUAL

PUBLIC ASSISTANCE GRANTEE AND SUBGRANTEE PROCUREMENT REQUIREMENTS UNDER 44 C.F.R. PT. 13 AND 2 C.F.R. PT. 215

FEMA Office of Chief Counsel

Procurement Disaster Assistance Team

December 2014

U.S. Department of Homeland Security
Washington, DC 20472

FEMA

FIELD MANUAL – PUBLIC ASSISTANCE GRANTEE AND SUBGRANTEE PROCUREMENT REQUIREMENTS UNDER 44 C.F.R. PT. 13 AND 2 C.F.R PT. 215

1. PURPOSE. This Field Manual provides a description and explanation of the mandatory requirements for Public Assistance grantees and subgrantees when using Public Assistance funding to finance their procurements. We developed this Field Manual to support FEMA employees in assisting grantees and subgrantees to comply with the procurement requirements and to increase consistency in the FEMA's application of these standards across the agency.

2. BACKGROUND

   a. Robert T. Stafford Disaster Relief and Emergency Assistance Act. The Robert T. Stafford Disaster Relief and Emergency Assistance Act ("Stafford Act") authorizes FEMA, among other things, to provide financial assistance to States, local governments, Indian tribal governments, and certain private nonprofit organizations ("PNPs") for debris removal, emergency protective measures, and permanent restoration of infrastructure following a Presidential declaration of an emergency or major disaster.

   b. Public Assistance Program. FEMA has administratively combined these Stafford Act authorities under the umbrella of its Public Assistance Program, under which FEMA provides financial assistance through grants to a State or Indian tribal government (grantees), which in turn carry out work directly and/or process subgrants to other eligible Public Assistance applicants (subgrantees).

   c. Use of Third-Party Contractors by Grantees and Subgrantees. Grantees and subgrantees may use contractors to assist them in carrying out these Public Assistance awards, and such contractor costs are attributable to billions of dollars in grant funding each year. As a condition of receiving financial assistance for these contractor costs, grantees and subgrantees must comply with, among other things, the Federal procurement requirements set forth at 44 C.F.R. § 13.36 (for States, local and Indian tribal governments) and 2 C.F.R. §§ 215.40-48 (for institutions of higher education, hospitals, and other private nonprofit organizations).

3. LEGAL EFFECT OF THIS FIELD MANUAL. The Field Manual is an internal guidance document and does not have the force and effect of law, regulation, or FEMA policy. Although it does not have such force and effect, in clarifying the content of the regulations and describing recommended best practices, it does contain information about how FEMA interprets and applies federal procurement requirements and how a grantee or subgrantee can comply with these requirements.

4. SCOPE

   a. This Field Manual provides a description and explanation of the procurement requirements to applicable grantees and subgrantees when procuring property and services for debris removal (Category A), emergency protective measures (Category B), and restoration of damaged facilities (Categories C-G) under the Public Assistance Grant Program. This includes, among other things, the procurement of property and services for the construction, repair, and alteration of buildings, structures, or appurtenances.

   b. Procurements of real property consisting of land and any existing buildings and structures on that land are generally beyond the scope of this Field Manual. This Field Manual, on the other hand, does apply to the procurement of services and property for the construction of buildings, structures, or appurtenances that were not on land to be used for the Public Assistance project when that land was acquired. This Field Manual also applies to any alterations or repairs to buildings or structures existing on that land when that land was acquired or made available for the Public Assistance project.

   c. This Field Manual describes and explains the procurement requirements for grantees and subgrantees under 44 C.F.R. § 13.36 and 2 C.F.R. §§ 215.40-48. In December 2014, FEMA will be joining with the Department of Homeland Security ("DHS") in adopting the new "Governmentwide Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards" codified at 2 C.F.R. pt. 200. FEMA will, as part of adopting the new Common Rule, remove the administrative requirements at 44 C.F.R. pt. 13 and no longer follow the procurement requirements at 2 C.F.R. pt. 215 (which have already been removed from the Code of Federal Regulations) for Stafford Act declarations after the date of promulgation. FEMA will, however, continue to apply 44 C.F.R. pt. 13 and 2 C.F.R. pt. 215 for declarations occurring before that date and this Field Manual will continue to provide guidance to FEMA employees for those declarations.

5. DISSEMINATION. This Field Manual is intended for use by FEMA personnel in applying the procurement standards under the Federal regulations. The Field Manual may be made available to grantees and subgrantees to increase their understanding as to how FEMA interprets procurement requirements under the Federal regulations.

6. UPDATES. The FEMA Office of Chief Counsel ("OCC") will continue to update this Field Manual by identifying, capturing, and validating information and interpretations based on agency experience.

7. PROCUREMENT DISASTER ASSISTANCE TEAM (PDAT). The PDAT is a group of attorneys within OCC that trains and advises Public Assistance staff; works with Public Assistance staff to provide training and guidance to grantees and subgrantees; reviews grantee and subgrantee procurement policies and procedures; and provides general guidance regarding concerns with a proposed grantee or subgrantee procurement action. This includes the PDAT providing various tools to FEMA staff, such as this Field Manual. FEMA employees may contact PDAT at FEMA-PFLDPDAT@fema.dhs.gov.

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I. INTRODUCTION

A. USE OF CONTRACTORS BY GRANTEES AND SUBGRANTEES

Grantees and subgrantees often use contractors to help them carry out their Public Assistance project awards. For example, a subgrantee may receive financial assistance under a Public Assistance Category E project award to repair a building damaged by a major disaster, and it may then award a contract to a construction company to do the work. FEMA's regulations specifically make contractor costs an "allowable cost" under the Public Assistance Grant Program.[1]

Such a contract is a commercial transaction between the grantee/subgrantee and its contractor, and there is privity of contract between the grantee/subgrantee and its contractor. The Federal Government, on the other hand, is not a party to that contract and has no privity of contract with that contractor.[2] The Federal Government's only legal relationship is with the grantee, not with the subgrantee or contractors. Therefore, there is no contractual liability on the part of the Federal Government to the grantee's/subgrantee's contractor because there is no privity of contract between them.[3]

---

[1] 44 C.F.R. § 13.22(a) ("(a) Limitation on the use of funds. Grant funds may be used only for: (1) The allowable costs of the grantees, subgrantees and cost-type contractors, including allowable costs in the form of payments to fixed-price contractors; and (2) Reasonable fees or profit to cost-type contractors…").

[2] The United States has waived sovereign immunity from suit under the Tucker Act in actions brought in the Court of Federal Claims "founded either upon the Constitution, or any act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages not sounding in tort." 28 U.S.C. § 1491(a)(1). The United States Court of Appeals for the Federal Circuit has "consistently held that for the government to be sued on a contract pursuant to the Tucker Act, there must be privity of contract between the plaintiff and the United States." Chancellor Manor v. United States, 331 F. 3d 891 (Fed. Cir. 2003).

[3] *See D.R. Smalley & Sons, Inc. v. United States*, 179 Ct. Cl. 594, 372 F. 2d 505 (1967):

> "The National Government makes many hundreds of grants each year to the various States, to municipalities, to schools and colleges and to other public organizations and agencies for many kinds of public works, including roads and highways. It requires the projects to be completed in accordance with certain standards before the proceeds of the grant will be paid. Otherwise the will of Congress would be thwarted and taxpayers' money would be wasted. (citation omitted) These grants are in reality gifts or gratuities. It would be farfetched indeed to impose liability on the Government for the acts and omissions of the parties who contract to build the projects, simply because it requires the work to meet certain standards and upon approval thereof reimburses the public agency for a part of the costs."

See also 2 U.S. Government Accountability Office, Office of the General Counsel, *Principles of Federal Appropriations Law*, pp. 10-55 to 10-57 (3rd Ed. 2006).

B. ROLE OF THE FEDERAL GOVERNMENT IN GRANTEE AND SUBGRANTEE CONTRACTING

Although the Federal Government is not a party to a grantee's or subgrantee's contract, it plays a large role in a grantee's or subgrantee's contracting with outside sources under the Public Assistance Grant Program. Grantees and subgrantees[4] that use Public Assistance funding must comply with the procurement requirements imposed by Federal law, executive orders, Federal regulations, and terms of the grant award. These requirements will control over non-Federal authorities (such as State or local rules for contracting) to the extent they conflict with Federal requirements.[5]

FEMA regulations impose procurement requirements on grantees and subgrantees at 44 C.F.R. § 13.36 (which applies to States and local and Indian tribal governments)[6] and 2 C.F.R. §§ 215.40-48 (which apply to institutions of higher education, hospitals, and other nonprofit organizations).[7] The rules in both sets of regulations are similar, but not the same. Most notably, the requirements in 2 C.F.R. pt. 215 are far less descriptive and prescriptive than those in 44 C.F.R. pt. 13. For example, 44 C.F.R. pt. 13 devotes a great deal of attention to the procurement methods of sealed bidding, competitive negotiations, procurement through competitive proposals, and procurement through noncompetitive proposals, while 2 C.F.R pt. 215 does not discuss these methods at all. Regardless of any such differences, it is important to recognize that the purpose of the procurement standards in these regulations is not just to obtain the best value for a particular service or good, but also to further various public policy

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[4] Although FEMA has no direct financial relationship with a subgrantee, only with the grantee, the grantee will "flow down" to the subgrantee the obligations that the grantee has under Federal law, regulations, executive orders, and the terms and conditions of the FEMA-State Agreement for the use of Public Assistance funding. This includes compliance with 44 C.F.R. pt. 13 and 2 C.F.R. pt. 215. This makes the subgrantee accountable to the grantee to comply with the "flowed down" requirements. See 44 C.F.R. § 13.37(a).

[5] See *Illinois Equal Employment Opportunity Regulations for Public Contracts*, B-167015, 54 Comp. Gen. 6 (1974) ("It is clear that a grantee receiving Federal funds takes such funds subject to any statutory or regulatory restrictions which may be imposed by the Federal Government. (citations omitted). Therefore, although the Federal Government is not a party to contracts awarded by its grantees, a grantee must comply with conditions attached to the grant in awarding federally assisted contracts."); see also King v. Smith, 392 U.S. 309, 333 n. 34 (1968) ("There is of course no question that the Federal Government, unless barred by some controlling constitutional prohibition, may impose the terms and conditions upon which its money allotments to the States shall be disbursed, and that any State law or regulation inconsistent with such Federal terms and conditions is to that extent invalid.").

[6] FEMA codified the Common Rule of OMB Circular A-102 at 44 C.F.R. pt. 13 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments).

[7] OMB codified OMB Circular A-100 at 2 C.F.R. pt. 215 (Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Nonprofit Organizations). Unlike many other agencies, FEMA has not codified its own version of OMB Circular A-110, which means that 2 C.F.R. pt. 215 applies to a Public Assistance grant.

objectives.[8]

C. STATE AND LOCAL LAWS AND REGULATIONS

The regulations at 44 C.F.R. § 13.36 and 2 C.F.R. pt. 215 provide that grantees and subgrantees will use their own procurement procedures that comply with applicable State and local laws and regulations, and also comply with applicable Federal laws and regulations. If State or local laws or regulations do not adequately address a particular aspect of procurement, the Federal Acquisition Regulations ("FAR") may provide useful guidance. To be clear, the Federal Government's rules for its own procurements under Federal law do not apply to grantee and subgrantee contracting under Public Assistance awards. However, in the case where the regulations at 44 C.F.R. pt. 13 or 2 C.F.R. pt. 215 are not clear or need amplification/clarification, FEMA may rely on FAR provisions that provide background for how similar terms and provisions are interpreted for federal procurements. FEMA staff should also review and consider audit findings of the OIG and FEMA Public Assistance appeals decisions.

D. STANDARD OF FEMA REVIEW

The regulations at 44 C.F.R. § 13.36 and 2 C.F.R. pt. 215 set forth various procurement standards that can be mandatory or discretionary. In some cases, a regulation will set forth a mandatory requirement—for example, 44 C.F.R. § 13.36(f) requires grantees and subgrantees to perform a price or cost analysis in connection with every procurement action including contract modifications. FEMA affords no deference to a grantee or subgrantee when making the determination of whether the grantee or subgrantee complied with the mandatory regulation. In the case of a cost or price analysis, FEMA will make the determination of whether or not the grantee or subgrantee conducted an analysis that met the regulatory requirement.

In other cases, a regulation will allow the grantee or subgrantee to take an action that involves the exercise of discretion. One example is the regulation at 44 C.F.R. § 13.36(b)(10), which provides that a local or Indian tribal government may use a time and materials contract only after, among other things, it makes a determination that no other contract is suitable. Another example is 44 C.F.R. § 13.36(d)(4), which provides that a local or Indian tribal government may use a noncompetitive procurement only if it is infeasible to award a contract through small purchase procedures, sealed bids, or competitive proposals and if the public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation. A third example is the decision by the subgrantee to conduct a competitive acquisition through

[8] See Department of Homeland Security ("DHS") Office of Inspector General, Report No. 14-46-D, *FEMA's Dissemination of Procurement Advice Early in Disaster Response Periods*, pp. 5-6 (Feb. 28, 2014) ("Contracting practices that do not comply with Federal procurement regulations result in high-risk contracts that can cost taxpayers millions of dollars in excessive costs and that often do not provide full and open competition to all qualified bidders, including small firms and women- and minority-owned businesses. In addition, full and open competition helps prevent favoritism, collusion, fraud, waste, and abuse.").

either sealed bidding or competitive proposals. In these examples, the subgrantees must exercise its discretion in making the required determinations and should justify its determination in writing.

The regulations do not identify the "standard of review" with which FEMA, as the federal awarding agency, should evaluate grantee and subgrantee procurement discretionary decisions. A "standard of review" is the criterion or level of deference by which a FEMA will measure the propriety of a decision or action made by a grantee or subgrantee. Consistent with the overall direction of 44 C.F.R. § 13.36 and 2 C.F.R. pt. 215 to not impose additional administrative requirements than those already set forth in the regulations[9] and consistent with principles of federalism,[10] FEMA will review discretionary procurement decisions by grantees and their subgrantees to determine whether: (1) the grantee's or subgrantee's decision lacked a rational basis; or (2) the procurement procedure involved a violation of federal law, regulation, or FEMA policy.[11] In reviewing whether a decision lacked a rational basis, FEMA does not substitute its judgment for that of its grantees and their subgrantees.

E. CONFLICTING FEDERAL REQUIREMENTS

A grantee or subgrantee may use both Public Assistance funding and another federal agency's funding for a particular project. In these cases, the grantee or subgrantee that uses funding for a third party procurement provided by FEMA and the other federal agency must comply with the procurement requirements of both FEMA and the other federal agency. These requirements may sometimes differ, with the result that FEMA expects the grantee or subgrantee to comply with both sets of requirements. If compliance with all applicable Federal requirements is impossible, the grantee or subgrantee should notify FEMA for resolution.

F. ORGANIZATION OF MANUAL

The following section of this Field Manual provides an overview of contracts and describes various contract types. This overview section liberally cites to the FAR as a common point of

[9] 44 C.F.R. § 13.6(a) ("(a) For classes of grants and grantees subject to this part, Federal agencies may not impose additional administrative requirements except in codified regulations published in the Federal Register."); 2 C.F.R. § 215.4 ("Federal awarding agencies may apply more restrictive requirements to a class of recipients when approved by OMB.").

[10] See Executive Order No. 13132, *Federalism* (Aug. 4, 1999), 64 Fed. Reg. 43255, 5 U.S.C. § 601 notes.

[11] For comparison purposes, the GAO will review federal agency bid protest decisions for reasonableness, consistency with the solicitation, and applicable procurement statutes and regulations. See *Matter of Analytical Innovative Solutions, LLC*, B-408727, 2013 Comp. Gen. Proc. Dec. P 263 (Nov. 6, 2013) ("In reviewing a protest challenging an agency's evaluation, our Office will not reevaluate proposals, nor substitute our judgment for that of the agency, as the evaluation of proposals is a matter within the agency's discretion....Rather, we will review the record only to determine whether the agency's evaluation was reasonable and consistent with the stated evaluation criteria and with applicable procurement statutes and regulations.") [internal citations omitted]. The scope of this review is similar to that of the Administrative Procedures Act, 5 U.S.C. § 706.

reference to facilitate a general discussion on contract types. To reemphasize, the Federal Government's rules for its own procurements under Federal law do not apply to grantee and subgrantee contracting under Public Assistance awards. The next three sections then provide an overview of the procurement standards applicable to States (44 C.F.R. § 13.36(a)), local and Indian tribal governments (44 C.F.R. §13.36(b)-(i)), and institutions of higher education, hospitals, and private nonprofit organizations (2 C.F.R. §§ 215.40-48). These subsections, at various points, will use examples to illustrate the application of a particular procurement standard under the regulations, and several such examples involve fact patterns from OIG audits. Although findings from OIG audits are not binding precedent on FEMA (and FEMA may have disagreed with the OIG's finding(s) in cited audits), they do comprise a useful body of administrative determinations that help inform an understanding of a particular standard. The last section describes the consequences of a grantee or subgrantee failing to comply with the procurement standards applicable to that organization.

Following these five sections, the Field Manual includes two appendices. Appendix A provides synopses of each OIG audit report in the past four years that had a finding related to grantee or subgrantee procurement, and Appendix B provides synopses of the Public Assistance second appeal decisions that addressed a grantee or subgrantee procurement issue as part of the decision.

II. OVERVIEW OF CONTRACTS

A. DEFINITION OF CONTRACT AND DISTINCTION FROM A SUBGRANT

A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.[12] There are three elements necessary to form a contract—mutual assent (known as offer and acceptance), consideration or a substitute, and no defenses to formation. Contracts are generally governed by the common law, although contracts for the sale of goods (movable, tangible property) are governed by Article 2 of the Uniform Commercial Code as well as the common law.

The term "contract" is generic and includes a number of different varieties or types.[13] For example, one could categorize a contract type by subject matter (construction, research, supply, service) or by the manner in which it can be formed and accepted (such as bilateral or unilateral). Grantees and subgrantees are free to select the type of contract they award consistent with 44 C.F.R. § 13.36, 2 C.F.R. pt. 215, Federal law and regulations, and applicable State and local law and regulations, and within the bounds of good commercial business practice.

It is important to recognize the difference between a subgrantee and a contractor. Through a grantee, a subgrantee performs work to accomplish a public purpose authorized by law—in other words, a subgrantee performs substantive work on an award project.[14] A contractor, in contrast, does not seek to accomplish a public benefit, and does not perform substantive work on the project. It is merely a vendor providing goods or services to directly benefit the grantee. FEMA's regulation at 44 C.F.R. § 13.3 defines a "subgrant" as follows:

> Subgrant means an award of financial assistance in the form of money, or property in lieu of money, made under a grant by a grantee to an eligible subgrantee. The term includes financial assistance when provided by contractual legal agreement, but does not include procurement purchases, nor does it include any form of assistance which is excluded from the definition of grant in this part.

By comparison, the regulation provides that a contract "means...a procurement contract under a grant or subgrant, and means a procurement subcontract under a contract." In making a determination of whether a subgrantee or vendor relationship exists, the substance of the

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[12] Restatement (Second) of Contract, § 1 (1981).

[13] Id.

[14] Compare 31 U.S.C. §§ 6301-6308. These statutes require the federal government's choice and use of legal instruments reflect the type of basic relationship which it expects to have with the nonfederal parties. There are three basic relationships between federal agencies and those who receive contracts and federal assistance awards: procurement contracts, grants, and cooperative agreements. Sections 6303-6305 of Title 31 provide the criteria for selecting the most appropriate funding arrangement.

relationship is more important than the form of the agreement.[15]

OMB Circular A-133 states that the characteristics indicative of a federal award received by a subgrantee are when the organization: (1) determines who is eligible to receive financial assistance; (2) has its performance measured against whether the objective of the Federal program are met; (3) has responsibility for programmatic decision making; (4) has responsibility for adherence to applicable Federal program compliance requirements; and (5) uses Federal funds to carry out a program of the organization as compared to providing goods or services for a program of the grantee.[16]

In contrast, OMB Circular A-133 states that the characteristics indicative of a payment for goods and services received by a vendor are when the organization: (1) provides the goods and services within normal business operations; (2) provides similar goods and services to many different purchasers; (3) operates in a competitive environment; (4) provides goods or services that are ancillary to the operation of the Federal program; and (5) is not subject to compliance requirements of the Federal program.[17]

The distinctions between a subgrant and contract necessitate that different requirements apply. For example, a subgrantee must comply with the cost principles based on the nature of the subgrantee, whereas a contractor has no such requirement. Profit, furthermore, is allowable and indeed expected. In addition, a contractor also has no requirement to comply with any of the administrative requirements in 44 C.F.R. pt. 13 or 2 C.F.R. pt. 215, including procurement.

B. CONTRACT PAYMENT OBLIGATIONS

There are basically three types of contract payment obligations: fixed-price, cost-reimbursement, and time and materials ("T&M"). All three types of contracts are referenced in 44 C.F.R. pt. 13, and fixed price and cost-reimbursement contracts are referenced in 2 C.F.R. pt. 215. Because neither set of regulations defines nor fully describes these types of contracts, the following provides a general overview of these contracts that is largely based on the concepts and principles from the FAR. As noted earlier, although the FAR does not govern grantee and subgrantee procurement, it is a useful general reference tool to describe terms and concepts not delineated in the 44 C.F.R. pt. 13 and 2 C.F.R. pt. 215.

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[15] See also FEMA Directive 205-1, *Properly Selecting Between Grants, Cooperative Agreements or Procurements When Transferring Federal Funds to Non-Federal Entities* (Apr. 07, 2014) for guidance regarding the distinction between grants and procurement contracts.

[16] OMB Circular No. A-133, *Audits of States, Local Governments, and Non-Profit Organizations*, § __.210(b) (2003) (as amended)

[17] Id. § __.201(d).

1. Fixed Price and Cost-Reimbursement Contracts

With respect to fixed price and cost-reimbursement contracts, the specific contract types range from firm-fixed price, in which the contractor has full responsibility for the performance costs and resulting profit (or loss), to a cost-plus-fixed-fee, in which the contractor has minimal responsibility for the performance costs and the negotiated fee (profit) is fixed. In between these two ends of the spectrum, there are various incentive contracts in which the contractor's responsibilities for the performance costs and the profit or fee incentives offered are tailored to the uncertainties involved in contract performance.

Fixed price contracts provide for a firm price or, in appropriate cases, an adjustable price.[18] The risk of performing the required work, at the fixed price, is borne by the contractor.[19] Firm-fixed price contracts are generally appropriate where the requirement (such as, scope of work) is well-defined and of a commercial nature.[20] Construction contracts, for example, are often firm-fixed price contracts. T&M contracts and labor-hour contracts are not firm-fixed-price contracts.[21]

Cost-reimbursement types of contracts provide for payment of certain incurred costs to the extent provided in the contract.[22] They normally provide for the reimbursement of the contractor for its reasonable, allocable, actual, and allowable costs, with an agreed-upon fee.[23] There is a limit to the costs that a contractor may incur at the time of contract award, and the contractor may not exceed those costs without the grantee's or subgrantee's approval or at the contractor's own risk. In a cost-reimbursement contract, the grantee/subgrantee bears more risk than in a firm-fixed price contract.[24] A cost-reimbursement contract is appropriate when the details of the required scope of work are not well-defined.[25] There are many varieties of cost-reimbursement contracts, such as cost-plus-fixed-fee, cost-plus-incentive-fee, and cost-plus-award-fee contracts.[26]

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[18] Cf. 48 C.F.R. subpart 16.2 (Fixed-Price Contracts). A fixed price contract can be adjusted, but this normally occurs only through the operation of contract clauses providing for equitable adjustment or other revisions of the contract price under certain circumstances. Cf. also, 48 C.F.R. § 16.203 (Fixed-Price Contracts with Economic Price Adjustment).

[19] Bowsher v. Merck & Co., 460 U.S. 824, 826 at n. 1 (U.S. 1983) ("A pure fixed-price contract requires the contractor to furnish the goods or services for a fixed amount of compensation regardless of the costs of performance, thereby placing the risk of incurring unforeseen costs of performance on the contractor rather than the Government.").

[20] Cf. 48 C.F.R. § 16.202-2.

[21] Cf. 48 C.F.R. § 16.201(b).

[22] Cf. 48 C.F.R. subpart 16.3 (Cost-Reimbursement Contracts).

[23] Cf. 48 C.F.R. subpart 16.3.

[24] Kellogg Brown & Root Servs. v. United States, 742 F.3d 967, 971 (Fed. Cir. 2014) ("...cost-reimbursement contracts are intended to shift to the Government the risk of unexpected performance costs...").

[25] Cf. 48 C.F.R. § 16.301-2(a).

[26] Cf. 48 C.F.R. subpart 16.3.

However, the cost-plus-a-percentage-of-cost type contract, which is discussed in detail later on in this manual, is strictly prohibited.[27]

2. Time and Materials (T&M) Contracts

This type of contract is one that typically provides for the acquisition of supplies or services on the basis of (1) direct labor hours at specified fixed hourly rates that include wages, overhead, general and administrative expenses, and profit; and (2) actual costs for materials.[28] A T&M contract is generally used when it is not possible at the time of awarding the contract to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of confidence.[29] T&M contracts are neither fixed-price nor cost-reimbursement contracts, but constitute their own unique contract type. A labor-rate contract is a type of T&M contract.

C. TYPES OF CONTRACT BASED ON PROCUREMENT METHOD

Another type of contract concern is the method of procurement, which is the process followed by a grantee or subgrantee to solicit contractors, evaluate offers, and selects a contractor through the use of evaluation criteria. The Federal procurement standards for local and Indian tribal governments recognize four methods of procurement: small purchase procedures, sealed bidding, procurement through competitive proposals, and procurement through noncompetitive proposals. A grantee's or subgrantee's method of procurement will most likely align to one of these four methods (although there may be various permutations). The following provides a brief overview of these four procurement methods, which are discussed in greater detail in later sections of this Field Manual.

1. Small Purchase Procedures

This method comprises those relatively simple and informal procurement methods for securing services, supplies, or other property for awards below the simplified acquisition threshold of $150,000.[30] Contract awards can be based on either lowest price submitted (such as in sealed bidding) or on technical qualifications and price (such as in procurement through competitive

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[27] See 44 C.F.R. § 13.36(f)(4), 2 C.F.R § 215.44(c); DHS Office of Inspector General, Report No. OIG-14-44-D, *FEMA Should Recover $5.3 Million of the $52.1 Million of Public Assistance Grant Funds Awarded to the Bay St. Louis Waveland School District in Mississippi-Hurricane Katrina*, p. 4 (Feb. 25, 2014) ("Federal regulations prohibit cost-plus-percentage-of-cost contracts because they provide no incentive for contractors to control costs—the more contractors charge, the more profit they make."). See also Section IV(E)(4), infra.

[28] See 48 C.F.R. § 16.601(b).

[29] Cf. 48 C.F.R. § 16.601(c).

[30] The simplified acquisition threshold, which is currently $150,000, is set by the Federal Acquisition Regulation at 48 C.F.R subpart 2.1 (Definitions) and in accordance with 41 U.S.C. § 1908. Note, however, that if applicable state or local law or regulation sets a threshold for simplified acquisitions at a dollar amount below $150,000, then that threshold will control per 44 C.F.R. § 13.36(b)(1).

proposals).

2. Sealed Bidding

Sealed bidding is a method of contracting that employs competitive bids, public opening of bids, and awards. In this method, the grantee or subgrantee prepares an invitation for bid that describes its requirements clearly, accurately, and completely and publicizes the invitation. Bidders submit sealed bids in response to the invitation to be opened publicly, and the grantee or subgrantee evaluates those bids without discussions. After evaluating the bids, the grantee or subgrantee makes an award to the responsible bidder whose bid was responsive and most advantageous to the grantee or subgrantee, considering only price and price-related factors (such as warranties, life-cycle costs, and transportation costs).[31] The type of contract awarded under sealed bidding is a firm fixed price contract.[32] Construction contracts and commercial-off-the-shelf items are examples of when sealed bidding is normally appropriate.

3. Procurement through Competitive Proposals (or Negotiated Procurement)

Under this method, either a fixed-price or cost-reimbursement contract is awarded to the responsible firm whose proposal is determined to be the most advantageous to the grantee or subgrantee with price and other factors, such as technical and past performance, considered.[33] The competitive negotiation process includes the solicitation and receipt of proposals from offerors, permits negotiations with offerors...[34]

This is the method of procurement most often used for professional services in connection with construction, such as program management, construction management, feasibility studies, preliminary engineering, design, architectural, engineering, surveying, mapping, and related services.[35] But it is not the method commonly used for actual construction, alteration, or repair to real property, as the regulations include a preference for sealed bidding to be used for these types of services (unless it would be infeasible to do so).[36]

4. Noncompetitive Procurement

This method of procurement involves the award of a contract by the grantee or subgrantee

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[31] Cf. 48 C.F.R. § 14.101.

[32] 44 C.F.R. § 13.36(d)(2).

[33] See 44 C.F.R. § 13.36(d)(3).

[34] Cf. 48 C.F.R. pt. 15.

[35] See 44 C.F.R. § 13.36(d)(3); cf. 48 C.F.R. pt. 36 (Construction and Architect-Engineer Contracts) and 37 (Service Contracting).

[36] 44 C.F.R. § 13.36(d)(2).

without providing for full and open competition.[37]

III. PROCUREMENT BY A STATE

The Federal procurement standards at 44 C.F.R. § 13.36(a) require a State[38] to follow the same policies and procedures it uses for procurements from its non-Federal funds when it procures property and services under a Public Assistance grant award.[39] In addition, the State must ensure that every purchase order or other contract includes any clauses required by Federal statutes and executive orders and their implementing regulations.[40]

The procurement standards at 44 C.F.R. § 13.36(a) apply to a State not only when the State is acting as a grantee under a Federal grant, but also when a State agency is a subgrantee.[41] Within the context of the Public Assistance grant, a State will designate a State agency that has responsibility for Public Assistance grant administration (and that State administrative agency serves the role as the "grantee").[42] But, in most cases, FEMA will approve a Project Worksheet for a scope of work to be completed by a State agency applicant other than the state

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[37] 44 C.F.R. § 13.36(d)(4); cf. 48 C.F.R. § 6.302.

[38] A "State" means "any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency or instrumentality of a State exclusive of local governments. The term does not include any public and Indian housing agency under United States Housing Act of 1937." 44 C.F.R. § 13.3.

[39] 44 C.F.R. § 13.36(a); see also DHS Office of Inspector General, Report No. 14-46-D, *FEMA's Dissemination of Procurement Advice Early in Disaster Response Periods*, p. 3 (Feb. 28, 2014) ("Federal Regulation 44 CFR 13.36(a) allows States, as grantees, to use their own procurement procedures.").

[40] Id. Many of the laws with which a State must comply as a condition of receiving federal assistance and which will apply to state contractors are set forth in the DHS Standard Terms and Conditions, although that document does not contain mandatory or model contract clauses. In addition, the regulation at 44 C.F.R. § 13.36(i) identifies several additional laws, regulations, and executive orders. Such laws include, but are not limited to, the Clean Air Act; Federal Water Pollution Control Act; Copeland Anti-Kickback Act; Contract Work Hours and Safety Standards Act; False Claims Act; Age Discrimination Act of 1975; Americans with Disabilities Act of 1990; Title VI of the Civil Rights Act of 1964; Title VIII of the Civil Rights Act of 1968; Title IX of the Education Amendments of 1975;Rehabilitation Act of 1973; Trafficking Victims Protection Act of 2000; Executive Orders 12549 and 12689 concerning debarment and suspension; Drug Free Workplace Act of 1988; Hotel and Motel Fire Safety Act of 1990; and the lobbying prohibitions of 31 U.S.C. § 1352.

[41] See, e.g. DHS Office of Inspector General, Report No. DS-13-09, *The Alaska Department of Transportation and Public Facilities Did Not Properly Account for and Expend $1.5 Million in FEMA Public Assistance Grant Funds*, p. 3 at n. 3 (Apr. 30, 2013) ("The Central Region is a State agency and, according to Federal regulations, officials must therefore comply with the same policies and procedures used for procurements from its non-Federal funds (44 CFR 13.36(a))."); DHS Office of Inspector General, Report No. DS-13-05, *The California Department of Parks and Recreation Did Not Account for or Expend $1.8 Million in FEMA Public Assistance Grant Funds According to Federal Regulations and FEMA Guidelines*, p. 4 (Mar. 27, 2013) ("The Department is a State entity and officials must therefore comply with the same policies and procedures used for procurements for its non-Federal funds (44 CFR 13.36(a)).").

[42] 44 C.F.R. § 206.207(b)(1).

administrative agency for the Public Assistance grant.

Upon FEMA's approval of the project, FEMA's regulation at 44 C.F.R. 206.202(e)(1) directs that the grantee, in turn, would approve "subgrants based on the Project Worksheets approved for each applicant."[43] The procurement standards applicable to the State agency applicant in this case would still be 44 C.F.R. § 13.36(a). In other words, approval of a "subgrant" from the State administrative agency to the other State agency applicant does not change or otherwise affect the procurement standard applicable to the "State" applicant.[44]

Even if a State complies with its own policies and procedures it uses for procurements from its non-Federal funds when it procures property and services under a Public Assistance grant award, FEMA will still evaluate the method of procurement and associated costs for, among other things, reasonableness.[45] FEMA will, for example, scrutinize a State's noncompetitive

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[43] 44 C.F.R. § 206.202(e)(1) ("(e) Grant approval. (1)...After we receive the SF 424 and 424D, the Regional Administrator will obligate funds to the Grantee based on the approved Project Worksheets. *The Grantee will then approve subgrants based on the Project Worksheets approved for each applicant.*") (emphasis added).

[44] See 53 Fed. Reg. 8034 (Mar. 11, 1988) (which finalized the common rule for the administration of grants and cooperative agreements to states, local and Indian tribal governments) ("As explained in E.O. 12612, Federalism, States possess unique constitutional authority, resources and competence. Under Federalism, States should be given the maximum administrative discretion possible with respect to national programs they administer. Intrusive, Federal oversight is neither necessary nor desirable... Consistent with the President's Federalism Executive Order, the proposed common rule provided that in three important areas (financial management systems, § XX .20, equipment, § XX .32, and procurement, § XX .36), States will expend and account for grant funds according to their own laws and procedures. This flexibility for States in these three areas applies only to funds expended by the State itself."); see also the DHS Office of Inspector General audits reports cited at supra note 41.

[45] See 2 C.F.R. pt. 225 (Cost Principles for State, Local, and Indian Tribal Governments), Appendix A (General Principles for Determining Allowable Costs), ¶ C.2:

> A cost is "reasonable" if, in its nature and amount, it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost. The question of reasonableness is particular important when government units or components are predominantly federally-funded. In determining reasonableness of a given cost, consideration shall be given to:
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> a. Whether the cost is of a type generally recognized as ordinary and necessary for the operation of the governmental unit or the performance of the Federal award.
>
> b. The restraints or requirements imposed by such factors as: Sound business practices; arm's-length bargaining; Federal, State and other laws and regulations; and, terms and conditions of the Federal award.
>
> c. Market prices for comparable goods or services.
>
> d. Whether the individuals concerned acted with prudence in the circumstances considering their responsibilities to the governmental unit, its employees, the public at large, and the Federal Government.
>
> e. Significant deviations from the established practices of the governmental unit which may unjustifiably increase the Federal award's cost.

procurement to determine whether or not circumstances warranted that method of procurement and resulted in unreasonable pricing, even if such a procurement otherwise complied with state policies and procedures.

Example of the Differing Procurement Standards for States and Local Governments – Geographic Preference

Scenario: The President declares a major disaster for the State of Z as a result of a hurricane, and the declaration authorizes the Public Assistance Grant Program for all counties in the State. The hurricane damaged a building of the State Z Agency of Transportation. Following approval of a Project Worksheet to repair the damaged building, State Z Agency of Transportation procures the services of a contractor to complete the repairs to the building by following the same policies and procedures it uses for procurements from its nonfederal funds when it procures construction services. The State Z Agency, when evaluating the bids for the work, uses a state statutorily imposed geographic preference and awards a contract, and the contract includes all clauses required by federal law, regulation, and executive order. The Disaster Recovery Manager has asked whether the use of the geographic preference was permissible under 44 C.F.R. pt. 13.

Answer: Yes, the use of the geographic preference was permissible under 44 C.F.R. pt. 13. The federal regulation at 44 C.F.R. § 13.36(a) provides, in relevant part, that a state must follow the same policies and procedures it uses for procurements from its nonfederal funds when it procures property and services under a Public Assistance grant award. In this case, the State Z Agency of Transportation followed these procedures, which included adhering to a statutorily imposed geographic preference when evaluating the bids.[46]

It is important to recognize that the procurement standards are different for states than they are for local and Indian tribal governments. As it relates to those entities, the federal regulation at 44 C.F.R. § 13.36(c)(2) provides that "grantees and subgrantees will conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographic preferences in the evaluation of bids or proposals," except in those cases where "applicable federal statutes expressly mandate or encourage geographic preference." However, because the state is not subject to regulation at 44 C.F.R. § 13.36(c)(2), the regulation bears no applicability to the question presented.

[46] Whether or not a particular geographic preference regime imposed by a State raises Constitutional issues under the dormant commerce clause is outside the scope of this Field Manual.

IV. PROCUREMENT BY LOCAL AND INDIAN TRIBAL GOVERNMENTS

Local[47] and Indian tribal governments[48] must use their own procurement procedures that reflect State and local law and regulations, provided that the procurements conform to applicable Federal law and standards identified at 44 C.F.R. § 13.36(b)-(i).[49] The following provides a summary of the eight subsections to 44 C.F.R. § 13.36. Notably, an Indian tribal government can be, in certain circumstances, a Public Assistance grantee, and the Indian tribal government must still meet the requirements of 44 C.F.R. § 13.36(b)-(i) when serving as a grantee or subgrantee.[50] The term "subgrantee" as used in the following subsections, therefore, includes a local government (which will never serve as a Public Assistance grantee) and an Indian tribal government acting as either a subgrantee or grantee.

A. GENERAL PROCUREMENT STANDARDS (44 C.F.R. § 13.36(b))

The regulation at 44 C.F.R. § 13.36(b) sets forth twelve general procurement standards, nine of which are mandatory. The first standard at 44 C.F.R. § 13.36(b)(1), as summarized above,

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[47] A "local government" means "a county, municipality, city, town, township, local public authority (including any public and Indian housing agency under the United States Housing Act of 1937) school district, special district, intrastate district, council of governments (whether or not incorporated as a nonprofit corporation under State law), any other regional or interstate government entity, or any agency or instrumentality of a local government." 44 C.F.R. § 13.3.

[48] A "federally recognized Indian tribal government" means the "governing body or a governmental agency of any Indian tribe, band, nation, or other organized group or community (including any Native village as defined in section 3 of the Alaska Native Claims Settlement Act, 85 Stat 688) certified by the Secretary of the Interior as eligible for the special programs and services provided by him through the Bureau of Indian Affairs." 44 C.F.R. § 13.3.

[49] 44 C.F.R. § 13.36(b)(1); *see also* DHS Office of Inspector General, Report No. 14-46-D, *FEMA's Dissemination of Procurement Advice Early in Disaster Response Periods*, p. 3 (Feb. 28, 2014) ("Federal Regulation 44 CFR 13.36(a) allows States, as grantees, to use their own procurement procedures. ***Other grantees and subgrantees may also use their own procurement procedures, but those procedures must conform to Federal law and standards stated in 44 CFR 13.36(b) through (i)*** [emphasis added].").

[50] The regulation at 44 C.F.R. § 13.4(a) provides that subparts A through D of 44 C.F.R. pt. 13 apply to all grants and subgrants to "governments," with limited exceptions. A "government" is defined as including a State or local government and a federally recognized Indian tribal government. Accordingly, the regulations in subparts A through D of 44 C.F.R. pt. 13—which includes 44 C.F.R. § 13.36—apply to Indian tribal governments.

Next, the regulation at 44 C.F.R. § 13.36(a) provides that "[w]hen procuring property and services under a grant, a ***State*** will follow the same policies and procedures it uses for procurements from its non-Federal funds..." (emphasis added). The regulation then states that "[o]ther grantees and subgrantees will follow paragraphs (b) through (i) in this section." The definition of "State" under 44 C.F.R. § 13.3 (see supra note 38) does not include an Indian tribal government.

FEMA has interpreted the regulations at 44 C.F.R. §§ 13.4 and 13.36 to mean that Indian tribal governments, whether serving as a grantee or subgrantee, must adhere to their procurement procedures, but those procedures must conform to applicable federal law and the Federal procurement standards at 44 C.F.R. § 13.36(b)-(i), with the Federal standards controlling to the extent that the Indian tribal procedures do not conform to these Federal standards.

requires a subgrantee to use its own procurement procedures, which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law and the standards under 44 C.F.R. § 13.36(b)-(i). The following provide a summary of the remaining eleven standards at 44 C.F.R. § 13.36(b)(2)-(12).

1. Contract Administration (44 C.F.R. § 13.36(b)(2))

Local and Indian tribal governments will maintain a contract administration system to ensure that contractors perform in accordance with terms, conditions, and specifications of their contracts or purchase orders.[51] The regulation does not provide any additional detail as to what the content of such an administration system should be, such that the content of any such administration system is left to the discretion of the subgrantee.

If reviewing a subgrantee's contract administration system, FEMA would look for at least the following basic elements that should reasonably be part of any such system.

- ***Contract Monitoring***. The subgrantee should have identified methods for monitoring the performance of the contractor to ensure that work conforms to project design and the scope of work in the Project Worksheet, quality controls are being met, and potential delays or cost overruns are identified.[52] The extent of monitoring may vary depending upon the type and scope of the contract.
- ***Voucher Processing***. The subgrantee should have clearly defined roles and responsibilities for the payment of the contractor. This will, among other things, ensure that the nature, type, and quantity of effort or materials being expended are in general accord with the progress of work under the contract, and that claimed costs are reasonable for the period covered by the voucher.
- ***Contract Closeout***. Contract closeout begins when the contract has been physically completed (all services performed and/or products delivered). The subgrantee should have a defined process for closeout that includes, among other things, final inspection,

[51] 44 C.F.R. § 13.36(b)(2).

[52] See 44 C.F.R. § 13.40 (Monitoring and Reporting Program Performance); cf. 48 C.F.R. § 42.11 (related to surveillance of Federal contracts for supplies and services other than construction); 48 C.F.R. § 37.6 (regarding surveillance of Federal contracts for services); see also DHS Office of Inspector General, Report No. 14-63-D, *FEMA Should Recover $1.7 Million of Public Assistance Grant Funds Awarded to the City of Waveland, Mississippi-Hurricane Katrina*, p. 4 (Apr. 15, 2014) (The subgrantee claimed costs for installing a temporary sewer collection system that the contractor improperly billed for excessive contract costs because the costs did not comply with contract terms. Among other violations, this violated the subgrantee's requirement to maintain an adequate contract administration system.); DHS Office of Inspector General, Report No. 11-24, *FEMA Public Assistance Grant Awarded to Wayne County, Mississippi, Board of Supervisors*, p. 6 (Sep. 15, 2011) (Subgrantee's failure to have adequate debris monitoring procedures constituted a failure to have an adequate contract administration system. The performance of the debris monitoring contractor suffered from multiple failures: the contractor has no experience and was provided no training in debris monitoring, load tickets were deficient, and there was no means to verify truck capacities.).

settlement of any disputes, and final payments.

A subgrantee, in establishing its administrative system, should also review the guidance provided by OMB under the FY 2013 Compliance Supplement to OMB Circular A-133 to auditors that will be auditing subgrantees that are subject to an audit under the Single Audit Act. Specifically, Section I of Part 6 of the Compliance Supplement provides specific guidance for "Procurement and Suspension and Debarment."

One of the key "risk assessment" activities is for an auditor to evaluate whether a subgrantee has "procedures to identify risks arising from vendor inadequacy, e.g., quality of goods and services, delivery schedules, warrant assurances, user support."[53] In addition, the Compliance Supplement states that relevant "control activities" include that a "contractor's performance with the terms, conditions, and specifications of the contract is monitored and documented."

As it relates to debris removal (Public Assistance Category A), FEMA has promulgated specific guidance as to monitoring performance under the contract.[54] Specifically, FEMA has stated that an applicant should establish debris monitoring procedures and include those procedures in an applicant's debris management plan for the applicant's financial interest, especially if the applicant has contracted for any component of the debris removal operation.[55] Monitoring contracted debris removal operations achieves two objectives. First, it verifies that work completed by the contractor is within the contract scope of work. Second, it provides the required documentation for Public Assistance reimbursement.[56] Applicants can use force account resources, contractors, or a combination of both to monitor debris removal operations. FEMA periodically validates an applicant's monitoring and validation of the debris operation, including inspection of truck loads.

2. Written Code of Procurement Staudards of Conduct (44 C.F.R. § 13.36(b)(3))

Subgrantees are required to have a written code of standards of conduct for their employees who are engaged in the award and administration of contracts.[57] FEMA expects an applicant, when contracting with Public Assistance grant funding, to ensure that procurement transactions are conducted in a manner beyond reproach, at arm's length, with impartiality, and without preferential treatment. FEMA's regulations require the subgrantee's written standards to provide for, at a minimum, the following items.

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[53] OMB Circular A-133 Compliance Supplement, pt. 6, § I (Mar. 2013).

[54] See FEMA 325, Public Assistance Debris Management Guide, Chapter 11 (Jul. 2007) ["Debris Management Guide"].

[55] Id. at 105.

[56] Id.

[57] 44 C.F.R. § 13.36(b)(3); see also 48 C.F.R. subpart 3.1.

i. No Conflicts of Interest

The regulation at 44 C.F.R. § 13.36(b)(3) requires subgrantees to maintain a written code of conduct governing the performance of their employees engaged in the award and administration of contracts.[58] The regulation then makes clear that "no employee, officer, or agent of the... subgrantee shall participate in the selection, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved."[59] The purpose of this code and the prohibition is 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 appearance and fact.

An organizational conflict of interest is one form of a prohibited conflict of interest and discussed later in this chapter. A second form is a personal conflict of interest. The regulation at 44 C.F.R. § 13.36(b)(3) provides that such a conflict would arise when the employee, officer, or agent, or any member of his or her immediate family, or a partner, or an organization that employs (or is about to employ) any of the above, has a financial or other interest in the contractor that is selected for award.[60]

Although the term "financial interest" is not defined or otherwise described in the regulation, the following provides a non-exhaustive list of the types of financial interest that may give rise to a personal conflict of interest:

- Compensation, including wages, salaries, commissions, professional fees, or fees for business referrals;
- Consulting relationships (such as commercial and professional consulting and service arrangements);
- Investment in the form of stock or bond ownership or partnership interest;
- Real estate investments; and
- Business ownership.[61]

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[58] 44 C.F.R. § 13.36(b)(3).

[59] Id.

[60] 44 C.F.R. § 13.36(b)(3)(i)-(iv). See also 18 U.S.C. § 208 and 5 C.F.R. pts. 2635 and 2640, subpart D (which prohibit a Federal employee from having a financial interest in an organization with which he or she is dealing); 48 C.F.R. § 52.203-16 (Preventing Personal Conflicts of Interest) (defining "personal conflict of interest" as it relates to an individual who performs an acquisition function closely associated with an inherently governmental function and is an employee of the contractor or a subcontractor).

[61] Federal criminal law at 18 U.S.C. § 208 prohibits an employee (subject to certain exceptions) from participating personally and substantially in an official capacity in any particular matter in which, to his knowledge, he or any other person specified in the statute has a ***financial interest***, if the particular matter will have a direct and predictable effect on that interest. The implementing federal regulation provides that a "disqualifying financial interest" means:

Example – Personal Conflict of Interest under a Federal Grant

In Town of Fallsburg v. United States, the Town of Fallsburg awarded a contract, under an Environmental Protection Agency (EPA) grant, to purchase equipment to maintain its sewage facility.[62] The town was governed by a town board and the town supervisor, who served as the project manager. The equipment contract was awarded to a business connected with the town supervisor's family. The town supervisor had no ownership interest in the business, but drew a small salary from it. After suspecting a conflict of interest, the EPA withheld payment under the grant. The town supervisor was eventually convicted of mail fraud for executing the bonding instrument needed for the equipment contract on behalf of the business and held guilty of fraudulently accelerating payments to the business.

The court affirmed the EPA's decision, reviewing the administrative decision under the arbitrary and capricious standard, and held that the town negligently failed to avoid a conflict of interest under 40 C.F.R. § 33.300(a), failed to exercise the degree of care required to effectively manage its public trust under 40 C.F.R. § 30.210, and failed to prohibit the appearance or actuality of favoritism in the awarding and administration of the contract as required by the grant. Notably, the EPA's regulations were different than 44 C.F.R. § 13.36(b)(3),[63] but the case is illustrative of the types of conflict of interest that FEMA would find prohibited.

ii. Prohibitions Against Gratuities

The subgrantee's officers, employees, and agents can neither solicit nor accept gratuities, favors, or anything of monetary value from contractors, potential contractors, or parties to subagreements.[64] This would include entertainment, hospitality, loan, and forbearance. It would

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"[T]he potential for gain or loss to the employee, or other person specified in [18 U.S.C. § 208], as a result of governmental action on the particular matter. The disqualifying financial interest might arise from ownership of certain financial instruments or investments such as stock, bonds, mutual funds, or real estate. Additionally, a disqualifying financial interest might derive from a salary, indebtedness, job offer, or any similar interest that may be affected by the matter."

5 C.F.R. § 2640.103(b).

[62] Town of Fallsburg v. United States, 22 Cl. Ct. 633, 1991 U.S. Cl. Ct. LEXIS 76 (1991).

[63] Id. at 644, footnote 8 ("8. Under the provisions of 40 C.F.R. § 33.300(a), the Town, as grantee was required to avoid conflicts of interest and to maintain a code or standards of conduct governing the performance of its officers, employees, and agents in the conduct of project work, including procurement and the expending of project funds, which would prohibit such officers, employees, and agents from accepting anything of monetary value from contractors.") and footnote 9 ("Under the provisions of 40 C.F.R. § 30.210, the grantee is required to efficiently and effectively manage grant funds which are deemed to constitute a public trust.").

[64] 44 C.F.R. § 13.36(b)(3); see, e.g. DHS Office of Inspector General, Report No. DD-13-11, *FEMA Should Recover $46.2 Million of Improper Contracting Costs from Federal Funds Awarded to the Administrators of the Tulane Educational Fund, New Orleans, Louisiana*, pp. 16-18 (Aug. 15, 2013) (which involved a conflict of interest and is further described at infra note 376).

also include services as well as gifts of training, transportation, local travel, and lodgings and meals, whether provided in-kind, by purchase of a ticket, payment in advance, or reimbursement after the expense has been incurred.[65]

iii. Permitted Financial Interests and Gratuities

As an exception to the general prohibition against gratuities and financial interests, the subgrantee may set minimum rules where the financial interest is not substantial or the gift is an ***unsolicited*** item of nominal intrinsic value.[66] The regulations do not provide any additional clarity as to what comprises "substantial" or "nominal intrinsic value," such that the content of any such exception is left to the discretion of the subgrantee. In any case, the Standards of Conduct for Employees of the Executive Branch provide a useful guide in analyzing a subgrantee's exceptions.[67]

iv. Penalties for Violations

The subgrantee's standards of conduct must, to the extent permitted by State or local law or regulations, provide for penalties, sanctions, or other disciplinary actions for violations by the subgrantee's officers, employees, agents, or by contractors or their agents.[68] For example, the penalty for a subgrantee's employee may be dismissal, and the penalty for a contractor might be the termination of the contract by the subgrantee.

v. Additional Restrictions

Federal agencies are permitted to impose additional restrictions in the case of real, apparent, or potential conflicts of interest.[69] As of the date of publication, FEMA has not imposed any such additional restrictions.

3. Review of Proposed Procurements (44 C.F.R. § 13.36(b)(4))

Subgrantee procurement procedures must provide for a review of proposed procurements to

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[65] Cf. 5 C.F.R. § 2635.203(b) (defining "gift" under the Standards of Conduct for Employees of the Executive Branch).

[66] 44 C.F.R. § 13.36(b)(3).

[67] See 5 C.F.R. §§ 2635.203 (providing exclusions for the meaning of gift, such modest items of food and refreshments offered other than part of a meal) and 2635.204 (providing exceptions to the gift prohibitions, such unsolicited non-cash gifts of a fair market value of $20 per occasion with a limit of $50 per year per source); see also 5 C.F.R. pt. 2640, subpart B (identifying exemptions for financial interests from the prohibitions of 18 U.S.C. § 208 for federal employees).

[68] 44 C.F.R. § 13.36(b)(3).

[69] Id.

avoid purchase of unnecessary or duplicative items pursuant to 44 C.F.R. § 13.36(b)(4).[70] Under these procedures, the subgrantee should give consideration to consolidating or breaking out procurements to obtain a more economical purchase.[71] Where appropriate, the subgrantee must make an analysis of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.[72] Within the context of the Public Assistance Program, there will be various occasions when a subgrantee would perform this analysis.

i. Eligibility

The property and services to be acquired must be eligible under the Stafford Act and the Public Assistance regulations at 44 C.F.R. pt. 206 and within the scope of the specific Project Worksheet.

ii. Necessity

FEMA expects grantees and subgrantees to limit the acquisition of federally-assisted property and services to the amount it needs to support its Public Assistance project(s). In monitoring whether a grantee or subgrantee has complied with its procedures to determine what property or services are unnecessary, FEMA bases its determinations on what would have been a grantee's or subgrantee's reasonable expectations at the time it entered into the contract.

iii. Examples

Acquisition of Equipment

One example is when a subgrantee needs to obtain equipment[73] that is necessary to respond to and/or recover from a major disaster in areas designated for Public Assistance.[74] In those circumstances, the subgrantee must analyze its options to either lease or purchase equipment, although the regulation at 44 C.F.R. § 13.36(b)(4) does not provide any detail or amplifying information on how such an analysis should be performed, leaving such details to the discretion of the subgrantee.

Although FEMA will not mandate that an applicant pursue a specific option for obtaining

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[70] 44 C.F.R. § 13.36(b)(4).

[71] Id.

[72] Id.

[73] Equipment is "tangible, non-expendable, personal property having a useful life of more than one year and an acquisition cost of $5000 or more per unit. 44 C.F.R. § 13.3.

[74] There may be instances after a major disaster when an applicant will not have sufficient equipment and supplies to respond to the incident in an effective manner. FEMA may, in those circumstances, provide financial assistance for the acquisition of equipment and supplies purchased or leased by an applicant. See FEMA Disaster Assistance Policy No. 9525.12, *Disposition of Equipment, Supplies, and Salvageable Materials*, § VI (Jul. 14, 2008).

equipment, FEMA will generally fund only the most cost-effective option. FEMA will analyze the applicant's decision to either lease or purchase equipment on a case-by-case basis by evaluating comparative costs and other factors. The following provides a non-exhaustive list of the considerations FEMA may use in this analysis:

- Estimated length of the period the equipment is to be used and the extent of use within that period;
- Financial and operating advantages of alternative types and makes of equipment;
- Cumulative rental payments for the estimated period of use;
- Net purchase price;
- Transportation and installation costs;
- Maintenance and other service costs;
- Availability of purchase options;
- Trade-in or salvage value;
- Availability of a servicing capability.[75]

Temporary Facilities

Another example of where a lease vs. purchase option analysis will be necessary is in the case of "temporary facilities." As a result of major disasters and emergencies, services provided at public and private nonprofit facilities may be disrupted to the extent that they cannot continue unless they are temporarily relocated to another facility.[76] Applicants may request temporary facilities to continue that service, and may lease, purchase, or construct eligible temporary facilities.[77] Whichever option is selected, the option must be reasonable, cost-effective, and temporary in nature.[78]

FEMA will not mandate that the applicant pursue a specific option for a temporary facility, but FEMA will fund only the most cost effective option.[79] In its policy guidance, FEMA has asserted that it will use various considerations in determining whether to fund a temporary facility. One such consideration is that an applicant must supply FEMA with sufficient information so as to enable FEMA to conduct a "cost comparison," and this information should

[75] Cf. 48 C.F.R. pt. 7, subpart 7.4 (Equipment Lease or Purchase).

[76] Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 93-288, § 403(a)(3)(D) (1974) (codified as amended at 42 U.S.C. § 5170b(a)(3)(D)) ["Stafford Act"]; FEMA Recovery Policy No. 9523.3, *Provision of Temporary Relocation Facilities* (Dec. 14, 2010).

[77] FEMA DAP No. 9523.3, supra note 76, § VII(D).

[78] Id.

[79] Id.

consist of at least three proposals with cost estimates.[80]

4. Awards to Responsible Contractors (44 C.F.R. § 13.36(b)(8))

A subgrantee must make awards only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement.[81] In awarding a contract, the subgrantee must give consideration to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.[82]

As a preliminary matter, a subgrantee may not enter into a contract with a contractor that is debarred or suspended as detailed in 44 C.F.R. § 13.35. But it is important to recognize that a contractor, even if not debarred or suspended, may still not be a "responsible" contractor for the purposes of 44 C.F.R. § 13.36(b)(8). For example, a contractor may not have the necessary "technical and financial resources" to properly perform a contract, such as the necessary equipment and technical skills (or the ability to obtain them) to perform a particular scope of work.

The Federal Acquisition Regulation ("FAR") sets forth general standards for determining contractor responsibility that provide a useful guide within the Public Assistance contracting context.[83] To be determined responsible, the FAR states that a prospective contractor, among other things, must:

- Have adequate financial resources to perform the contract, or the ability to obtain them;
- Be able to comply with the required proposed delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments;
- Have a satisfactory performance record;
- Have a satisfactory record of integrity and business ethics;
- Have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them (including, as appropriate, such elements as production control procedures, property control systems, quality assurance measures, and safety programs applicable to materials to be produced or services to be performed by the prospective contractor and subcontractors);
- Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them; and

[80] Id. § VII(D)(1).

[81] 44 C.F.R. § 13.36(b)(8)).

[82] Id.

[83] 48 C.F.R. pt. 9 (Contractor Qualifications), subpart 9.1 (Responsible Prospective Contractors).

- Be otherwise qualified and eligible to receive an award under applicable laws and regulations.[84]

5. Procurement Records (44 C.F.R. § 13.36(b)(9))

A subgrantee must maintain sufficiently detailed records that document the procurement history.[85] These records must include, but are not necessarily limited to, the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.[86] Although not mentioned in the regulation, these records must also include the contract document and any contract modifications with the signatures of all parties. In addition, the procurement documentation file should also contain:

- Purchase request, acquisition planning information, and other pre-solicitation documents;
- List of sources solicited;
- Independent cost estimate;
- Statement of work/scope of services;
- Copies of published notices of proposed contract action;
- Copy of the solicitation, all addenda, and all amendments;
- An abstract of each offer or quote;
- Determination of contractor's responsiveness and responsibility;
- Cost or pricing data;
- Determination that price is fair and reasonable, including an analysis of the cost and price data;
- Notice of award;
- Notice to unsuccessful bidders or offerors and record of any debriefing;
- Record of any protest;
- Bid, performance, payment, or other bond documents;
- Notice to proceed

[84] See 48 C.F.R. § 9.104-1.

[85] 44 C.F.R. § 13.36(b)(9).

[86] Id.

Example – Insufficient Records Detailing a Procurement

Second Appeal, County of Hyde, NC, Debris Removal, FEMA-4019-DR

Background. In August 2011, strong winds from Hurricane Irene downed tree limbs and generated vegetative debris throughout Hyde County, North Carolina. FEMA prepared Project Worksheet (PW) 1296 for $1,833,070 to fund Hyde County's (Applicant) debris removal activities countywide. The Applicant employed a contractor through a "pre-event contract" it entered into in 2010 for debris removal services.

During the review of the PW, FEMA determined that of the total cost claimed by the Applicant, only $1,425,627 was eligible for reimbursement. FEMA reduced the eligible amount by $407,442, based on the contract rates proposed by the lowest bidder that had responded to the Applicant's request for proposals (RFP) for the pre-event contract. The contractor the Applicant selected for the pre-event contract was the highest bidder.

Applicant's Rationale. Following the original solicitation in 2010, the Applicant received four bids in response to the RFP and awarded the corresponding Pre-Event Agreement for Debris Management and Removal Services on September 2, 2010, to J.B. Coxwell, a contracting firm that was the highest bidder. The contractor's response to the RFP was the only response out of the four that included unit prices for ferry rides in its proposal. The Applicant maintained that by including the unit prices for the ferry rides, J.B. Coxwell was the only "responsible" bidder. The Applicant stated that J.B. Coxwell was the only bidder that had previous experience removing debris from Ocracoke Island and that it considered costs related to the County's unique geographical setting and the North Carolina Ferry System by including fees for debris transported by ferry from the island.

Second Appeal Decision. FEMA denied the Applicant's second appeal, largely basing its decision on the fact that the Applicant did not provide documentation supporting that it had evaluated all four RFPs based on the evaluation factors in the original RFP. The second appeal decision stated the following:

> While the Applicant provides statements in support of its decision to award the contract to the highest bidder, the Applicant did not provide documentation supporting that it evaluated all four RFPs based on the areas of consideration listed in its RFP. The Applicant refers to "proposer rankings" in its appeal but has provided no documentation supporting that it ranked all bids. The Applicant asserts that the contractors that were not selected were not "responsive" because they failed to address the special considerations outlined in the RFP. However, there is no indication that the three other contractors did not take those special considerations into account when developing the bid unit prices. Simply because J.B. Coxwell was the only contractor to include unit prices for the ferry rides does not justify disqualifying the other three bids. Based on the documentation, the Applicant did not follow the State procurement procedures detailed above. Therefore, the actual costs associated with the debris removal activities performed by J.B. Coxwell are not eligible for

funding.

6. Time and Material (T&M) Contracts (44 C.F.R. § 13.36(b)(10))

The regulation at 44 C.F.R. § 13.36(b)(10) provides that a subgrantee may use a T&M contract only after a determination that no other contract is suitable, and if the contract includes a ceiling price that the contractor exceeds at its own risk.[87] The ceiling price must not be so high as to render it meaningless as a cost control measure.[88] Although the regulation does not define the term "T&M" contract, this type of contract is one that typically provides for the acquisition of supplies or services on the basis of (1) direct labor hours at specified fixed hourly rates that include wages, overhead, general and administrative expenses, and profit; and (2) actual costs for materials.[89] A T&M contract is generally used when it is not possible at the time of placing the contract to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of confidence.[90]

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[87] For examples of subgrantees failing to include cost ceiling limitations, see DHS Office of Inspector General, Report No. DA-13-07, *FEMA Should Recover $701,028 of Public Assistance Grant Funds Awarded to Memphis Light, Gas and Water Division – Severe Weather February 2008*, p. 3 (Nov. 20, 2012); DHS Office of Inspector General, Report No. DA-13-05, *FEMA Should Recover $2.2 Million of Public Assistance Grant Funds Awarded to Memphis Light, Gas and Water Division - Severe Weather, June 2009*, p. 3 (Nov. 20, 2012); DHS Office of Inspector General, Report No. DA-13-04, *FEMA Should Recover $7.7 Million of Public Assistance Grant Funds Awarded to the City of Lake Worth, Florida Hurricane Wilma*, p. 3 (Nov. 20, 2012); DHS Office of Inspector General, *FEMA Public Assistance Grant Awarded to Henderson County, Illinois*, p. 3 (Sep. 27, 2011); see also Letter from Deborah Ingram, Assistant Administrator, FEMA Recovery Directorate, to Mark S. Ghilarducci, Secretary, California Emergency Management Agency *re: Second Appeal—Santa Barbara County, PA ID 083-99083-00, OIG Audit Report DS-11-04, FEMA-1577-DR-CA, Multiple Project Worksheets, Enclosed Analysis* (Nov. 4, 2013); Letter from Deborah Ingram, Assistant Administrator, FEMA Recovery Directorate, to Jonathon E. Monken, Director, Illinois Emergency Management Agency, *re: Second Appeal Henderson County, PA ID 071-99071-00, Procurement Standards, FEMA-1771-DR-IL, Office of the Inspector General (OIG) Audit DD-11-22*, Enclosed Analysis (Sep. 20, 2013).

[88] See DHS Office of Inspector General, Report No. DD-13-06 *FEMA Should Recover $6.7 Million of Ineligible or Unused Public Assistance Funds Awarded to Cameron Parish, Louisiana, for Hurricane Rita*, p. 9 (Feb. 27, 2013) (Subgrantee awarded a time and materials contract for program management that contained a limit of $50 million, however, this ceiling was unreasonably high and therefore meaningless as a cost control measure for a contract award of $9.4 million.).

[89] See e.g. 48 C.F.R. § 16.601(b).

[90] FEMA 322, Public Assistance Guide, p. 53 (Jun. 2007) ["Public Assistance Guide"]:

> Applicants should avoid using time and materials contracts. FEMA may provide assistance for work completed under such contracts for a limited period (generally not more than 70 hours) ***for work that is necessary immediately after the disaster has occurred when a clear scope of work cannot be developed***. Monitoring is critical and a competitive process still should be used to include labor and equipment rates. …Applicants must carefully monitor and document contractor expenses, and a cost ceiling or "not to exceed" provision must be included in the contract. If a time and materials contract has been used, the applicant should contact the State to ensure proper guidelines are followed. (emphasis added).

FEMA, as a matter of policy, has advised the following with respect to the use of T&M contracts under Public Assistance projects:

- Since this type of contract creates the risk that costs could be beyond what the parties anticipated, FEMA generally discourages the use of T&M contracts except when circumstances warrant such use and when no other contract type is suitable.[91]
- T&M contracts may, on occasion, be extended for a short period when absolutely necessary, for example, until appropriate unit price contracts have been prepared and executed.[92]
- Applicants must carefully monitor and document contractor expenses.[93]
- When T&M contracting is employed, the applicant should notify the State to ensure proper guidelines are followed.[94]
- FEMA has advised that these contracts should be limited to work that is necessary immediately after an incident and should not exceed 70 hours.[95]

FEMA has cited these policies above in various second appeal decisions,[96] and the OIG has also cited those policies in various OIG audits. The inappropriate use of T&M contracts is a relatively frequent finding of the OIG during audits of Public Assistance projects.

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[91] Id.; FEMA Recovery Fact Sheet No. 9580.212, *Public Assistance Frequently Asked Questions (FAQ)*, ¶ 6 (Oct. 28, 2012):

> 6. Are there any procurement actions that are discouraged by FEMA?
>
> Time and materials contracts. Applicants should avoid using time and materials contracts in their procurement actions. This contract type creates the risk that costs could go beyond what the parties anticipated, so applicants should only use it when no other contract type is suitable. In light of this risk, time and materials contracts must include a ceiling amount on the price of the contract. [footnote omitted] Including a ceiling shifts the risk to the contractor for any overages. For Public Assistance, contracts should be limited for work that is necessary immediately after a disaster and should not exceed 70 hours. [footnote omitted].

[92] FEMA P-323, Public Assistance Applicant Handbook, p. 45 (Mar. 2010).

[93] Public Assistance Guide, *supra* note 90, p. 53; Letter from Deborah Ingram, Assistant Administrator, FEMA Recovery Directorate, to Jonathon E. Monken, Director, Illinois Emergency Management Agency *re: Second Appeal–Henderson County, PA ID 071-99071-00, Emergency Levee Repairs and Dewatering, FEMA-1771-DR-IL, Project Worksheet (PW) 1524 v2*, Enclosed Analysis (Sep. 11, 2012).

[94] Public Assistance Guide, supra note 90, p. 53.

[95] See supra note 90.

[96] See, e.g. Letter from Deborah Ingram, Assistant Administrator, FEMA Recovery Directorate, to Mark S. Ghilarducci, Secretary, California Emergency Management Agency *re: Second Appeal—Santa Barbara County, PA ID 083-99083-00, OIG Audit Report DS-11-04, FEMA-1577-DR-CA, Multiple Project Worksheets, Enclosed Analysis* (Nov. 4, 2013).

Example – Use of Time and Materials Contract

DHS Office of Inspector General Report No. DA-13-08 (Dec. 2012)
FEMA Should Recover $470,244 of Public Assistance Grant Funds to the City of Lake Worth, Florida – Hurricanes Frances and Jeanne

Background. Hurricane Frances struck the City of Lake Worth (City) on September 3, 2004, and caused widespread damage to the City's electrical distribution system. Using its emergency contracting procedures, the City hired multiple electrical contractors under noncompetitive time and equipment contracts to repair damages caused by the storm. The City hired the contractors without performing a cost or price analysis to determine the reasonableness of the proposed prices, and without establishing ceiling prices that the contractors exceeded at their own risk.

Before the City could complete all electrical repair work resulting from Hurricane Frances, the City's electrical distribution system suffered additional damage from Hurricane Jeanne on September 24, 2004. According to the City's utility department, electrical power was restored to all of the City's customers by September 29, 2004. However, additional work was required to complete permanent repairs necessitated by the two storms. The City did not solicit competitive bids for the permanent work. Instead, it continued to use the contractors hired under the noncompetitive contracts for the contract work, which was completed December 5, 2004.

General Summary of OIG Finding. The OIG concluded that the need to restore electrical power constituted exigent circumstances that warranted the use of noncompetitive contracts through September 29, 2004, because lives and property were at risk. However, the City should have performed a cost/price analysis and established contract ceiling prices for the time-and-material work. In addition, the OIG concluded that the City should have openly competed the permanent repair work after that date because exigent circumstances no longer existed to justify the use of noncompetitive contracts.

It is important to recognize that, in some cases, a T&M contract may be appropriate in the immediate response to an incident to protect lives, public health, and safety, as it may be impossible to accurately estimate the extent or duration of the required scope of work or to anticipate costs with any reasonable degree of confidence in the immediate aftermath of the incident. Such a contract must still include a contract ceiling price and, furthermore, the applicant should recognize that the use of the contract in perpetuity may not be appropriate. Specifically, after a period of exigency or emergency has ended, the applicant should normally be able to formulate a detailed scope of work so as to allow a contract to be competitively awarded and/or transitioned to a non-T&M basis.

Example – Use of Time and Materials Contract Beyond the Exigent or Emergency Period

DHS Office of Inspector General Report No. DS-13-11 (Jul. 2013)
Los Angeles County, California, Did Not Properly Account for and Expend $3.9 Million in

FEMA Grant Funds for Debris-Related Costs

Background. County officials noncompetitively awarded debris-related T&M contracts to various contractors for four FEMA-funded projects. The County awarded these contracts without full and open competition; after the exigency period; and when a scope of work could be formulated. The County selected the contractors from an on-call list that the County established approximately 3 years before the disaster for its internal operations. Because the County's selection occurred before the disaster, pricing could not be predicated upon a FEMA- (or otherwise-) specified scope of work, nor could a comparison be made to other contractors who may have offered more competitive pricing on a particular, defined, post-disaster scope of work.

General Summary of OIG Finding. Using these preselected/on-call contractors may have been advantageous in the immediate aftermath of the disaster (*i.e.*, the exigency period), when a scope of work could not be easily defined and a streamlined procurement process was necessary to ensure the safety of lives and property. However, the OIG stated that it was not appropriate to claim costs associated with these contracts for the full extent of disaster-related projects ultimately reimbursed by the Federal Government when there was no exigency or actual assurance that contract costs were reasonable.

After the exigency period had passed, "full and open competition—through competitive bidding on an appropriate type of contract (*i.e.*, non–T&M)—should have occurred." Instead, County officials allowed the four contractors to complete the projects on a T&M basis, and without project-specific contracts and project-specific scopes of work. Further, the OIG asserted that (1) the circumstances did not warrant the award of noncompetitive/T&M contract after the exigency period passed; (2) there was no evidence that only T&M contracts would be suitable; (3) the contracts did not include project-specific cost ceilings; and (4) contractor expenses were not carefully and consistently monitored.

7. Settlement of Contractual and Administrative Issues (44 C.F.R. § 13.36(b)(11))

Subgrantees alone will be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of their procurements.[97] These issues include, but are not limited to, source evaluation, protests, disputes, and claims. These standards do not relieve the subgrantee of any contractual responsibilities under its contracts. FEMA will not substitute its judgment for that of the subgrantee unless the matter is primarily a Federal concern, such as the subgrantee's compliance with the requirements of 44 C.F.R. § 13.36. Violations of law will be referred to the local, State, or Federal authority having proper jurisdiction.

[97] 44 C.F.R. § 13.36(b)(11).

8. Protest and Dispute Procedures (44 C.F.R. § 13.36(b)(12))

A subgrantee must have "protest procedures" to handle and resolve "disputes" relating to their procurements and shall in all instances disclose information regarding the protest to the State.[98] A protestor must exhaust all administrative remedies with the subgrantee and State before pursuing a protest with FEMA.[99]

The regulation at 44 C.F.R. § 13.36(b)(12) appears to use the terms "protests" and "disputes" interchangeably. Under Federal acquisitions, the terms are distinct—a "protest" pertains to disagreements before or over the award of a contract,[100] and a "dispute" pertains to disagreements after a contract has been awarded.[101] Because 44 C.F.R. § 13.36(b)(12) uses the terms interchangeably, it appears that the regulation extends to both protests and disputes.

Reviews of disputes or protests by FEMA will be limited to:

- Violations of Federal law or regulations (violations of State or local law will be under the jurisdiction of State or local authorities);
- Subgrantee's noncompliance with FEMA's regulation for subgrantee procurement at 44 C.F.R. § 13.36; and
- Violations of the subgrantee's protest procedures for failure to review a complaint or protest.[102]

FEMA will review the protests within its jurisdiction *de novo*, that is, FEMA will review such protests without reference to the legal conclusions and assumptions reached of the grantee or subgrantee. Protests or disputes received by FEMA other than those specified above will be

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[98] 44 C.F.R. § 13.36(b)(12).

[99] Id.

[100] A "protest" is defined under 48 C.F.R. § 33.101 as a written objection by an interested party to any of the following:

(1) a solicitation or other request by an agency for offers for a contract for the procurement of property or services;

(2) the cancellation of the solicitation or other request;

(3) an award or proposed award of the contract;

(4) a termination or cancellation of an award of the contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.

Protests are also known as "bid protests," "award protests," or "protests against award."

[101] A "dispute" is a disagreement between the contractor and the contractor officer regarding the rights of a party under a contract.

[102] 44 C.F.R. § 13.36(b)(12). FEMA has not adopted any formal process for reviewing such actions.

referred to the State or subgrantee.[103]

Examples – FEMA Review of Protests and Disputes

Example 1: A contractor, after exhausting all administrative remedies with the State and Town, submits a request to FEMA for a review of the contractor's protest to the Town's procurement of construction services. The Town, a Public Assistance subgrantee, had solicited bids to a contract to repair a damaged Town building. The sole ground for the protest was that the Town used a local geographic preference in evaluating bids in violation of 44 C.F.R. § 13.36(c)(2). As this protest relates to the Town's compliance with FEMA's procurement regulations, this is a matter that FEMA would review.

Example 2: An architectural firm, after exhausting all administrative remedies with the State and Town, submits a request to FEMA for a review of the architectural firm's protest to the Town's procurement of architectural and engineering services. The Town, a Public Assistance subgrantee, had solicited bids for architectural and engineering services to design a new Town Hall to replace the Town Hall that was destroyed by a major disaster. The sole ground for the protest was that the architectural firm was more qualified than the firm to whom the Town ultimately awarded the contract. As this protest does not involve a potential violation of Federal law, regulation, executive order, noncompliance with FEMA's regulation for subgrantee procurement at 44 C.F.R. § 13.36, or the Town's violation of its own protest procedures, FEMA would not review this matter and would return it to the State for action.

9. Encouraging Intergovernmental Agreements (44 C.F.R. § 13.36(b)(5))

To foster "greater economy and efficiency," the regulation at 44 C.F.R. § 13.36(b)(5) encourages grantees and subgrantees to enter into "State and local intergovernmental agreements for procurement or use of common goods and services." The regulation does not, however, provide any additional context as to the attributes of such an intergovernmental agreement and what procedures parties would need to implement in order to satisfy the requirements of 44 C.F.R. § 13.36 when procuring goods and services in support of such an agreement.

FEMA has generally interpreted this regulation as encouraging jurisdictions to collaborate in joint procurements (or a "cooperative procurement") for goods and services where economies of scale would result in savings or using purchasing schedules or contracts. A joint procurement means a method of contracting in which two or more purchasers agree from the outset to use a single solicitation document and enter into a single contract with a vendor for the delivery of property and services. This is typically done to obtain advantages unavailable for smaller procurements. Unlike a State or local purchasing schedule or contract, a joint procurement is not drafted for the purposes of accommodating the needs of other parties that may later choose to

[103] Id.

participate in the benefits of the contract.

The subgrantee responsible for undertaking the joint procurement may, upon contract award, assign to the other participants responsibilities for administering those parts of the contract affecting their property or services. Participation in a joint procurement, however, does not relieve any participating subgrantee from the requirements and responsibilities it would have if it were procuring the property or services itself, and does not relinquish responsibility for the actions of other participants merely because the primary administrative responsibility for a particular action resides in an entity other than itself.

Example – Intergovernmental Agreements / Joint Procurements

Hypothetical: Two jurisdictions collaborate to promulgate a joint solicitation for a contract for debris removal services in both jurisdictions. Following the solicitation and receipt of bids, both jurisdictions jointly evaluate the responses and jointly award a contract to a debris removal contractor. The procurement meets all of the other requirements of 44 C.F.R. §§ 13.36(b)-(i), such as including the required contract clauses, and the parties having taken all required affirmative steps to ensure minority firms, women-owned business enterprises, and labor surplus area firms are used when possible. A major disaster declaration occurs one week after the contract is awarded, and the jurisdictions both use the contract for the debris removal services for two weeks.

Analysis: Both jurisdictions worked together to prepare the solicitation and conducted the evaluations of bids, both are parties to the agreement, and the scope of work under the contract expressly describes that the performance of services will occur in both jurisdictions. Presuming that the procurement meets all of the other requirements of 44 C.F.R. § 13.36, this contract could be used by both jurisdictions for debris removal services during a major disaster.

It is important to understand, however, that FEMA and the OIG have not interpreted this regulation so as to enable one jurisdiction to satisfy the procurement requirements of 44 C.F.R. § 13.36 by just using another jurisdiction's contractor after entering into an intergovernmental agreement with that other jurisdiction.[104] This is the case even if the use of another jurisdiction's contractor through an interlocal agreement would satisfy local and State procurement laws and regulations. In that case, the jurisdiction that availed itself of the other jurisdiction's contract was not an original party to the contract, and the scope of work under that contract did not involve work in the jurisdiction where the work was ultimately being performed. FEMA often refers to the assignment of contracts from one jurisdiction to another as "piggybacking."[105]

[104] FEMA has expressed in various policy documents that it disfavors an applicant's use of another jurisdiction's contractor, and how such use can jeopardize reimbursement. See Debris Management Guide, supra note 54, p. 19; FEMA Recovery Fact Sheet No. 9580.212, supra note 91, ¶ 6.

[105] FEMA Recovery Fact Sheet No. 9580.212, supra note 91, ¶ 6.

FEMA guidance provides that "[b]ecause the competitive process for the existing contract could not have included the full scope of the new work, the new work has not been competitively bid. The resulting costs may therefore be higher than if the work had been bid out separately. FEMA therefore discourages such contracts and will use the reasonableness of eligible work as a basis to determine reimbursable cost."[106] There are, notwithstanding, limited circumstances where the acquisition of contract rights through assignment from another entity may be permissible as discussed in section IV(C)(5). In cases falling outside these limited circumstances, it may be the case that awarding a short-term, non-competitive emergency work contract (such as debris removal) to another jurisdiction's contractor for site-specific work may be appropriate to meet the immediate, exigent or emergency needs. However, if the contract is for a long-term operation lasting weeks or months, the contract should be competitively bid as soon as possible (*see* section II(D)(3)(iv) below for a more detailed discussion of "infeasibility" and emergency/exigent procurements).

The use of state, local or tribal supply schedules or contracts is prohibited unless the underlying transaction complies with all of the applicable provisions of 44 C.F.R. § 13.36(b)-(i), to include the requirement for open and full competition. .

10. Purchasing From the General Services Administration's Schedules

The General Services Administration ("GSA") establishes long-term governmentwide multiple award schedule ("MAS") contracts with commercial firms to provide access to millions of commercial products and services at volume discount pricing.[107] The MAS contracts, also referred to GSA Schedule and Federal Supply Schedule contracts, are indefinite delivery, indefinite quantity contracts.[108] Use of the GSA Schedules Program by a federal agency is considered a "competitive procedure" under the Competition in Contracting Act of 1984 when certain ordering procedures are followed.[109]

Disaster Purchasing[110] is a GSA program that allows state and local governments access to buy goods and services from ALL GSA Federal Supply Schedules to facilitate disaster preparation[111]

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[106] Id.

[107] GSA awards and administers MAS contracts pursuant to 40 U.S.C. § 501.

[108] The GSA Schedules program is prescribed in the Federal Acquisition Regulations at 48 C.F.R. pt. 8, subpart 8.4 and 48 C.F.R. pt. 38.

[109] 48 C.F.R. § 6.102(d)(3).

[110] See U.S. General Services Administration, *State and Local Disaster Purchasing* (available at http://www.gsa.gov/portal/content/202321?utm_source=FAS&utm_medium=print-radio&utm_term=disasterrecovery&utm_campaign=shortcuts).

[111] "Preparedness" means actions that involve a combination of planning, resources, training, exercising, and organizing to build, sustain, and improve operational capabilities. Preparedness is the process of identifying the personnel, training, and equipment needed for a wide range of potential incidents, and developing jurisdiction –

or response[112]; facilitate recovery[113] from a major disaster declared by the President under the Stafford Act, or to facilitate recovery from terrorism or nuclear, biological, chemical, or radiological attack.[114] A "State or local government" authorized to use the GSA schedules includes any State, local, regional, or tribal government, or any instrumentality of such an entity (including any local educational agency or institution of higher education).[115] The use of a GSA schedule is voluntary for a State or local government, and agreement by a schedule contractor to offer recovery purchasing under the contract and acceptance of any order for recovery purchasing from a State or local government is voluntary.[116]

FEMA promulgated Disaster Assistance Fact Sheet No. 9580.103 to set forth amplifying guidance for State and local governments' use of the GSA supply schedules.[117] This Fact Sheet states that applicants who purchase goods and services under the DRPP should follow the GSA ordering procedures found at 48 C.F.R. §§ 8.405-1 and 405-2.[118] The Fact Sheet states that by using these procedures, applicants that participate in the DRPP will satisfy the requirements to procure products and/or services through full and open competition.[119]

State and local governments may be able to avail themselves of other GSA federal supply schedules or similar purchasing arrangements as authorized by federal law.

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specific plans for delivering capabilities when needed for an incident. See U.S. General Services Administration, *Disaster Purchasing FAQs* (available at http://www.gsa.gov/portal/content/202557#Question5).

[112] "Response" means immediate actions to save lives, protect property and the environment, and meet basic human needs. Response also includes the execution of emergency plans and actions to support short-term recovery. Id.

[113] "Recovery" means the development, coordination, and execution of service- and site-restoration plans; the reconstitution of government operations and services; individual, private-sector, nongovernmental, and public-assistance programs to provide housing and to promote restoration; long-term care and treatment of affected persons; additional measures for social, political, environmental, and economic restoration; evaluation of the incident to identify lessons learned; post incident reporting; and development of initiatives to mitigate the effects of future incidents. Id.

[114] 40 U.S.C. § 502(d). Section 502(d) was created by the John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083, § 833 (2006) and later amended by Federal Supply Schedules Usage Act of 2010, Pub. L. No. 111-263, § 4 (2010).

[115] 40 U.S.C. § 502(d), (c)(3); 48 C.F.R. § 538.7001.

[116] 48 C.F.R. § 538.7001(a).

[117] Disaster Assistance Fact Sheet No. 9580.103, *General Services Administration Disaster Recovery Purchasing Program* (Jul. 7, 2008).

[118] Id. at 3 ("FEMA may reimburse Public Assistance State, local, and tribal government applicants for products and/or services purchased under DRPP if they were procured competitively and are otherwise eligible under the Public Assistance Program. Public Assistance applicants who purchase goods or services under the DRPP should follow the GSA ordering procedures found in 48 CFR §§ 8.405 – 8.405-2. By using these outlined procedures, [] State, local, and tribal governments that participate in GSA DRPP will satisfy the requirements to procure products and/or services through full and open competition.").

[119] Id.

11. Obtaining Goods and Services through Mutual Aid Agreements

FEMA, pursuant to FEMA Recovery Policy No. 9523.6, allows a subgrantee to use Public Assistance funding to pay for work performed by another entity through a mutual aid agreement.[120] This policy applies to all forms of mutual aid assistance, including agreements between a requesting and providing entity, statewide mutual aid agreements, and mutual aid services provided under the Emergency Management Assistance Compact ("EMAC").[121] There are three types of mutual aid work eligible for FEMA assistance:

- ***Emergency Work (Public Assistance Categories A and B)*** – Mutual aid work provided in the performance of emergency work necessary to meet immediate threats to life, public safety, and improved property.

- ***Permanent Work Related to Utilities (Public Assistance Category F)*** – Work that is of a permanent nature but is necessary for emergency restoration of utilities. For example, work performed to restore electrical and other power.

- ***Grant Management Work*** – For Public Assistance only, work associated with the performance of the grantee's responsibilities as grant administrator outlined in 44 C.F.R. § 206.202(g). Use of Emergency Management Assistance Compact ("EMAC") provided assistance to perform these tasks is eligible mutual aid work.[122]

If mutual aid work falls within the scope described above, then FEMA will next look to see if the providing entity performed the work using force account labor or contract resources.[123] A subgrantee (the requesting entity) may use Public Assistance funding to pay for the costs of the *force account labor* of the entity providing assistance (the providing entity) consistent with FEMA Recovery Policy No. 9523.6.[124] If, however, the providing entity performs mutual aid work through contract, then FEMA will perform the following analysis.

Contract Services or Supplies Are Incidental to the Work Performed by the Providing Entity. In those cases where contract services or supplies are incidental to the work performed by the

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[120] FEMA Recovery Policy No. 9523.6, *Mutual Aid Agreements for Public Assistance and Fire Management Assistance* (Nov. 10, 2012). FEMA does not treat a mutual aid agreement as a procurement for the purposes of 44 C.F.R. pt. 13 (or 2 C.F.R. pt. 215 in the case of private nonprofit organizations) so long as the work provided under the agreement falls within certain categories of work. Rather, FEMA treats the mutual aid assistance performed by a providing entity's employees as akin to temporary hires of the requesting entity.

[121] Id. § VI(C).

[122] Id. § VI(B).

[123] If mutual aid work does not fall within these three eligible types of work, then FEMA treats the mutual aid agreement as a procurement and evaluates it against the criteria of 44 C.F.R. § 13.36(b)-(i).

[124] The providing entity's force account labor is treated akin to temporary hires.

providing entity, then FEMA will generally not treat the mutual aid agreement as a procurement and evaluate it according to the criteria at 44 C.F.R. § 13.36.

The Providing Entity Predominantly or Exclusively Performs Mutual Aid Work Through Contract. In other cases, however, a providing entity may perform the work under the mutual aid agreement predominantly or exclusively through contract. FEMA will, in these cases, treat the mutual aid agreement as a procurement and evaluate it against the criteria of 44 C.F.R. § 13.36(b)-(i). The following example illustrates the approach.

Examples –Mutual Aid Work Performed Through Contract

Example 1: The City of X (requesting entity) requests 30 police officers from the City of W (providing entity) to provide police officers to perform law enforcement operations immediately following a tornado in the requesting entity's jurisdiction. This request is pursuant to an existing mutual aid agreement for police support. The providing entity contracts with a bus company to transport the police officers to the requesting entity's jurisdiction, and includes the costs of this transportation along with its force account labor costs in its bill to the providing entity. Such contract services are incidental to the law enforcement services performed by the providing entity, and FEMA would treat those costs as eligible so long as all other requirements of FEMA Recovery Policy No. 9523.6 were met.

Example 2: The City of Z is impacted by a tornado that generates widespread debris throughout the jurisdiction. In order to obtain debris removal services, the City of Z contacts the City of Y, which has an existing contractor for debris removal. Rather than entering into a contract directly with Debris Removal Contractor, the City of Z enters into a mutual aid agreement with the City of Y for the provision of debris removal assistance. The City of Y, after the mutual aid agreement is executed, sends Debris Removal Contractor to the City of Z, and the Contractor performs debris removal throughout the City of Z for 90 days. This would not be a mutual aid agreement falling with the scope of FEMA Recovery Policy No. 9523.6. As such, FEMA would treat this transaction as a procurement, and would evaluate City of Z's procurement of the debris removal services of the City of Y through the mutual aid agreement according to 44 C.F.R. § 13.36(b)-(i).[125]

[125] In limited circumstances (and although not encouraged by FEMA), it may be possible for the City of X to acquire the contract rights of the City of Y (the "Providing Entity"), which would avoid the need for the contract work to be performed through mutual aid and would be a method of procurement which could satisfy the requirements of 44 C.F.R. § 13.36. See infra section IV(A)(12). It may also be the case that, based on individual facts and circumstances, the procurement may fall within exception for noncompetitive procurements at 44 C.F.R. § 13.36(d)(4). See infra section IV(C)(4).

12. Using Another Jurisdiction's Contract

A grantee or subgrantee may find it useful to acquire contract rights through assignment by another jurisdiction.[126] FEMA refers to the assignment of contracts from one jurisdiction to another as "piggybacking," and as discussed earlier in this manual, discourages the use of such contracts.[127] Although FEMA generally discourages the practice, a grantee or subgrantee that obtains contractual rights through assignment[128] may use them after first determining that:

- The original contract was procured in compliance with 44 C.F.R. § 13.36.
- The original contract contains appropriate assignability provisions that permit the assignment of all or a portion of the specified deliverables under the terms originally advertised, competed, evaluated, and awarded, or contains other appropriate assignment provisions.
- The contract price is fair and reasonable;[129]
- The contract provisions are adequate for compliance with all Federal requirements.[130]
- The scope of work to be performed falls within the scope of work under the original contract and there are no cardinal changes to the contract.[131]
- The scope of the assigned contract originally procured by the assigning party *does not exceed the amount of property and services required to meet the assigning party's original, reasonably expected needs*. The regulation at 44 C.F.R. § 13.36 requires the grantee or subgrantee to have procurement procedures that preclude it from acquiring property or services it does not need. Therefore, a contract would have an improper original scope if the original party added excess capacity in the original procurement primarily to permit assignment of those contract rights to another entity. Moreover, an assignable contract with an overbroad scope of work may lead to unreasonable pricing

[126] The assignment of contracts or portions of contracts from the original purchasing entity to another entity to purchase equipment, supplies, and services is separate and distinct from joint procurements and state and local supply schedules.

[127] FEMA Recovery Fact Sheet No. 9580.212, supra note 91, ¶ 6.

[128] An "assignment" is the transfer of contract rights from one party to another. Black's Law Dictionary 138 (9th Ed. 2009) (defining "assignment of rights").

[129] The grantee or subgrantee need not perform a second price analysis if a price analysis was performed for the original contract. However, FEMA expects the grantee or subgrantee to determine whether the contract price or prices originally established are still fair and reasonable before using those rights.

[130] The grantee or subgrantee using assigned contract rights is responsible for ensuring the contractor's compliance with required Federal provisions.

[131] See section IV(A)(14) for a discussion of cardinal changes.

and thus should not be used. For example, a statewide debris removal contract that does not have pricing that accounts for variables in the actual scope of work required by a local government subgrantee or the specific conditions of that local market may lead to unreasonable pricing.

- The quantities the assigning party acquired, coupled with the quantities the acquiring grantee or subgrantee seeks, do not exceed the amounts available under the assigning entity's contract.

If these circumstances are not met, then FEMA considers the subgrantee's contract with its vendor as a sole-source award. The subgrantee may still be able to use the existing contract if the conditions precedent for a sole-source award at 44 C.F.R. § 13.36(d)(4) (and discussed in section VII(C)(4)) are met.

13. Using an Existing Contract of the Subgrantee

A subgrantee may have an existing contract in place for a particular service or supplies that it wishes to utilize to perform work under a Public Assistance project award. The use of such an existing contract may be permissible in the following circumstances:

- The subgrantee originally procured the contract in full compliance with the federal procurement standards at 44 C.F.R. § 13.36(b)-(i).

- The work to be performed falls within the scope of work of the original contract and there are no cardinal changes.[132]

- The scope of the original contract originally procured does not exceed the amount of property and services required to meet the subgrantee's original, reasonably expected needs. The regulation at 44 C.F.R. § 13.36 requires the grantee or subgrantee to have procurement procedures that preclude it from acquiring property or services it does not need. Therefore, a contract could have an improper original scope if the subgrantee added excess capacity in the original procurement primarily to permit not only its present use, but also its future use in an incident.[133] Moreover, an existing contract with an overbroad scope of work may lead to unreasonable pricing and thus should not be used. For example, a standing debris removal contract that does not have pricing that accounts for variables in the actual scope of work required by a local government subgrantee or the specific conditions of the specific event may lead to unreasonable pricing.

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[132] Id.

[133] We note that jurisdictions may, as a matter of prudence, procure "advance contracts" that are only to be used in the case of a future incident, such as contracts for debris removal. If procured in full compliance with 44 C.F.R. § 13.36(b)-(i), such a method of advance procurement is permissible.

If these circumstances are not met, then FEMA considers the subgrantee's contract with its vendor as a sole-source award. The subgrantee may still be able to use the existing contract if the conditions precedent for a sole-source award at 44 C.F.R. § 13.36(d)(4) (and discussed in section VII(C)(4)) are met.

14. Changes in Contracts

Subgrantee contracts will not be perfect when awarded. During performance, many changes may be required in order to fix inaccurate or defective specifications, react to newly encountered circumstances, or modify the work to ensure the contract meets subgrantee requirements. A contract "change" is any addition, subtraction, or modification of work required under a contract during contract performance. Notwithstanding the need to make appropriate contract changes, all such modifications must be within the scope of the original contract. "Cardinal" changes, however, are not permissible.

A significant change in contract work (property or services) that causes a major deviation from the original purpose of the work or the intended method of achievement, or causes a revision of contract work so extensive, significant, or cumulative that, in effect, the contractor is required to perform very different work from that described in the original contract, is a cardinal change. Such practices are sometimes informally referred to as "tag-ons." A change within the scope of the contract (sometimes referred to as an "in-scope" change) is not a "tag-on" or cardinal change. Issues related to impermissible, cardinal changes may arise within the context of a subgrantee using an existing contract or obtaining assigned contract rights from another jurisdiction.

FEMA has not developed a finite list of acceptable contract changes. Recognizing a cardinal change contract can be difficult, and a cardinal change cannot be identified easily by assigning a specific percentage, dollar value, number of changes, or other objective measure that would apply to all cases. The following provide some amplifying guidance.

i. Changes in Quantity

To categorize virtually any change in quantity as a prohibited cardinal change (sometimes referred to as an "out-of-scope" change) fails to account for the realities of the marketplace and unnecessarily restricts a subgrantee from exercising reasonable freedom to make minor adjustments contemplated fairly and reasonably by the parties when they entered into the contract.

ii. Tests

Among other things, customary marketing practices can influence the determination of which changes will be "cardinal." Other tests involve the nature and extent of the work to be performed, the amount of effort involved, whether the change was originally contemplated at the time the original contract was entered into, or the cumulative impact on the contract's quantity, quality, costs, and delivery terms.

iii. Federal Contracting Standards

The broader standards applied in Federal contracting practice reflected in Federal court decisions, Federal Boards of Contract Appeals decisions, and Comptroller General decisions provide guidance in determining whether a change would be treated as a cardinal change. FEMA does not imply that these Federal procurement decisions are controlling, but FEMA intends to consider the collective wisdom within these decisions in determining the nature of third party contract changes along the broad spectrum between permissible changes and impermissible cardinal changes.

15. Encouraging the Use of Federal Excess and Surplus Property (44 C.F.R. § 13.36(b)(6))

The Federal regulation at 44 C.F.R. § 13.36(b)(6) encourages subgrantees to use Federal excess and surplus property in lieu of purchasing new equipment and property whenever this is feasible and reduces project costs. A subgrantee would acquire such equipment and property through the Federal Surplus Personal Property Donation Program.

Various Federal laws, including 40 U.S.C. § 549,[134] authorize the Administrator of General Services to carry out the Federal Surplus Personal Property Donation Program.[135] Under this Program, GSA will donate surplus Federal property—through a State agency for surplus property (SASP)—to eligible "public agencies"[136] and eligible "nonprofit educational or public health institutions."[137] Surplus personal property (surplus property) means excess personal property (as defined in 41 U.S.C. § 102-36.40) not required for the needs of any Federal agency, as determined by GSA.[138]

A SASP, under state law, is the agency responsible for fair and equitable distribution, through

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[134] See 41 C.F.R. § 102-37.380 (What is the statutory authority for donations of surplus Federal property made under this subpart?).

[135] See 41 C.F.R. pt. 102-37 (Donation of Surplus Personal Property).

[136] 40 U.S.C. § 549(a):

> "The term "public agency" means—
>
> (A) a State;
>
> (B) a political subdivision of a State (including a unit of local government or economic development district);
>
> (C) a department, agency, or instrumentality of a State (including instrumentalities created by compact or other agreement between States or political subdivisions); or
>
> (D) an Indian tribe, band, group, pueblo, or community located on a state reservation.

[137] 40 U.S.C. § 549(c)(3); 41 C.F.R. § 102-37.380(b).

[138] 41 C.F.R. § 102-37.25.

donation, of property transferred by GSA.[139] For most public and nonprofit activities, the SASP determines if an applicant is eligible to receive property as a public agency, a nonprofit educational or public health institution, or for a program for older individuals.[140] A SASP may request GSA assistance or guidance in making such determinations.[141]

The process for requesting surplus property for donation varies, depending on who is making the request. As a general matter, most prospective donation recipients should submit requests for property directly to the appropriate SASP, and SASPs and public airports submit their requests to the appropriate GSA regional office.[142]

16. Encouraging the Use of Value Engineering (44 C.F.R. § 13.36(b)(7))

The Federal regulation at 44 C.F.R. § 13.36(b)(7) encourages subgrantees to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions.[143] Value engineering, according to the regulation, is a "systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lower cost."[144] The regulation, however, does not offer any additional explanation, and it is useful to examine the meaning of "value engineering" as used in Federal contracting for additional context.

As it relates to Federal procurement, Federal law defines "value engineering" as an "analysis of the functions of a program, project, system, product, item of equipment, building, facility, service, or supply of an executive agency" that is "performed by qualified agency or contractor personnel" and "directed at improving performance, reliability, quality, safety, and life cycle costs."[145] Simply stated, value engineering is a systematic and organized approach to provide the necessary functions in a project at the lowest cost, and promotes the substitution of materials and methods with less expensive alternatives without sacrificing functionality.[146]

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[139] 40 U.S.C. § 549(a)(3); 41 C.F.R. pt. 102-37, subpart D (State Agency for Surplus Property).

[140] 41 C.F.R. § 102.37-385 (Who determines if a prospective donee applicant is eligible to receive surplus property under this subpart?); see also 41 C.F.R. § 102-37.130 (What are a SASP's responsibilities in the donation of surplus property?).

[141] Id.

[142] 41 C.F.R. § 102-37.50 (What is the general process for requesting surplus property for donation?).

[143] 44 C.F.R. § 13.36(b)(7).

[144] Id.

[145] 41 U.S.C. § 1711 (Value Engineering). The law requires Federal agencies to establish and maintain value engineering processes and procedures, and such policies and procedures are prescribed in the Federal Acquisition Regulations. See 48 C.F.R. pt. 48 (Value Engineering).

[146] The Federal Acquisition Regulation requires Federal agencies to provide contractors a substantial financial incentive to develop and submit value engineering change proposals, and Federal contracting activities will include

For example, GSA states that value engineering can be used in both the design and construction phase of Federal buildings. In the design phase of Federal building development, properly applied value engineering considers alternative design solutions to optimize the expected cost/worth ratio of projects at completion and elicits ideas for maintaining or enhancing results while reducing life cycle costs. In the construction phase, GSA contractors are encouraged through shared savings to draw on their special "know-how" to propose changes that cut costs while maintaining or enhancing quality, value, and functional performance.

B. COMPETITION (44 C.F.R. § 13.36(c))

The regulation at 44 C.F.R. § 13.36(c) requires a subgrantee to conduct all procurement transactions in a manner providing "full and open competition" consistent with the standards of 44 C.F.R. § 13.36. Although not defined in the regulation, "full and open competition" generally means that a complete requirement is publicly solicited and all responsible sources are permitted to compete.[147] The full and open competition requirement has proven to be one of the most common problems with subgrantee procurements in recent years and comprises a majority of audit findings by the OIG.

There are numerous benefits to full and open competition, such as increasing the probability of reasonable pricing from the most qualified contractors, and helping discourage and prevent favoritism, collusion, fraud, waste, and abuse.[148] It also allows the opportunity for minority firms, women's business enterprises, and labor surplus area firms to participate in federally-funded work.[149]

Noncompetitive procurements not providing for full and open competition will be scrutinized by FEMA and may be scrutinized by the OIG during an audit, even if they result in the same or lower price than if the procurement was conducted through full and open competition.

1. Situations Restrictive of Competition (44 C.F.R. § 13.36(c)(1))

The regulation at 44 C.F.R. § 13.36(c)(1) identifies seven situations that are considered to be restrictive of competition. This is an illustrative and non-exclusive list, such that FEMA may consider other situations similar to those on the list as restrictive of competition, even though

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value engineering provisions in appropriate supply, service, architect-engineer, and construction contracts (except where exemptions are granted). 48 C.F.R. § 48.102.

[147] Cf. 48 C.F.R. § 2.101 ("Full and open competition, when used with respect to a contract action, means that all responsible sources are permitted to compete.").

[148] DHS Office of Inspector General, Report No. 14-11-D, *FEMA Should Recover $6.1 Million of Public Assistance Grant Funds Awarded to Orlando Utilities Commission under Hurricane Frances*, p. 5 (Dec. 3, 2013).

[149] Id.

they are not specifically listed.[150]

i. Requiring Unnecessary Experience and Excessive Bonding (44 C.F.R. § 13.36(c)(1)(i))

A subgrantee must not require unnecessary experience and excessive bonding.[151] First, as it relates to experience, this could include requiring unnecessary levels or years of experience for contractors as organizations, the contractors' workforce, or the contractors' key personnel on a project.

Second, as it relates to bonding, the regulation discourages unnecessary bonding because it increases the cost of the contract and restricts competition, particularly by disadvantaged and small business enterprises. Many bidders have limited "bonding capacity" and unnecessary performance bonding requirements reduce a prospective bidder's or offeror's capability to bid or offer a proposal on bonded work. Small and disadvantaged businesses with a limited record of performance may have particular difficulty obtaining bonds.

FEMA does not require any additional bonding requirements other than construction bonding set forth at 44 C.F.R. § 13.36(h). However, a subgrantee might find bid, performance, or payment bonds to be desirable for work other than construction work or in amounts in excess of those required at 44 C.F.R. § 13.36(h), even though bonding can be expensive. In these cases, because bonding requirements can limit contractor participation, FEMA expects the subgrantee's bonding requirements to be reasonable and not unduly restrictive.

ii. Placing Unreasonable Requirements on Firms in Order for Them to Qualify to Do Business (44 C.F.R. § 13.36(c)(1)(ii))

The subgrantee must not place unreasonable requirements on firms in order for them to do business.[152] This means that the subgrantee should include only those requirements that are the least restrictive to meet the purposes necessitating the establishment of the qualification requirements.

iii. Noncompetitive Pricing Practices between Firms or Between Affiliated Companies (44 C.F.R. § 13.36(c)(1)(iii))

Noncompetitive pricing practices between firms or between affiliated companies are restrictive

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[150] The regulation provides that "Some of the situations considered to be restrictive of competition ***include but are not limited to***..." (emphasis added). Applying the interpretive principle of ejusdem generis, this means that the list is not exhaustive.

[151] 44 C.F.R. § 13.36(c)(1)(i).

[152] 44 C.F.R. § 13.36(c)(1)(ii).

of competition.[153] The most prominent form of noncompetitive pricing is referred to as "bid rigging," which is the practice where conspiring competitors effectively raise prices where a purchaser acquires goods or services by soliciting competing bids. Essentially, competitors agree in advance who will submit the winning bid on a contract being awarded through the competitive bidding process.[154] Bid rigging takes many forms, but bid-rigging conspiracies usually fall into one or more of the following categories: bid suppression, complementary bidding, and bid rotation.

The following provides some additional explanations for these types of schemes, which are predominantly based on the Department of Justice, Anti-Trust Division's description of them within the Federal context.

- In ***bid suppression*** schemes, one or more competitors, who otherwise would be expected to bid, or who have previously bid, agree to refrain from bidding or withdraw a previously submitted bid so that the designated winning competitor's bid will be accepted.[155]
- ***Complementary bidding*** (also known as "cover" or "courtesy" bidding) occurs when some competitors agree to submit bids that are either too high to be accepted or contain special terms that will not be acceptable to the buyer. Such bids are not intended to secure the buyer's acceptance, but are merely designed to give the appearance of genuine competitive bidding. Complementary bidding schemes are the most frequently occurring forms of bid rigging, and they defraud purchasers by creating the appearance of competition to conceal secretly inflated prices.[156]
- In ***bid rotation*** schemes, all conspirators submit bids but take turns being the low bidder. The terms of the rotation may vary. For example, competitors may take turns on contracts according to the size of the contract, allocating equal amounts to each conspirator or allocating volumes that correspond to the size of each conspirator company.[157]

iv. Noncompetitive Awards to Consultants that Are on Retainer Contracts (44 C.F.R. § 13.36(c)(1)(iv))

Noncompetitive awards to consultants on retainer contracts are restrictive of competition.[158] The term "retainer contract" is not defined in the regulations, but is basically a form of agreement for

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[153] 44 C.F.R. § 13.36(c)(1)(iii).

[154] U.S. Department of Justice Anti-Trust Division, *Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What to Look For* (available at http://www.justice.gov/atr/public/guidelines/211578.pdf).

[155] Id. at 2.

[156] Id.

[157] Id.

[158] 44 C.F.R. § 13.36(c)(1)(iv).

general, unspecified services entered into in advance of work to be done. Under such an agreement, the consultant remains available when the client needs services during a specific period or on a specified matter.[159] As applied here, the regulation is making clear that it would be restrictive of competition if a subgrantee simply made a noncompetitive award for work to be done under a Public Assistance award to a consultant that was already on retainer, specifically where the noncompetitive award was for property or services not specified for delivery under the retainer contract and where the retainer contract was not originally procured in a manner that met all of the conditions of 44 C.F.R. § 13.36(b)-(i).

Example of Situation Restrictive of Competition
Use of Architect-Engineering Firm on Retainer

Background: The President declares a major disaster for the State of Z as a result of a hurricane, and the declaration authorizes Public Assistance for all counties in the State. The hurricane damaged Town W's building and FEMA approves a project worksheet for the repair of the building. The scope of work under the project includes architectural and engineering services because of the complexity of project, with FEMA estimating the cost of these services using a cost curve. The Town has had the same architectural and engineering firm ("Firm") on a retainer contract that was originally awarded 20 years earlier and has used that firm for all "needed professional services related to construction." The retainer contract simply provides for the Firm to provide any and all architectural and engineering services needed by the Town, and the contract was not procured in compliance with the requirements at 44 C.F.R. § 13.36(b)-(i).

Following approval of the Public Assistance project, the Town orders the architectural and engineering services from Firm, and the services are subject to the same rates in the existing contract between the Firm and the Town.

Analysis: First, the Town did not conduct the original procurement through full and open competition and in compliance with 44 C.F.R. § 13.36(b)-(i). Second, the scope of work under the contract was not specifically for architectural and engineering services for building repairs, but instead for "all professional services related to construction." This type of practice is specifically enumerated as a situation that is restrictive of competition at 44 C.F.R. § 13.36(c)(1)(iv). The Town, therefore, has not met the required procurement standards under 44 C.F.R. pt. 13.

v. Organizational Conflicts of Interest (44 C.F.R. § 13.36(c)(1)(v))

[159] Within the legal services industry, a "retainer" means, among other things, an advance payment of fees for work that the lawyer will perform in the future or a fee that a client pays to a lawyer simply to be available when the client needs legal help during a specified period or on a specified matter. Black's Law Dictionary 1430 (9th ed. 2009).

The regulation at 44 C.F.R. § 13.36(b)(3)—discussed earlier in this chapter—provides that "no employee, officer, or agent of the… subgrantee shall participate in selection, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved." In addition to personal conflicts of interest, it is also important to recognize that organizational conflicts of interest can also present issues under a subgrantee's procurement. The regulation later discusses organizational conflicts of interest at 44 C.F.R. § 13.36(c)(1)(v), providing that an "organizational conflict of interest" is a situation considered "restrictive of competition." The regulation, however, does not define or provide additional guidance as to the scope and meaning of "organizational conflict of interest." It is, therefore, helpful to understand the meaning and scope of organizational conflicts of interest within the Federal Government's procurement contracting rules and processes.

Subpart 9.5 of the FAR sets the regulatory guidance governing organizational conflicts of interest in the case of Federal acquisitions. Such a conflict arises where "because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage."[160] Federal contracting officers are to avoid, neutralize, or mitigate potential significant conflicts of interest so as to prevent unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity.[161]

Because conflicts may arise in factual situations not expressly described in the relevant FAR sections, the regulation advises contracting officers to examine each situation individually and to exercise "common sense, good judgment, and sound discretion" in assessing whether a significant potential conflict exists and in developing an appropriate way to resolve it.[162] The situations in which organizational conflicts of interest arise, as addressed in FAR subpart 9.5 and in the decisions of the Comptroller General, can be broadly categorized into the following three groups: ***unequal access to information, biased ground rules, and impaired objectivity.***

a. *Unequal Access to Information*

The first group consists of situations where a firm has access to nonpublic information as part of its performance of a government contract and where that information may provide the firm a competitive advantage in a later competition for a government contract. In these "unequal access to information" cases, the concern is limited to the risk of the firm gaining a competitive advantage; there is no issue of bias.[163]

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[160] 48 C.F.R. § 9.501.

[161] 48 C.F.R. §§ 9.504(a), 9.505.

[162] 48 C.F.R. § 9.505.

[163] Cf. *Pragmatics Inc.*, B-407320.2, 2013 U.S. Comp. Gen. LEXIS 61 (Mar. 26, 2013); *Aetna Government Health Plans*, B-254397.15, 1995 Comp. Gen. LEXIS 502 (Jul. 27, 1995).

b. *Biased Ground Rules*

The second group consists of situations in which a firm, as part of its performance of work of a government contract, has in some sense set the ground rules for another government contract by, for example, writing the statement of work or the specifications. In these "biased ground rules" cases, the primary concern is that the firm could skew the competition, whether intentionally or not, in favor of itself.[164] These situations may also involve a concern that the firm, by virtue of its special knowledge of the subgrantee's future requirements, would have an unfair advantage in the completion for those requirements.[165] The rules apply to the firm later serving as a prime contractor or a subcontractor on the contract for which the firm has written the statement of work or specifications.[166]

c. *Impaired Objectivity*

The third group comprises cases where a firm's work under one government contract could entail its evaluating itself, either through an assessment of performance under another contract or an evaluation of proposals.[167] In these "impaired objectivity" cases, the concern is that the firm's ability to render impartial advice to the government could appear to be undermined by its relationship with the entity whose work product is being evaluated.[168]

Example – Organizational and Personal Conflict of Interest

Background. The President declares a major disaster for the State of Z as a result of severe storms and flooding, and the declaration authorizes the Public Assistance for all counties in the State. In the Town of Maple, the flooding severely damages 225 private homes and public infrastructure and deposits enormous and wide scale quantities of debris across the entire Town.

FEMA considers debris removal from private property and demolition of private structures as the responsibility of a private property owner, and does not generally provide funding for such activities. However, upon a written request from the local government, FEMA may provide financial assistance for the removal of debris from private property in areas where debris is so widespread that debris removal is in the public interest and to for the demolition of unsafe private structures that endanger the public under sections 407 and 403 of the Stafford Act,

[164] 48 C.F.R. §§ 9.505-1, 9.505-2.

[165] See *The Pragma Corporation.*, B-255236, 1994 U.S. Comp. Gen. LEXIS 132 (Feb. 18, 1994).

[166] See, e.g. DHS Office of Inspector General, Report No. DD-11-15, *FEMA Public Assistance Grant Awarded to Saint Mary's Academy (SMA), New Orleans, Louisiana*, p. 3 (Aug. 5, 2011) (identifying an organizational conflict of interest arising in a private nonprofit organization's procurement; see infra note 397).

[167] 48 C.F.R. § 9.505-3.

[168] Id.

respectively.

The Mayor of the Town requests FEMA approval for the private property debris removal and demolition of unsafe structures. FEMA, after working to obtain various information and certifications from the Mayor, approves the request. The City submits a proposed scope of work for the projects, FEMA approves them, and FEMA then awards Public Assistance projects for the private property demolition and debris removal.

The Town then publicizes a solicitation for the debris removal and demolition work on private property. The Mayor, who owns Debris Company, wants to take advantage of this contracting opportunity and resigns from his position. Following his resignation, he submits a bid on the solicitation on behalf of Debris Company and the Town awards the contract to Debris Company.

Analysis. This situation would comprise an actual or apparent organizational conflict of interest. In this case, the Mayor was individually involved in preparing the request for financial assistance to FEMA, preparing the project worksheet, and preparing the solicitation. He likely had access, therefore, to information that would have given him and his company an unfair competitive advantage over other companies. In addition, the Mayor was involved in preparing the scope of work for the project worksheet and solicitation, such that he could have, intentionally or not, skewed the solicitation in favor of his company.

vi. Specifying Only a Brand Name Product Instead of Allowing an Equal Product to Be Offered (44 C.F.R. § 13.36(c)(1)(vi))

It would be restrictive of competition for a subgrantee to specify only a "brand name" product instead of allowing "an equal" product to be offered.[169] This would include specifying only a "brand name" product without allowing offers of "an equal" product, or allowing "an equal" product without listing the salient characteristics that the "equal" product must meet to be acceptable for award.

When it is impractical or uneconomical to write a clear and accurate description of the technical requirements of the property to be acquired, a "brand name or equal" description may be used to define the performance or other salient characteristics of the property sought. The specific features or salient characteristics of the named brand that must be met by offerors of "an equal" proposal should be clearly stated.[170]

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[169] 44 C.F.R. § 13.36(c)(1)(vi).

[170] Cf. DHS Office of Inspector General, Report No. DD-11-15, *FEMA Public Assistance Grant Awarded to Saint Mary's Academy (SMA), New Orleans, Louisiana*, p. 3 (Aug. 5, 2011) (Subgrantee gave a particular contractor an additional advantage on the same contract because it identified "[contractor name] or equal" in its request for bid documents but did not describe the specific technical requirements that would equal that contractor's product.

vii. Any Arbitrary Action in the Procurement Process (44 C.F.R. § 13.36(c)(1)(vii))

Any "arbitrary action" in the procurement process is also restrictive of competition.[171] The term "arbitrary" means within the legal context that an action or decision was "founded on prejudice or preference rather than on reason or fact" and/or "depended on individual discretion."[172] It also means, as used in common parlance, something that is unreasonable or unsupported. Accordingly, an "arbitrary action" within the procurement context would include, among other things, a discretionary action that showed preference or prejudice to certain contractors in a manner not consistent with full and open competition. This would be the case, for example, where a subgrantee only solicits bids for a limited set of contractors for contracts exceeding $150,000.

Arbitrary Procurement Not Consistent with the Full and Open Competition Standard

DHS Office of Inspector General Report No. 14-11-D (Dec. 2013)
FEMA Should Recover $6.1 Million of Public Assistance Grant Funds to Orlando Utilities Commission under Hurricane Frances

Background. The Orlando Utilities Commission ("Utility") received a Public Assistance award that included, among other things, $6.1 million for debris removal and permanent electrical repair work necessitated by damage resulting from Hurricane Frances. The Utility solicited bids for the work only from contractors that it had used before the storm or ones that it believed had the requisite knowledge, expertise, and work force to perform the required work. As part of the audit, Utility officials stated that the Utility procured the contracts under exigent circumstances.

General Summary of OIG Finding. The OIG found, in relevant part,[173] that the solicitation of bids from only a limited pool of contractors was not full and open competition. The OIG did not question about $2.6 million in contract costs related to emergency restoration of power. However, the OIG disagreed that emergency conditions warranted the use of the noncompetitive contracts in question to perform $6.1 million in debris removal and electrical repair work that the Utility completed after it restored emergency power to its customers.

Please note that this audit is applying 2 C.F.R. § 215.44(a)(3)(iii)-(iv), however, those provisions are substantively similar to those at 44 C.F.R. § 13.36(c)(1)(vi)).

[171] 44 C.F.R. § 13.36(c)(1)(vii).

[172] Black's Law Dictionary 119 (9th ed. 2009) ("Arbitrary, adj. (1) Depending on individual discretion; specif., determined by a judge rather than by fixed rules, procedures, or law. (2) (Of a judicial decision) founded on prejudice or preference rather than on reason or fact.").

[173] The OIG made other findings concerning the Utility's procurement that are not discussed here.

2. Local Preferences in Contractor Selection (44 C.F.R. § 13.36(c)(2))

Subgrantees must, pursuant to 44 C.F.R. § 13.36(c)(2), conduct their procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals.[174] Such geographic preferences may come in a variety of forms, such as the following examples.

Examples of In-State and Local Preferences

Price Matching Policies: A price matching policy is where a local jurisdiction will give an opportunity for a local vendor—within a certain percentage of the lowest bid to the solicitation—to match the lowest bid. If the local vendor does not match the bid, then the jurisdiction awards the contract to the original low bidder.

Reducing Bids During Sealed Bidding Evaluation. A jurisdiction may reduce by a certain percentage a bid submitted by a local vendor during the evaluation of bids submitted during a sealed bid process. For example, a local preference may provide that "the jurisdiction shall deem a bid submitted by a resident business to be five percent lower than the bid actually submitted."

Adding Weight to Evaluation Factor Score During Procurement by Competitive Proposals. A jurisdiction may add weight on all evaluation factors to a resident business during procurement by competitive proposals. For example, a local preference may provide that "The jurisdiction shall award an additional five percent of total weight on all evaluation factors to a resident business."

Set Asides. A local jurisdiction may simply set aside certain contracts for only resident companies.

There are, however, several exceptions to geographic preferences set forth in the regulation concerning licensing, architectural and engineering services, and Federal statutes.

- ***State Licensing Requirements***. The regulation provides that subgrantees are permitted to require their contractors to be licensed in accordance with state licensing requirements.[175]
- ***Preference for Local Architectural and Engineering Services***. When contracting for architectural and engineering services, geographic location may be used as a selection criterion, provided there are an appropriate number of qualified firms for consideration

[174] 44 C.F.R. § 13.36(c)(2).

[175] 44 C.F.R. § 13.36(c)(2) ("Nothing in this section preempts State licensing laws.").

given the nature and size of the project.[176]

- ***Geographic Preferences*** Mandated ***or Encouraged by Federal Statute***. The regulation provides that a subgrantee may impose a state or local geographic preference when such a preference is expressly mandated or encouraged by Federal statute.[177]

Example – Use of Prohibited In-State Geographical Preference

Scenario: The President declares a major disaster for the State of Z as a result of a hurricane, and the declaration authorizes Public Assistance for all counties in the State. The hurricane damaged Town X's building. Following approval of a Project Worksheet to repair the damaged building, the Town solicits bids for the work to repair the building. The Town, when evaluating the bids for the work, uses a state statutorily imposed geographic preference that results in an award to a local contractor.

Answer: The use of the geographic preference was not permissible. The Federal regulation at 44 C.F.R. § 13.36(c)(2) provides that "grantees and subgrantees will conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographic preferences in the evaluation of bids or proposals," except in those cases where "applicable Federal statutes expressly mandate or encourage geographic preference." In this case, no Federal statute authorized the preference. The Town, therefore, has violated the Federal procurement standards at 44 C.F.R. § 13.36, even though the geographic preference was required by State law.

As it relates to the exception described above for geographic preference mandated or encouraged by Federal statute, subgrantees frequently inquire as to whether two particular Federal statutes provide the required basis to impose a geographic preference, each of which is discussed below.

i. Section 307 of the Stafford Act

Section 307 of the Stafford Act requires that, in the "expenditure of funds for debris clearance, distribution of supplies, reconstruction, or other major disaster or emergency assistance activities," which may be carried out by contract or agreement with private organizations, firms, and individuals, "preference shall be given" to the extent "practicable and feasible" to those organizations, firms, and individuals "residing or doing business primarily in the area affected by such major disaster or emergency."[178] In carrying out this authority, a contract or agreement

[176] 44 C.F.R. § 13.36(c)(2) ("When contracting for architectural and engineering (A/E) services, geographic location may be a selection criteria provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.").

[177] Id.

[178] Stafford Act, supra note 76, § 307 (codified as amended at 42 U.S.C. § 5150); 44 C.F.R. § 206.10.

may be set aside for award based on a specific geographic area.[179] The statute also provides that the "head of a Federal agency, as feasible and practicable, shall formulate requirements to facilitate compliance with this section."[180]

For direct expenditures of the Federal Government, FEMA regulations implement Section 307 at 44 C.F.R. § 206.10 and the Federal Acquisition Regulations implement Section 307 for Federal procurement at 48 C.F.R. § 26.200. FEMA has interpreted Section 307 as not applying to grantee and subgrantee procurements.

ii. Tribal Self-Determination and Education Assistance Act

Tribal preferences may be permissible if certain requirements are met under the Indian Self-Determination and Education Assistance Act.[181] The Indian Self-Determination and Education Assistance Act sets forth the broad Federal policy to respond to the:

> "... [S]trong expression of the Indian people for self-determination by assuring maximum participation in the direction of...Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities."[182]

As it relates to tribal preferences, Section 7(b) (entitled "Wage and Labor Standards") of the Indian Self-Determination and Education Assistance Act provides, in relevant part, the following:

> "(b) Preference requirements for wages and grants. Any contract, subcontract, grant, or subgrant pursuant to this Act, the Act of April 16, 1934 (48 Stat. 596), as amended, ***or any other Act authorizing Federal contracts with or grants to Indian organizations or for the benefit of Indians***, shall ***require*** that to the greatest extent feasible—
>
> (1) preferences and opportunities for training and employment in connection with the administration of such contracts or grants shall be given to Indians; and
>
> (2) preference in the award of subcontracts and subgrants in connection with the administration of such contracts or grants shall be given to ***Indian organizations*** and to ***Indian-owned economic enterprises*** as defined in section 3 of the Indian Financing Act of 1974..."[183]

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[179] Stafford Act, supra note 76, § 307(a)(3) (codified as amended at 42 U.S.C. § 5150(a)(3)).

[180] Id. § 307(b)(3) (codified as amended at 42 U.S.C. § 5150(b)(3)).

[181] Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2205 (1975) (codified as amended at 25 U.S.C. § 450 *et seq.*).

[182] Id. § 3 (codified as amended at 25 U.S.C. § 450a).

[183] Id. § 7 (codified as amended at 25 U.S.C. § 450e).

Applying Section 7(b) to the Public Assistance grant program, an Indian tribal government acting as either a grantee or subgrantee may give a preference in the award of contracts funded in whole or in part with Public Assistance funding to businesses falling within the meaning of "Indian organizations" or "Indian-owned economic enterprises" under the Indian Self-Determination and Education Assistance Act.

An "*Indian-owned economic enterprise*" is defined by Section 3 of the Indian Financing Act of 1974 as "any Indian-owned (as defined by the Secretary of the Interior) commercial, industrial, or business activity established or organized for the purpose of profit" provided that "such Indian ownership shall constitute not less than 51 per centum of the enterprise."[184] The term "*organization*" is defined by Section 3 of the Indian Financing Act of 1974 as "unless otherwise specified,...the governing body of any Indian tribe...or entity established or recognized by such governing body for the purpose of this [Indian Financing Act of 1974]."[185]

3. Contract Award Selection Procedures (44 C.F.R. § 13.36(c)(3))

The regulation at 44 C.F.R. § 13.36(b)(3) requires grantees to have written selection procedures for procurement transactions.[186] This requirement would apply, therefore, to Indian tribal governments when serving as a Public Assistance grantee, but would not apply to Indian tribal or local governments serving as a subgrantee. The requirements under the regulation are aimed at not only ensuring competition, but also avoiding dishonest and unfair practices. These written selection procedures must have the following features.

i. Clear and Accurate Description of Requirements (44 C.F.R. § 13.36(c)(3)(i))

Solicitations must have clear and accurate descriptions of the technical requirements for the materials, products, or services to be procured.[187] The purpose of these descriptions is to enable vendors to understand the requirements and prepare sound proposals to satisfy those requirements. The description of requirements may include a statement of the qualitative nature

[184] Indian Financing Act of 1974, Pub. L. No. 93-262, § 2(e), 88 Stat. 77 (codified as amended at 25 U.S.C. § 1452(e)) ("'Economic enterprise' means any Indian-owned (as defined by the Secretary of the Interior) commercial, industrial, or business activity established or organized for the purpose of profit: Provided, That such Indian ownership shall constitute not less than 51 per centum of the enterprise."); see also 25 C.F.R. § 276.2(d) (which is part of the Secretary of Interior's Uniform Administrative Requirements for Grants) ("(d) 'Economic enterprise' means any commercial, industrial, agricultural or business activity that is at least 51 percent Indian owned, established or organized for the purpose of profit.").

[185] Id. § 2(f) (codified as amended at 25 U.S.C. § 1452(f)) ("'Organization,' unless otherwise specified, shall be the governing body of any Indian tribe, as defined in subsection (c) hereof, or entity established or recognized by such governing body for the purpose of this Act."). The statute does not, however, define the term "*Indian organization*," but separately defines the words "organization" and "Indian."

[186] 44 C.F.R. § 13.36(c)(3) ("Grantees will have written selection procedures for procurement transactions.").

[187] 44 C.F.R. § 13.36(c)(3)(i).

of the material, product, or service to be procured and, when necessary, must set forth the minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use.[188]

Grantees should avoid detailed product specifications "if at all possible."[189] When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a "brand name or equal" description may be used as a means to define the performance or other salient requirements of a procurement.[190] The specific features of a name brand, which must be met by offerors, must be clearly stated.[191] The description of requirements must not, in competitive procurements, contain features that unduly restrict competition.[192]

This regulation notably expresses a preference for performance or functional specifications, but does not prohibit the use of detailed technical specifications when appropriate. A performance specification describes an end result, an objective, or standard to be achieved, and leaves the determination of how to reach the result to the contractor.[193] Using such a model, the grantee should describe what the product should be able to do or the services to accomplish without imposing unnecessarily detailed requirements on how to accomplish the tasks.

ii. Identification of Requirements and Evaluation Factors (44 C.F.R. § 13.36(c)(3)(ii))

The solicitation must identify all requirements that offerors must fulfill and all other factors to be used in evaluating bids or proposals (called "evaluation factors").[194] FEMA does not mandate or dictate any specific evaluation factors, except that the evaluation factors must support the purposes and scope of work of the Public Assistance project award.

4. Use of Prequalified Lists (44 C.F.R. § 13.36(c)(4))

A subgrantee may use a prequalified list of persons, firms, and products among which to

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[188] Id.

[189] Id.

[190] Id.

[191] Id.

[192] 44 C.F.R. § 13.36(c)(3)(i). A list of some of the features considered to be restrictive of competition are set forth at 44 C.F.R. § 13.36(c)(1) and discussed in supra section IV(B)(1) of this Field Manual.

[193] See Stuyvesant Dredging Co. v. United States, 834 F.2d 1576 (Fed. Cir. 1987). Design specifications, on other hand, set forth in detail the materials to be employed and the manner in which the work is to be performed, and the contractor is required to follow them as one would a road map and without deviation. See L.L. Simmons Co. v. United States, 412 F.2d 1360 (Ct. Cl. 1969).

[194] 44 C.F.R. § 13.36(b)(3)(ii); cf. 48 C.F.R. subpart 15.3 (Source Selection).

compete a future procurement for services or goods.[195] There are, however, several conditions precedent that must be met in using such a list. First, the subgrantee will ensure that all prequalified lists of persons, firms, or products used in acquiring goods and services are current and include enough qualified sources to ensure maximum full and open competition.[196] Second, subgrantees must not preclude potential bidders from qualifying during the solicitation period.[197] In addition, the subgrantee should take care to ensure prequalification procedures are not used to restrict full and open competition and should document its justification for the use of such a list in procurement using federal funds.[198]

Some subgrantees may have different policies as to either bids offering services where the contractor has not been pre-qualified before the solicitation or bids offering products where the products have not been prequalified before the solicitation. When using nonfederal funds, it may be the case that the subgrantee may not allow a non-qualified contractor to submit a proposal for services or products, such that vendors must obtain pre-qualification independent of any solicitation. *However, when using Public Assistance funds, subgrantees must allow vendors an opportunity to qualify during the solicitation period*, although FEMA does not expect a subgrantee to delay a proposed award (extend the solicitation period) in order to afford a vendor the opportunity to demonstrate that its product or services meet the pre-qualification requirements (*e.g.*, technical capability, management capability, prior experience, and past performance).[199]

FEMA encourages applicants to pre-qualify debris removal contractors before an event and then conduct full and open competition among that list. In that case, the solicitation for pre-qualifying contractors must adequately define in the proposed scope of work all potential debris types, anticipated haul distances, and size of events. It is important to recognize, however, that only soliciting bids from members of that list and not allowing other vendors to qualify for that

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[195] 44 C.F.R. § 13.36(c)(4); cf. 48 C.F.R. subpart 9.2 (Qualifications Requirements).

[196] Id. The regulation does not provide any amplification of what makes a pre-qualified list "current." In the absence of any regulatory guidance, FEMA generally evaluates the currency of a list based on an amalgamation of various factors, to include whether the subgrantee updates the list with enough frequency to: (1) ensure vendors on the list continue to possess the required qualifications; (2) ensure the pre-qualification criteria apply to the current requirement being solicited; and (3) ensure that enough vendors remain on the list to ensure full and open competition.

[197] Id.

[198] Cf. 44 C.F.R. § 13.36(c)(1)(i); 48 C.F.R. § 9.202 (directing a federal agency to prepare a written justification before establishing a qualification requirement).

[199] Cf. 48 C.F.R. § 9.202(e) (which provides that a federal contracting officer need not delay a proposed award in order to provide a potential offeror with an opportunity to demonstrate its ability to meet the standards specified for qualification).

list during the solicitation period would violate the regulation.[200]

Example – Use of a Pre-Qualified List

Scenario: The Town of Z, following a public solicitation for a Request for Qualifications, pre-qualifies five contractors to perform debris removal in the jurisdiction in the case of a disaster. A year later, the President declares a major disaster as a result of a hurricane and the declaration authorizes Public Assistance in the county in which the Town is located. The hurricane generated large quantities of debris. The Town solicits sealed bids for debris removal services only from the list of pre-qualified contractors and does not allow other contractors to qualify to be on the list during the solicitation period. The FEMA Disaster Recovery Manager ("DRM") asks whether this procurement met the requirements of full and open competition under 44 C.F.R. § 13.36(c).

Analysis: The answer is no, the procurement did not meet the requirements of full and open competition. In this case, the Town used a pre-qualified list and did not allow other contractors to qualify to be on the list during the solicitation period. This is an express violation of 44 C.F.R. § 13.36(c)(4).

That being said, it may be the case that awarding a short-term, non-competitive debris removal work contract to one of the contractors on the pre-qualified list as described above may be permissible if the requirements of 44 C.F.R. § 13.36(d)(4) have been met, such as where the work was so time-sensitive so as to make full and open competition infeasible. However, if the contract is for a long-term operation lasting weeks or months, the contract should be competitively bid in a manner that complies with full and open competition as soon as possible.

C. METHODS OF PROCUREMENT (44 C.F.R. § 13.36(d))

The regulation at 44 C.F.R. § 13.36(d) sets forth four methods of procurement to be followed by a subgrantee. A subgrantee should use competitive procedures appropriate for the acquisition undertaken, and the procurement method must comply with state and local laws, regulations, and

[200] See, e.g. DHS Office of Inspector General, Report No. 14-49-D, *FEMA Should Recover $8.2 Million of the $14.9 Million of Public Assistance Grant Funds Awarded to the Harrison County School District, Mississippi - Hurricane Katrina*, pp. 4-5 (Mar. 13, 2014) (subgrantee circumvented full and open competition when it sent bid invitations (based on qualifications) to nine sources but did not advertise publicly to allow other qualified parties the opportunity to bid); DHS Office of Inspector General, Report No. DS-13-14, *FEMA Should Recover $4.2 Million of Public Assistance Grant Funds Awarded to the Department of Design and Construction, Honolulu, Hawaii*, p. 6 (Sep. 24, 2013) (subgrantee circumvented full and open competition and invited four *specific* contractors—with whom they were familiar—to bid on roadwork repairs); DHS Office of Inspector General, Report No. DA-13-17, *FEMA Should Recover* $3.5 *Million of Public Assistance Grant Funds Awarded to the City of Gautier, Mississippi-Hurricane Katrina*, p. 3 (Jun. 7, 2013) (the subgrantee hired a debris removal contractor from a list of contractors it had contacted for price quotes approximately 1 month prior to the disaster instead of openly competing the work).

procedures, so long as the methods of procurement at least comply with the minimum requirements of 44 C.F.R. § 13.36(d).

1. Procurement by Small Purchase Procedures (44 C.F.R. § 13.36(d)(1))

"Small purchase procedures" are those relatively simple and informal procurement methods for securing services, supplies, or other property. The regulation at 44 C.F.R. § 13.36(d)(1) authorizes such procedures for the acquisition of services, supplies, or other property valued at less than the Federal simplified acquisition threshold fixed at 41 U.S.C. § 134, and which is currently set at $150,000.[201] A subgrantee may set lower thresholds for small purchase procedures in compliance with state or local law.

This type of procurement is often accomplished by inviting vendors to submit quotes, which the buyer then evaluates and makes an offer.[202] When using these procedures, a subgrantee must ensure the following:

- ***Competition.*** The subgrantee must obtain price or rate quotations from an "adequate number of sources,"[203] which FEMA has interpreted as at least three sources.[204]
- ***Prohibited Divisions.*** The subgrantee may not divide or reduce the size of its procurement so as to avoid the additional procurement requirements applicable to larger acquisitions.[205]

2. Procurement by Sealed Bids (Formal Advertising) (44 C.F.R. § 13.36(d)(2))

The regulation at 44 C.F.R. § 13.36(d)(2) recognizes sealed bidding as a generally accepted method of procurement by a subgrantee. Under this method, bids are publicly solicited and a firm-fixed price contract (lump sum or unit price[206]) is awarded to the responsible offeror whose

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[201] On August 30, 2010, the Civilian Agency Acquisition Council published an updated simplified acquisition threshold of $150,000 in the Federal Register. 75 Fed. Reg. 53,129 (Aug. 30, 2010). This adjusted dollar threshold took effect on the date of publication. *See* Ronald Reagan National Defense Authorization Act for FY 2005, Pub. L. No. 108-375, § 807 (2005).

[202] Cf. 48 C.F.R. pt. 13 (Simplified Acquisition Procedures), subpart 13.1 (Procedures). In the Federal contracting context, the basis of an award can be on lowest price and/or quality. See 48 C.F.R. § 13.106-2 (Evaluation of Quotations or Offers).

[203] 44 C.F.R. § 13.36(d)(1).

[204] FEMA Recovery Fact Sheet No. 9580.212, supra note 91, ¶ 3.

[205] DHS Office of Inspector General, Report No. DD-11-22, *FEMA Public Assistance Grant Awarded to Henderson County, Illinois*, pp. 3-4 (Sep. 27, 2011) ("The Federal Acquisition Regulation prohibits breaking down a proposed large purchase into multiple small purchases merely to permit use of simplified acquisition procedures. Further, although 44 CFR 13.36 does not include a specific prohibition against such circumvention, ***we believe that any action specifically designed to circumvent a Federal regulation is not allowable*** [emphasis added].").

[206] A "lump sum" is the entire contract price, and a "unit price" is the cost of one unit.

bid, conforming to all the material terms and conditions of the invitation for bids, is the lowest in price.[207] The steps in sealed bidding involve preparation of the invitation for bids; publicizing the invitation for bids; submission of bids; evaluation of bids; and contract award.

i. When Sealed Bidding Is Appropriate (44 C.F.R. § 13.36(d)(2)(i))

The regulation states that, in order for sealed bidding to be feasible, the following conditions should be present:

- ***Precise Specifications.*** A complete, adequate, and realistic specification or purchase description is available.[208] As such, a vendor can simply bid a price in response to the solicitation.
- ***Adequate Sources.*** Two or more responsible bidders are willing and able to compete effectively for the business.[209]
- ***Fixed Price Contract.*** The procurement generally lends itself to a firm fixed-price contract.[210]
- ***Price Determinative.*** The successful bidder can be selected on the basis of price.[211] This would include price-related factors listed in the solicitation, such as transportation costs, discounts, etc. Apart from the responsibility determination discussed earlier in this Field Manual, contractor selection is not determined on the basis of other factors whose costs cannot be measured at the time of award.
- ***Discussions Unnecessary.*** Although not discussed in the regulation, another factor to be considered in determining whether sealed bidding is feasible is whether discussions with one or more bidders are expected to be unnecessary, because award can be based on price and price-related factors alone. However, this does not include pre-bid conferences with prospective bidders, which can often be useful.

The regulation also states that, for procuring construction, sealed bidding is the preferred method of procurement when it is feasible, which FEMA has reiterated in policy.[212]

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[207] 44 C.F.R. § 13.36(d)(2). Cf. 48 C.F.R. § 14.103-2 ("An award is made to the responsible bidder [] whose bid is responsive to the terms of the invitation for bids and is most advantageous to the government, considering only price and the price-related factors included in the invitation…").

[208] 44 C.F.R. § 13.36(d)(2)(i)(A).

[209] 44 C.F.R. § 13.36(d)(2)(i)(B).

[210] 44 C.F.R. § 13.36(d)(2)(i)(C).

[211] *Id.*

[212] FEMA Recovery Fact Sheet No. 9580.212, supra note 91, ¶ 5.

ii. Requirements for Sealed Bidding (44 C.F.R. § 13.36(d)(2)(ii))

If a subgrantee uses sealed bid procedures, the regulation sets forth the following requirements.

Publicity. The subgrantee must publicly advertise the invitation for bids.[213] There is, however, no detailed discussion or set of guidelines in the regulation, such as the method of advertising (e.g., internet, trade journals, newspapers and other periodicals), the number of times the notice must be published, the target circulation of any advertising, and the number of days before the receipt of bids that it must be published. Therefore, the precise manner of the advertising is at the subgrantee's discretion and subject to state and local requirements.

Adequate Sources. The subgrantee must solicit bids from an adequate number of known suppliers.[214] There is, however, no detailed discussion or set of guidelines in the regulation, such as the method for soliciting bids (*e.g.*, e-mail or letters), how many suppliers must be solicited, and the number of days before the receipt of bids a supplier must receive the solicitation. Therefore, the precise manner of such solicitations is at the subgrantee's discretion and subject to state and local requirements. As a best practice, FEMA recommends a subgrantee develop, manage, and use a solicitation mailing/e-mail list as a critical part of the procurement process. This list should include all eligible and qualified vendors that have expressed interest in receiving solicitations for the type of work, or that the subgrantee considers capable of filling the requirements of a particular procurement. The subgrantee should manage this list to ensure it is kept current and that firms expressing an interest or desire in an upcoming procurements are added. This list will also serve as the record detailing which firms received the solicitation so as to enable the subgrantee to demonstrate that it met the regulatory requirement.

Adequate Specifications. The invitation for bids, including any specifications and pertinent attachments, must describe the property or services sought in sufficient detail that a prospective bidder will be able to submit a proper bid.[215] FEMA has held that soliciting bids on a scope of work that a subgrantee intentionally misrepresents violates this requirement.[216]

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[213] 44 C.F.R. § 13.36(d)(2)(ii)(A).

[214] Id.

[215] 44 C.F.R. § 13.36(c)(2)(ii)(B).

[216] See Letter from Deborah Ingram, Assistant Administrator, FEMA Recovery Directorate, to Mark Schouten, Iowa Homeland Security and Emergency Management Division *re: Second Appeal—City of Cedar Rapids, PA ID 113-12000-00, Regulated Asbestos Material (RACM) Demolition and Debris Removal, FEMA-1763-DR-IA, Projects Worksheets (PW) 10433, 10523, 10524, 10525, and 10445*, Enclosed Analysis (Dec. 19, 2013):

> "The Applicant then re-bid the project; however, this procurement action indicated that the estimated quantity of demolition debris was 65,000 tons as opposed to the original estimate of 100,000 tons. The Applicant intentionally bid the project at almost half the estimated debris quantity in order to allow contractors to avoid acquiring performance and payment bonds for the higher contract cost of the higher quantity of debris... Soliciting bids on a scope of work intentionally represented as approximately half of the estimated quantity does

Sufficient Time. The invitation for bids must provide bidders sufficient time to prepare and submit bids before the date set for opening the bids and must comport with state and local requirements.[217] For comparative purposes, the Federal Acquisition Regulation identifies a variety of factors to analyze when determining the length of time to submit a bid, including the degree of urgency, complexity of the requirement, anticipated extent of subcontracting, whether use was made of pre-solicitation notices, geographic distribution of bidders, and normal transmission time for both invitations and bids.[218]

Public Opening. The subgrantee must open all bids at the time and place prescribed in the invitation for bids.[219]

Fixed Price Contract. A firm fixed price contract is awarded in writing to the lowest responsive and responsible bidder.[220] When specified in the bidding documents, other price factors such as transportation costs and life cycle costs affect the determination of the lowest bid; payment discounts are used to determine the low bid only when prior experience indicates that such discounts are typically taken.[221] The subgrantee may reject any and all bids if there is a sound, documented business reason.[222] Although not provided in the regulations, the following provide some examples of circumstances under which a subgrantee may reject individual bids:

- A bid fails to conform to the essential requirements or applicable specifications of the invitation for bids.
- A bid fails to conform to the delivery schedule in the invitation for bids.
- A bid imposes conditions that would modify the requirements of the invitation for bids (since allowing the bidder to impose such conditions would be prejudicial to other bidders).
- Subgrantee determines that the bid is unreasonable as to price.
- A bid is from an entity that is suspended or debarred.

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not fulfill the requirements to provide a complete, adequate and realistic specification and does not properly define the services to be procured."

[217] 44 C.F.R. § 13.36(c)(2)(ii)(A).

[218] 48 C.F.R. § 14.202-1(b).

[219] 44 C.F.R. § 13.36(d)(2)(ii)(C).

[220] 44 C.F.R. § 13.36(d)(2)(ii)(D). Although not mentioned in the regulation, a fixed price incentive contract or inclusion of an economic price adjustment provision can sometimes be appropriate.

[221] Id.

[222] 44 C.F.R. § 13.36(d)(2)(E).

- A bidder fails to furnish a bid guarantee (when a bid guarantee is required).[223]

3. Procurement by Competitive Proposals (44 C.F.R. § 13.36(d)(3))

The regulation at 44 C.F.R. § 13.36(d)(3) recognizes the use of competitive proposals to be a generally accepted procurement method when the nature of the procurement does not lend itself to sealed bidding and the subgrantee expects that more than one source will be willing and able to submit an offer or proposal. Under this method, a fixed-price or cost-reimbursement contract is awarded to the responsible firm whose proposal is most advantageous to the subgrantee, with price and other factors considered.[224] This is the method of procurement most often used for professional services in connection with construction, such as program management, construction management, feasibility studies, preliminary engineering, design, architectural, engineering, surveying, mapping, and related services. But, it is not the method commonly used for actual construction, alteration, or repair to real property, as the regulations require sealed bidding to be used for these types of services (unless it would be infeasible to do so).

i. When Procurement by Competitive Proposals Is Appropriate (44 C.F.R. § 13.36(d)(3))

Procurement through competitive proposals (also known as "negotiation") is the appropriate method when more than one source is expected to submit an offer and either a fixed-price or cost-reimbursement contract is appropriate.[225] In addition to these two factors set forth in the regulation, the following comprise additional circumstances when procurement by competitive proposals should be used:

- ***Type of Specifications.*** Property or services to be acquired are performance or functional based—or, even if described in technical specifications, other circumstances such as the need for discussions or other factors for basing the contract award on something other than price are present.

- ***Price Is Not Determinative.*** Due to the nature of the service or good to be acquired, the subgrantee cannot base the contract award exclusively on price or price-related factors. In different types of procurements through competitive proposals, the relative importance of cost or price may vary. When the subgrantee's material requirements are clearly definable and the risk of unsuccessful contract performance is minimal, cost or price may play a dominant role in source selection. The less definitive the requirements, the more development work required, or the greater the performance risk, the more technical or

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[223] Cf. 48 C.F.R. § 14.404-2 (Rejection of Individual Bids) (which sets forth the grounds for a Federal contracting officer to reject bids for sealed bidding for Federal procurements).

[224] 44 C.F.R. § 13.36(d)(3).

[225] Id.

past performance considerations may play a dominant role in source selection and supersede low price.

- ***Discussions Needed or Expected.*** Separate discussions with individual offeror(s) are expected to be necessary after they have submitted proposals. This is a key distinction from sealed bidding, in which discussions with individual bidders are not permitted and the award of the contract will be made based on price and price-related factors alone

ii. Requirements for Competitive Proposals (44 C.F.R. § 13.36(d)(3)(i)-(iv))

If a subgrantee uses procurement through competitive proposals, the regulation sets forth the following requirements:

Public Announcement. The subgrantee must publicly advertise the request for proposals.[226] There is, however, no detailed discussion or set of guidelines in the regulation, such as the method of advertising (*e.g.*, internet, trade journals, newspapers and other periodicals), the number of times the notice must be published, the target circulation of any advertising, and the number of days before the receipt of bids that it must be published. Therefore, the precise manner of the advertising is at the subgrantee's discretion and subject to state and local requirements.

Adequate Sources. The subgrantee must solicit proposals from an adequate number of qualified sources.[227] There is, however, no detailed discussion or set of guidelines in the regulation, such as the method for soliciting bids (*e.g.*, e-mail or letters), how many sources must be solicited, and the number of days before the receipt of bids a source must receive the solicitation. Therefore, the precise manner of such solicitations is at the subgrantee's discretion and subject to state and local requirements. As a best practice, FEMA recommends a subgrantee develop, manage, and use a solicitation mailing/e-mail list as a critical part of the procurement process as discussed above in the sealed bidding section above.

Disclosure of Evaluation Factors and Their Relative Importance. The request for proposals must identify all evaluation factors and their relative importance.[228] Although FEMA does not mandate or dictate any specific evaluation factors, a best practice for the subgrantee is to have the evaluation factors for a specific procurement reflect the subject matter and the elements that are most important to the subgrantee. Evaluation factors could include, for example, technical design, technical approach, length of delivery schedules, quality of proposed personnel, past performance, and management plan. Another best practice would be for the request for

[226] 44 C.F.R. § 13.36(d)(3)(i).

[227] 44 C.F.R. § 13.36(d)(3)(ii).

[228] 44 C.F.R. § 13.36(d)(3)(i); cf. 48 C.F.R. § 15.203(a).

proposals to set forth the basis for the award (*e.g.*, "tradeoff"[229] or "technically qualified/low price"[230]). Although all evaluation factors and their relative importance must be specified in the solicitation, the numerical or percentage ratings or weights need not be disclosed. Solicitations, in other words, must provide offerors enough information to compete equally and intelligently, but they need not give precise details of the subgrantee's evaluation plan.[231]

Technical Evaluation. The subgrantee must have a method for conducting technical evaluations of the proposals received and for selecting awardees.[232]

Consideration of Proposals. The subgrantee must honor, to the maximum extent practical, any response to a publicized request for proposals.[233]

Award. The subgrantee will make an award to the responsible firm whose proposal is most advantageous to the program ("best value"), with price and other factors considered.[234] The award must be consistent with the publicized evaluation and award criteria.

iii. Architectural and Engineering Services (44 C.F.R. § 13.36(d)(3)(v))

One of the more common types of services that a subgrantee will procure through the competitive proposal method is architectural and engineering services. Notably, the regulation at 44 C.F.R. § 13.36(d)(3)(v) provides that subgrantees may use competitive proposal procedures for *qualifications-based* procurement of architectural/engineering professional services. The regulation does not define what is meant by "architectural/engineering professional services," but FEMA has generally considered the term to refer to services subject to the "architect-engineering services" contracting procedures set forth in Subpart 36.6 of the Federal Acquisition Regulation, which include the following:

- Professional services of an architectural or engineering nature, as defined by applicable State law, and which the State law requires to be performed or approved by a registered

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[229] Under the Federal Acquisition Regulations, a "tradeoff process" is appropriate when it may be in the best interest of the Federal Government to consider award to other than the lowest priced offeror or other than the highest technically rated offeror. The process permits "tradeoffs" among cost or price and non-cost factors and allows the Federal Government to accept other than the lowest price proposal. The perceived benefits of the higher priced proposal must merit the additional cost. 48 C.F.R. § 15.101-1.

[230] Under the Federal Acquisition Regulations, the lowest price technically acceptable source selection process is appropriate when best value is expected to result from selection of the technically acceptable proposal with the lowest evaluated price. Tradeoffs are not permitted, and proposals are evaluated for acceptability but not ranked using the non-cost/price factors. 48 C.F.R. § 15.101-2.

[231] Cf. *QualMed, Inc.*, B-254397, 73 Comp. Gen. 235 (Jul. 20, 1994).

[232] 44 C.F.R. § 13.36(d)(3)(iii).

[233] 44 C.F.R. § 13.36(d)(3)(i).

[234] 44 C.F.R. § 13.36(d)(3)(iv).

architect or engineer.

- Professional services of an architectural or engineering nature associated with design or construction of real property.
- Other professional services of an architectural or engineering nature or services incidental thereto (including studies, investigations, surveying and mapping, tests, evaluations, consultations, comprehensive planning, program management, conceptual designs, plans and specifications, value engineering, construction phase services, soils engineering, drawing reviews, preparation of operating and maintenance manuals and other related services) that logically or justifiably require performance by registered architects or engineers or their employees.
- Professional surveying and mapping services on an architectural or engineering nature.[235]

Under the qualifications based procurement described at 44 C.F.R. § 13.36(d)(3)(v), competitors' qualifications are evaluated and the most qualified competitor is selected, subject to fair and reasonable compensation.[236] This method, where price is not used as a selection factor, can only be used in procurement of architectural/engineering services and cannot be used to purchase other types of services (even if an architectural/ engineering firm is the one providing those other types of services).[237]

The regulation does not, however, provide further detail as to the process for an architectural-engineering services' qualifications-based procurement. As such, the following provides some general guidance in the case where the subgrantee requests guidance for a process to be followed:[238]

- ***Public Announcement.*** The subgrantee publicly announces all requirements for architect-services, which will include all evaluation criteria.[239]

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[235] 48 C.F.R. § 36.601-4.

[236] 44 C.F.R. § 13.36(d)(3)(v).

[237] Id; see, e.g. DHS Office of Inspector General, Report No. DA-12-22, *FEMA Public Assistance Grant Funds Awarded to the Long Beach Port Commission, Long Beach, Mississippi,* pp. 3-4 (Jul. 18, 2012) (The subgrantee solicited bids from A/E firms and selected one firm using a qualifications-based selection process, however, this method of contracting, where price is not used as a selection factor, may be used only in procurement of A/E professional services and may not be used to purchase other types of services, such as project management services, from A/E firms).

[238] The process for Federal procurement of architect-engineering services is set forth in 48 C.F.R. pt. 36, subpart 36.6 (Arcbitect-Engineer Services).

[239] See, e.g. DHS Office of Inspector General, Report No. OIG-14-49-D, *FEMA Should Recover $8.2 Million of the $14.9 Million of Public Assistance Grant Funds Awarded to the Harrison County School District, Mississippi - Hurricane Katrina,* pp. 4-5 (Mar. 13, 2014) (Subgrantee circumvented full and open competition when it sent bid

- ***Evaluation of Qualifications***. The subgrantee evaluates all offerors' qualifications to determine the most qualified offeror, with price excluded as an evaluation factor. This evaluation is often completed by an evaluation board that reviews the responses to the solicitation, evaluates the firms in accordance with the evaluation criteria, holds discussions with the most highly qualified firms (usually the top three), and then prepares a report for the selection authority that summarizes the evaluations and provides recommendations.

- ***Selection***. The subgrantee's selection authority makes a final decision.

- ***Negotiations***. Negotiations are first conducted with the most qualified offeror.

- ***Negotiations with the Next Most Qualified Offeror***. If failing to agree on a fair and reasonable price, the subgrantee may conduct negotiations with the next most qualified offeror. Then, if necessary, the subgrantee will conduct negotiations with successive offerors in descending order until contract award can be made to the offeror whose price the subgrantee believes is fair and reasonable.

4. Procurement by Noncompetitive Proposals (44 C.F.R. § 13.36(d)(4))

Procurement by noncompetitive proposals is procurement through solicitation of a proposal from only one source or where, after a solicitation of a number of sources, competition is determined inadequate. The regulations set forth various requirements that must be met in order for a subgrantee to use this procurement method. FEMA or the grantee may require the subgrantee to submit a proposed procurement for pre-award review.[240] It is important to recognize that a subgrantee's noncompetitive procurement may meet the requirements of state and local procurement laws and regulations, but not meet the Federal procurement standards set forth at 44 C.F.R. § 13.36(d)(4)—such a procurement would not be compliant with 44 C.F.R. pt. 13.[241]

There are several key requirements with which a subgrantee must comply when conducting a noncompetitive procurement. One of the requirements is that a subgrantee must conduct a cost analysis, under which the subgrantee verifies the proposed cost data, verifies the projections of the data, and evaluates the specific elements of costs and profits.[242] The subgrantee must also

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invitations (based on qualifications) to nine sources, but did not advertise publicly to allow other qualified parties the opportunity to bid).

[240] 44 C.F.R. § 13.36(d)(4)(iii) ("Grantees and subgrantees may be required to submit the proposed procurement to the awarding agency for pre-award review in accordance with paragraph (g) of this section.").

[241] See Letter from Deborah Ingram, Assistant Administrator, FEMA Recovery Directorate, to Kristi Turman, Director, South Dakota Office of Emergency Management *re: Second Appeal—County (PA ID 015-99015-00), Embankment Erosion, FEMA-1915-DR-SD, Project Worksheet (PW) 847, Enclosed Analysis* (Jul. 25, 2012).

[242] 44 C.F.R. § 13.36(d)(4)(ii).

negotiate profit as a separate element of price.[243]

Another requirement is that a subgrantee may use procurement by noncompetitive proposals only under two conditions precedent. The first condition precedent is that the award of a contract must be "*infeasible*" under small purchase procedures, sealed bids, or competitive proposals.[244] The regulation does not define the term "infeasible," but the term is generally defined as not feasible, impracticable, or not capable of being done, effected, or accomplished.[245] Whether or not a form of competitive procurement is feasible includes an analysis of the facts and circumstances of a particular incident and is intertwined with the analysis of the second condition precedent. The subgrantee must, as with all other significant items in the history, document the basis and justification for procurement by noncompetitive proposals.[246]

The second condition precedent is that one of the following four circumstances applies, as detailed in the following four subsections.

i. The Item Is Only Available from a Single Source (44 C.F.R. § 13.36(d)(4)(i)(A))

A subgrantee may, pursuant to 44 C.F.R. § 13.36(d)(4)(i)(A), use the procurement through noncompetitive proposal method when it requires services or supplies that are available from only one responsible source and no other supplies or services will satisfy its requirements. When a subgrantee issues a change order to a contract that is beyond the scope of the contract, it has made a sole source award that must meet these requirements.

The regulations do not offer further detail as to when property or services are available from only one source so as to fall within the scope of the exception.[247] The subgrantee may use its own judgment in determining whether this condition has been met, but it should contemporaneously

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[243] 44 C.F.R. § 13.36(f)(2).

[244] 44 C.F.R. § 13.36(d)(4)(i).

[245] "Infeasible." Merriam-Webster.com. Accessed June 17, 2014. http://www.merriam-webster.com/dictionary/infeasible (defining "infeasible" as "not feasible; impracticable"). The term "impracticable" means something that is not capable of being done, effected, or accomplished. "Impracticable." Merriam-Webster.com. Accessed June 17, 2014. http://www.merriam-webster.com/dictionary/impracticable (defining "impracticable" as "incapable of being performed or accomplished by the means employed or at command").

[246] See, e.g. DHS Office of Inspector General, Report No. DS-11-12, *FEMA Public Assistance Grant Awarded to City of Paso Robles, California*, p. 3 (Sep. 13, 2011) ("District officials did not solicit competitive bids in awarding contracts and services for Project 245. Further, they could not reasonably justify why full and open competition did not occur. For example, Federal regulations allow for flexible (e.g., noncompetitive) contracting under exigent circumstances. However, exigency was not a factor for this work; the work was permanent in nature and not emergency-oriented.").

[247] Cf. 48 C.F.R. § 6.302-1 (entitled "Only one responsible source and no other supplies or services will satisfy agency requirements), which is the Federal Acquisition Regulation's equivalent to the exception at 44 C.F.R. § 13.36(d)(4)(i)(A).

document its rationale in the procurement record. That being said, the following comprise a non-exhaustive list of when FEMA would consider property and services as available from only one source.

- ***Patents or Restricted Data.*** There are patent or data rights restrictions that would preclude competition.
- ***Substantial Duplication of Costs.*** In the case of a sole source award to an existing contractor already performing work before a major disaster, there would be a substantial duplication of costs that would not be expected to be recovered through competition. This situation would arise, for example, if a contractor was in the middle of constructing a facility when the facility was damaged by a major disaster, and the scope of work under the Public Assistance project was to repair the construction work completed as of the date of the incident.

A prior working relationship between the subgrantee and the contractor, or an assertion by the subgrantee that a particular contractor is familiar with the work, will be insufficient to meet the requirements of 44 C.F.R. § 13.36(d)(4)(i)(A).[248] Nor is it sufficient to assert that the noncompetitive procurement was the most efficient and cost effective means of procuring the needed services.[249]

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[248] DHS Office of Inspector General, Report No. 14-63-D, *FEMA Should Recover $1.7 Million of Public Assistance Grant Funds Awarded to the City of Waveland, Mississippi-Hurricane Katrina*, pp. 5-6 (Apr. 15, 2014) (subgrantee said that they did not seek competitive bids for A/E work because it had used a particular A/E firm since 1997 or 1998 and they were familiar with the firm's work); DHS Office of Inspector General, Report No. 14-44-D, *FEMA Should Recover $5.3 Million of the $52.1 Million of Public Assistance Grant Funds Awarded to the Bay St. Louis Waveland School District in Mississippi-Hurricane Katrina,* p. 5 (Feb. 25, 2014) (instead of seeking competitive bids for A/E work, the subgrantee hired an A/E firm it had previously employed, the subgrantee said they were familiar with the contractor's work and that other A/E firms did not have the capacity to meet their requirements, however, the subgrantee did not provide any evidence to support their assertion that no other qualified A/E firms were available for the project work); DHS Office of Inspector General, Report No. 14-08-D, *FEMA Should Recover $615,613 of Public Assistance Grant Funds Awarded to Orlando Utilities Commission under Hurricane Jeanne*, p. 3 (Nov. 21, 2013) (subgrantee solicited bids only from contractors that it had used before or ones that it believed had the requisite knowledge, expertise, and work force to perform the required work); DHS Office of Inspector General, Report No. DA-13-18, *FEMA Should Recover $4.1 Million of Public Assistance Grant Funds Awarded to Orlando Utilities Commission -Hurricane Charley*, p. 3 (Jun. 5, 2013) (subgrantee solicited bids only from contractors from which they already had secured services prior to the storm, or ones that they believed had the requisite knowledge, expertise, and workforce to perform the required work); DHS Office of Inspector General, Report No. DD-13-06, *FEMA Should Recover $6.7 Million of Ineligible or Unused Public Assistance Funds Awarded to Cameron Parish, Louisiana, for Hurricane Rita*, p. 8 (subgrantee awarded a noncompetitive A/E contract a contractor that it had used before, this pre-existing contract was more than 2 decades old, and the subgrantee incorporated it by reference into at least 17 disaster-related construction contracts).

[249] DHS Office of Inspector General, Report No. DA-13-13, *FEMA Should Recover $3.2 Million of Public Assistance Grant Funds Awarded to the Moss Point School District Hurricane Katrina*, p. 5 (Mar. 15, 2013) (the subgrantee disagreed that FEMA should disallow costs because it procured the A/E services at issue in the most efficient and cost effective manner under the circumstances by procuring A/E services from the A/E firm that it had

Example – Impermissible Sole Source Contract

Scenario: The City of X owns a wastewater treatment plant that provides secondary treatment to wastewater before discharging the water into the City River. Rather than operate the plant directly, the City has procured a 10-year contract with Safe Water to operate, maintain, repair, and manage the plant. The contract between the City and Safe Water provides that Safe Water is not responsible for major repairs to the plant necessitated by, among other things, acts of God.

Severe storms and flooding damage one of the major effluent pipes at the plant. The City emplaces a temporary pipe in the days of the event that enables the plant to resume operations on a normal basis until permanent repairs can be effectuated. After performing an engineering study over the next several months, the City evaluates several options for repairing the pipe provided by its engineer and makes a decision on how to proceed. The City then issues a change order to the existing contract to have Safe Water make the repairs. Safe Water makes the repairs, which cost $520,000, and City pays Safe Water for the work.

Analysis: The change order issued by the City comprised a sole source award. Pursuant to 44 C.F.R. § 13.36(d)(4), such a contract is only permissible if award of the contract was "infeasible" under small purchase procedures, sealed bids, or competitive proposals and one of the four circumstances outlined in 44 C.F.R. § 13.36(d)(4)(i)(A)-(D) has been met. In this case, there was nothing indicating that the repair of the pipe was a service only available from Safe Water, such that the City would not be able to rely upon the circumstance outlined at 44 C.F.R. § 13.36(d)(4)(i)(A) (the item is only available from a single source). There was also no information indicating that it was infeasible to award a contract through one of the competitive forms of procurement.

ii. The Public Exigency or Emergency for the Requirement Will Not Permit Delay Resulting from Competitive Solicitation (44 C.F.R. § 13.36(d)(4)(i)(B))

A subgrantee may use the procurement through the noncompetitive proposal method when the public ***exigency*** or ***emergency*** for the requirement will not permit delay resulting from competitive solicitation.[250] The regulation does not provide any additional information or guidance about the use of this exception from full and open competition, and the subgrantee may use its own judgment in determining whether this condition has been met. The subgrantee

done business with since 1970 because it was satisfied with the firm's performance and the A/E firm was familiar with its facilities and procedures).

[250] 44 C.F.R. § 13.36(d)(4)(i)(B). The Federal Acquisition Regulation's equivalent to this exception from full and open competition is 48 C.F.R. § 6.302-2, entitled "unusual and compelling urgency."

should, however, contemporaneously document its rationale in the procurement record. That being said, the following provides several key considerations in reviewing a subgrantee's procurement to determine whether it meets the "emergency" or "exigency" circumstance under 44 C.F.R. § 13.36(d)(4)(i)(B).

a. *Exigency vs. Emergency*

The term "exigency" is not necessarily the same as the term "emergency," although the terms are often used interchangeably. An "exigency" is generally defined as something that is necessary in a particular situation that requires or demands immediate aid or action.[251] By comparison, the term "emergency" means an unexpected and usually dangerous situation that calls for immediate action.[252] One of the key distinctions between the terms, accordingly, is that an emergency will typically involve a threat to the public or private property or some other form of dangerous situation, whereas an exigency is not necessarily limited.

Examples Illustrating the Meaning of Exigency and Emergency

Emergency. A tornado impacts the City of X and causes widespread and catastrophic damage, including loss of life, loss of power, damage to public and private structures, and millions of cubic yards of debris across the City, leaving almost the entire jurisdiction inaccessible. The City needs to begin debris clearance activities immediately to restore access to the community and support search and rescue operations and power restoration. This would be an example of an "emergency" for the purposes of 44 C.F.R. § 13.36(d)(4)(i)(B).

Exigency. A tornado impacts the City of X in June and causes widespread and catastrophic damage, including damage to a City school. The City wants to repair the school and have it ready for the beginning of the following school year in September. The City estimates, based on past experience, that the sealed bidding process will take at least 90 days, and the City's engineer estimates that the repair work would take another 60 days. This would bring the project completion to well after the beginning of the school year. Rather than going through sealed bidding, the City—in compliance with State and local law—wants to solicit bids from five contractors that have previously constructed schools in the State and award the contract to the lowest bidder among those five. This would be an example of an "exigency" for the purposes of 44 C.F.R. § 13.36(d)(4)(i)(B), such that sealed bidding would be infeasible under

[251] "Exigent." Merriam-Webster.com. Accessed June 17, 2014. http://www.merriam-webster.com/dictionary/exigent. (defining "exigent" as "(1) requiring immediate aid or action <exigent circumstances>; (2) requiring or calling for much; demanding <an exigent client>").

[252] "Emergency." Merriam-Webster.com. Accessed June 17, 2014. http://www.merriam-webster.com/dictionary/emergency. (defining "emergency" as "(1) an unforeseen combination of circumstances or the resulting state that calls for immediate action; (2) an urgent need for assistance or relief <the mayor declared a state of emergency after the flood>").

the circumstances and the use of some other procurement method was necessary based on the particular situation.

b. *Interplay between Infeasibility and Emergency/Exigency*

The duration of "infeasibility" is not necessarily the same as the period of emergency or exigency. As stated above, in order to use the procurement through noncompetitive proposals, the award of the contract must be "infeasible" under small purchase procedures, sealed bids, or competitive proposals. And it may be the case that—while it may be infeasible in the short-term to pursue a competitive procurement process in light of an emergency or exigency that does not permit delay—it is possible for the subgrantee to proceed with a competitive procurement to transition the work into a contract that meets the full and open competition requirements of 44 C.F.R. § 13.36.[253]

Example – Transitioning into a Competitive Contract After the Period of Exigency or Emergency Has Ended

DHS Office of Inspector General Report No. 14-45-D (Feb. 2014)
New Jersey Complied with Applicable Federal and State Procurement Standards when Awarding Emergency Contracts for Hurricane Sandy Debris Removal Activities

Background. Hurricane Sandy impacted the State of New Jersey in October 2012 and caused historic devastation and substantial loss of life. The amount of debris generated throughout the State was unprecedented, leaving much of New Jersey inaccessible. Although the State had pre-storm debris removal contracts in place with four vendors, the contracts did not provide sufficient options to local entities given the extensive debris removal requirements. While one option available to local entities was to procure their own emergency contracts on a municipality-by-municipality basis, the State determined that the situation required a state-level option to municipalities for immediate use given the sheer volume of debris.

[253] See DHS Office of Inspector General, Report No. 14-11-D, *FEMA Should Recover $6.1 Million of Public Assistance Grant Funds Awarded to Orlando Utilities Commission under Hurricane Frances,* p. 3 (Dec. 3, 2013) (exigent circumstances no longer existed to warrant the use of noncompetitive contracts for work related to power restoration after power was restored to customer in the jurisdiction of the subgrantee, a public utility); DHS Office of Inspector General, Report No. DD-13-07, *FEMA Should Recover $881,956 of Ineligible Public Assistance Funds and $862,983 of Unused Funds Awarded to St. Charles Parish School Board, Luling, Louisiana,* p.4 (Feb. 27, 2013) (subgrantee continued to use noncompetitive contracts after the "danger" had passed, which in this instance was represented by the need to stabilize the school system); DHS Office of Inspector General, Report No. DA-13-08, *FEMA Should Recover $470,244 of Public Assistance Grant Funds Awarded to the City of Lake Worth, Florida-Hurricanes Frances and Jeanne,* p.4 (Dec. 4, 2012) (the need to restore electrical power constituted exigent circumstances that warranted the use of noncompetitive contracts through September 29, 2004, because lives and property were at risk, however, the subgrantee should have openly competed the permanent repair work after that date because exigent circumstances no longer existed to justify the use of noncompetitive contracts).

The State ultimately awarded a noncompetitive contract (permitted under state law during periods of public "exigency") to a debris removal contractor, and then made this contractor available to local municipalities under the State's cooperative purchasing program. After reviewing the State's procurement process, FEMA notified the State that it would reimburse all eligible program costs under the noncompetitive contract for a period of 60 days.

General Summary of Relevant OIG Finding. The OIG concluded that that use of the debris removal contract by a municipality during FEMA's 60-day authorization period would comply with State procurement standards and 44 C.F.R. § 13.36. However, the OIG also stated that a municipality would need to use a competitive process to award contracts for debris removal activities outside the 60-day period to comply with FEMA guidelines and 44 C.F.R. § 13.36.

c. *"Emergency" and "Emergency Work" Are Distinguishable*

The term "emergency" for the purposes of 44 C.F.R. § 13.36(d)(4)(i)(B) is separate and distinct from "emergency work" as that term is used in the Public Assistance context. "Emergency work" in the Public Assistance context means either Public Assistance Categories A (debris removal) or B (emergency protective measures) that is necessitated because of immediate threats to life, improved property, public health and safety. However, just because the subgrantee is performing "emergency work" does not relieve the subgrantee from the requirements of full and open competition, as not all emergency work is so time sensitive to the point where full and open competition is "infeasible."

This situation will often arise within the context of debris removal performed after a major disaster or emergency. Under current FEMA policy, FEMA has stated that long-term debris removal lasting weeks or months generally requires competitive bidding to conform with the requirements of 44 C.F.R. § 13.36.[254] FEMA guidance states that an applicant may use a noncompetitive contract for short-term debris removal, but should competitively bid the contract as soon as possible.[255] This FEMA guidance is often quoted and applied by the Office of Inspector General ("OIG") in various audits.[256]

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[254] FEMA Fact Sheet No. 9580.212, supra note 91, § 8.

[255] Id.

[256] See, e.g. DHS Office of Inspector General, Report No. 14-45-D, *New Jersey Complied with Applicable Federal and State Procurement Standards When Awarding Emergency Contracts for Hurricane Sandy Debris Removal Activities*, p. 6 (Feb. 27, 2014) ("Although considered 'emergency work' under FEMA's Public Assistance program, FEMA has determined that long-term debris removal lasting weeks or months generally requires competitive bidding to conform with Federal law and procurement standards set forth in 44 CFR 13.36. FEMA guidance states that an applicant may use a noncompetitive contract for short-term debris removal, but should competitively bid the contract as soon as possible."); DHS Office of Inspector General, Report No. DA-12-20, *FEMA Public Assistance Grant Funds Awarded to City of Miramar; Florida-Hurricane Wilma*, p. 4 (Jul. 15, 2012) ("the subgrantee said that exigent circumstances warranted the use of noncompetitive contracting and that they acted in the best interest of

The other key principle to bear in mind is that an "emergency" or "exigency" circumstance under 44 C.F.R. § 13.36(d)(4)(i)(B) may apply to permanent work under a Public Assistance project. It is the nature of the exigency or emergency, not the category of work, upon which this circumstance depends. However, while not dispositive, the "permanent" versus "emergency" nature of the work is sometimes considered by the OIG in making the determination as to whether an exigency or emergency existed so as to warrant a noncompetitive procurement. [257]

iii. Awarding Agency Authorizes Noncompetitive Proposals (44 C.F.R. § 13.36(d)(4)(i)(C))

A subgrantee may use the procurement through the noncompetitive proposal method when the "awarding agency" authorizes noncompetitive proposals.[258] The regulation at 44 C.F.R. § 13.3 defines an "awarding agency" to mean "(1) with respect to a grant, the Federal agency, and (2) with respect to a subgrant, the party that awarded the subgrant." As applied to a non-state Public Assistance subgrantee, therefore, the "awarding agency" is the State.[259] It should be reemphasized here that the Federal procurement standards at 44 C.F.R. § 13.36(a) require a State to follow the same policies and procedures it uses for procurements from its non-Federal funds when it procures property and services under a Public Assistance grant award.[260] It should also be reemphasized that local and Indian tribal governments *must use their own procurement procedures that reflect applicable State and local law and regulations*, provided that the procurements conform to applicable Federal law and standards identified at 44 C.F.R. § 13.36(b)-(i).[261] The requirement of State, local, and Indian tribal governments to follow their

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their citizens. However, the contracts in question were awarded for debris removal from the [subgrantee's] rights-of-way. FEMA has determined that such activity is not a public exigency or emergency that relieves the applicant of competitive bidding (FEMA Policy 9580.4, Fact Sheet: *Debris Operations – Clarification: Emergency Contracting vs. Emergency Work*, January 2001).").

[257] See, e.g. DHS Office of Inspector General, Report No. DS-11-12, *FEMA Public Assistance Grant Awarded to City of Paso Robles, California*, p. 3 (Sep. 13, 2011) ("However, exigency was not a factor for this work; the work was permanent in nature and not emergency-oriented [emphasis added]."); DHS Office of Inspector General, Report No. DA-13-13, *FEMA Should Recover $3.2 Million of Public Assistance Grant Funds Awarded to the Moss Point School District Hurricane Katrina*, p. 5 (Mar. 15, 2013) ("Although Federal regulation 44 CFR 13.36 (d)(4)(i)(B) allows procurements by noncompetitive proposals when the public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation, the contract work in question was for permanent work and not emergency work [emphasis added]."). But see DHS Office of Inspector General, Report No. DD-13-11, *FEMA Should Recover $46.2 Million of Improper Contracting Costs from Federal Funds Awarded to the Administrators of the Tulane Educational Fund* (Aug. 15, 2013) (in this audit, the Inspector General found exigent circumstances warranting a noncompetitive contract for permanent work).

[258] 44 C.F.R. § 13.36(d)(4)(i)(C).

[259] Note, however, that competition must still be infeasible per 44 C.F.R. § 13.36(d)(4)(i) and otherwise comply with applicable state and local laws and regulations per 44 C.F.R. § 13.36(b).

[260] 44 C.F.R. § 13.36(a).

[261] 44 C.F.R. § 13.36(b)(1); *see also* DHS Office of Inspector General, Report No. 14-46-D, *FEMA's Dissemination of Procurement Advice Early in Disaster Response Periods*, p. 3 (Feb. 28, 2014) ("Federal Regulation 44 CFR

own laws, regulations, policies, and procedures is not obviated by 44 C.F.R. § 13.36(d)(4)(i)(C), such that any noncompetitive action authorized under this section must still conform to the laws, regulations, policies, and procedures governing the procurements of the State, local, and Indian tribal grantee and subgrantee.

iv. Competition Is Deemed Inadequate After the Solicitation of a Number of Sources (44 C.F.R. § 13.36(d)(4)(i)(D))

A subgrantee may use the procurement through the noncompetitive proposal method when, after the solicitation of a number of sources, the subgrantee determines competition to be inadequate.[262] This situation could arise when, among other things, the subgrantee has advertised the invitation for bids or request for proposals and solicited a number of sources, but has received only a single bid or proposal; received only a single responsive bid or proposal; or received no responsive bids or proposals.

FEMA considers competition to be "inadequate" in the context of 44 C.F.R. § 13.36(d)(4)—and the procurement by noncompetitive proposal method thus legally available to a subgrantee—when a subgrantee has complied with all of the procurement standards and the receipt of a single offer or bid, single responsive offer or bid, or no responsive bids or proposals is caused by conditions outside the subgrantee's control. FEMA will not, on other hand, consider competition inadequate where a subgrantee did not sufficiently publicize the requirement, solicited only a few sources that chose not to submit a proposal, set unduly restrictive specifications, and/or took arbitrary actions or failed to take other actions that resulted in the inadequate competition. In those cases, adequate competition may very well be possible, it is just that the subgrantee failed to take the proper steps and actions to ensure such competition.

It is important, therefore, for a subgrantee to document its justification for why there is inadequate competition and why it moved forward with a noncompetitive award without cancelling the solicitation and resoliciting offers or bids. In making this justification, it may be necessary for the subgrantee to evaluate whether or not it sufficiently publicized the invitation for bids or requests for proposals and/or solicited an adequate number of firms. It may also be necessary to speak to those firms solicited to find out why they did not submit offers or bids. If the reason is an overly restrictive specification or delivery requirement, then the subgrantee would need to evaluate whether it should cancel the solicitation, change that specification to allow for more bids or offers, and re-solicit bids or offers. If the subgrantee chooses to move forward with the award in light of the restrictive specification, then the subgrantee should document in the procurement file why the restrictive specification or delivery requirement was necessary and could not be modified so as to enable additional competition.

13.36(a) allows States, as grantees, to use their own procurement procedures. ***Other grantees and subgrantees may also use their own procurement procedures, but those procedures must conform to Federal law and standards stated in 44 CFR 13.36(b) through (i)*** [emphasis added].").

[262] 44 C.F.R. § 13.36(d)(4)(i)(D).

D. CONTRACTING WITH SMALL AND MINORITY FIRMS, WOMEN'S BUSINESS ENTERPRISES, AND LABOR AREA SURPLUS FIRMS (44 C.F.R. § 13.36(e))

The regulation at 44 C.F.R. § 13.36(e)(1) requires that a subgrantee take all necessary affirmative steps to assure that minority firms, women's business enterprises, and labor area surplus firms are used when possible.[263] Notably, this is not an authority to provide set-asides, but rather a requirement aimed at ensuring maximum participation of these types of firms.

1. Required Affirmative Steps to Assure Certain Firms Are Used (44 C.F.R. § 13.36(e)(2))

A subgrantee must, at a minimum, take the following six "affirmative steps" to assure that minority firms, women's business enterprises, and labor area surplus firms are used when possible:

- ***Solicitation Listing***. The subgrantee must place qualified small and minority businesses and women's business enterprises on solicitation lists.[264]
- ***Soliciting***. The subgrantee must assure that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources.[265]
- ***Breaking Up Requirements***. The subgrantee must divide total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority business, and women's business enterprises.[266] In applying this requirement, it is important to recognize that dividing up a large requirement into smaller parts so as to fall beneath the small acquisition threshold is prohibited, as would the opposite technique of bundling requirements so that it precludes small businesses, minority firms, and women's business enterprises from being a prime contractor.[267] Notwithstanding, dividing a bona fide large requirement into smaller components to facilitate participation by small businesses would be acceptable.
- ***Accommodating Delivery Schedules***. The subgrantee must establish delivery schedules, where the requirement permits, which encourage participation by small and minority

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[263] 44 C.F.R. § 13.36(e).

[264] 44 C.F.R. § 13.36(e)(1)(i).

[265] 44 C.F.R. § 13.36(e)(1)(ii).

[266] 44 C.F.R. § 13.36(e)(1)(iii).

[267] See DHS Office of Inspector General, Report No. DD-11-22, *FEMA Public Assistance Grant Awarded to Henderson County, Illinois*, p. 3-4 (Sep. 27, 2011) ("The Federal Acquisition Regulation prohibits breaking down a proposed large purchase into multiple small purchases merely to permit use of simplified acquisition procedures. Further, although 44 CFR § 13.36 does not include a specific prohibition against such circumvention, we believe that any action specifically designed to circumvent a Federal regulation is not allowable [emphasis added].").

business, and women's business enterprises.[268]

- ***Using Federal Agencies.*** Using the services and assistance of the Small Business Administration, and the Minority Business Development Agency of the Department of Commerce.[269]
- ***Affirmative Steps for Contractors.*** The subgrantee must require the prime contractor, if subcontracts are to be let, to take the five affirmative steps described above.[270]

2. Meaning of Small Business, Minority Business, Labor Area Surplus Firm, and Women's Business Enterprise

The regulation at 44 C.F.R. § 13.36(e) does not, however, define the terms women's businesses enterprise, small business, minority business, or labor surplus area firm. In the absence of such definitions, FEMA applies the following meanings of those terms when evaluating compliance with the requirements of 44 C.F.R. § 13.36.

i. Labor Surplus Area Concern

A labor surplus area concern (*i.e.*, business)[271] is one that, together with its first tier subcontractors, will perform substantially in labor surplus areas.[272] "Performing substantially" means that the costs incurred on account of manufacturing, production, or appropriate services in labor surplus areas exceed 50% of contract price,[273] and a labor surplus area is a civil jurisdiction that has a civilian average annual unemployment rate during the previous two calendar years of 20 percent or more above the average annual civilian unemployment rates for all States during the same 24-month reference period.[274]

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[268] 44 C.F.R. § 13.36(e)(1)(iv).

[269] 44 C.F.R. § 13.36(e)(1)(v).

[270] 44 C.F.R. § 13.36(e)(1)(vi).

[271] A "concern" means any business entity organized for profit (even if its ownership is in the hands of a nonprofit entity) with a place of business located in the United States and which makes a significant contribution to the U.S. economy through payment of taxes and/or use of American products, material and/or labor, etc. "Concern" includes but is not limited to an individual, partnership, corporation, joint venture, association, or cooperative. 48 C.F.R. § 19.001.

[272] 48 C.F.R. § 2.101 (which defines the term "labor area surplus concern" for the purposes of the Federal Acquisition Regulations); *see also* Executive Order 12073, *Federal Procurement in Labor Surplus Areas* (Aug. 16, 1978) (which requires executive agencies to emphasize procurement set-asides in labor surplus areas).

[273] 48 C.F.R. § 2.101.

[274] 20 C.F.R. § 654.5; 48 C.F.R. § 2.101. The Secretary of Labor is responsible under Executive Order 12073 for classifying and designating labor surplus areas.

ii. Small Business

FEMA will accept the meaning of a small business established under the applicable state, local, and Indian tribal laws and regulations. Where state, local, and Indian tribal laws and regulations do not provide a definition of small business, FEMA considers a business that is independently owned and operated, not dominant in the field of operation in which it is bidding on contracts, and qualified as a small business under the Small Business Administration criteria and size standards at 13 C.F.R. pt. 121.[275]

iii. Women's Business Enterprise

FEMA will accept the meaning of women's business enterprise established under the applicable state, local, and Indian tribal laws and regulations. Where state, local, and Indian tribal laws and regulations do not provide a definition of small business, FEMA considers a women's business enterprise as an enterprise that is: (a) at least 51 percent owned by one or more women or, in the case of a publicly owned business, at least 51 percent of the stock is owned by one or more women; and (b) whose management and daily operations are controlled by one or more women.

iv. Minority Business

FEMA will accept the meaning of a minority business established under the applicable state, local, and Indian tribal laws and regulations. Where state, local, and Indian tribal laws and regulations do not provide a definition of small business, FEMA considers a minority business as a business that is (a) at least 51 percent owned by one or more minority group members or, in the case of a publicly owned business, at least 51 percent of the stock is owned by one or more minority group members; and (b) whose management and daily operations are controlled by one or more minority group members.

3. Set Asides for Small Businesses, Minority Firms, and Women's Business Enterprises

A recurring issue within the context of subgrantee procurement is whether the subgrantee may set-aside a certain percentage of its contracting under a Public Assistance project award for small businesses, minority firms, and women's business enterprises. The regulation at 44 C.F.R. § 13.36(c) requires that a subgrantee conduct all procurements in a manner providing full and open competition, and makes no provision for specific exceptions to this requirement in the case of small businesses, minority firms, and women's business enterprises. Notably, the regulation at 44 C.F.R. § 13.36(e) does not provide an express authority to provide set-asides or quotas for these types of firms, but rather only for a subgrantee to take certain steps to ensure maximum participation of these types of firms. As such, FEMA views set-asides and other quotas as

[275] 13 C.F.R. pt. 121 (Small Business Size Regulations).

impermissible, unless specifically authorized by federal law.[276]

E. COST OR PRICE ANALYSIS (44 C.F.R. § 13.36(f))

1. General Requirement (44 C.F.R. § 13.36(f)(1))

The regulation at 44 C.F.R. § 13.36(f)(1) states that a subgrantee must perform a cost or price analysis in connection with every federally assisted procurement action, including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation but, as a starting point, grantees must make and subgrantees should make independent cost estimates before receiving bids or proposals.[277]

i. Cost Analysis

The regulation requires a subgrantee to perform a cost analysis when the offeror is required to submit the elements of its estimated cost under professional, consulting, and architectural engineering services contracts.[278] A subgrantee is also required to perform a cost analysis for sole source procurements when adequate price competition is lacking, including contract modifications or change orders. However, a subgrantee need not complete a cost analysis if it can establish price reasonableness on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public or based on prices set by law or regulation.[279]

ii. Price Analysis

When a cost analysis is not necessary, the subgrantee must perform a price analysis in all other instances to determine the reasonableness of the proposed contract price.[280] Price analysis is where the offeror's prices are compared to each other and/or established market or catalogue

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[276] See, e.g. Indian Self-Determination and Education Assistance Act, supra note 181.

[277] 44 C.F.R. § 13.36(f)(1). This regulation provides, in relevant part, that "The method and degree of analysis is dependent on the facts surrounding the particular procurement situation but, as a starting point, ***grantees*** must make independent cost estimates before receiving bids or proposals." (emphasis added). By referencing only the "grantee" and not the "subgrantee," this means that the independent cost estimate is not a mandatory requirement for subgrantees. Although it may technically not be a mandatory requirement, FEMA recommends that subgrantees conduct an independent cost estimate. There are numerous benefits to such an estimate, to include ensuring a clear basis for the subgrantee's determination that the benefits of the procurement warrant the cost, provides a basis for cost and price analysis, ensuring that the subgrantee select the appropriate method of procurement (*e.g.*, does not choose small purchase procedures when the estimate exceeds $150,000), and ensures proper bonding requirements (which are different when exceeding the $150,000 threshold).

[278] Id.

[279] Id.

[280] Id.

prices. Using this technique, a subgrantee compares the actual prices offered by various offerors to determine the reasonableness of the proposed price.

iii. Amplifying Guidance Concerning Cost and Price Analysis – Federal Acquisition Regulations

The regulation at 44 C.F.R. § 13.36(f) does not provide any additional detail about how to complete a price or cost analysis. Due to the lack of guiding information in the regulations, Public Assistance subgrantees may inquire as to what techniques or steps they must perform in order to meet the regulatory requirements to conduct a price or cost analysis outside the scope of what is provided in the regulations.

The first response to any inquiry about cost or price analysis techniques is that the subgrantee should use its own procurement procedures, which reflect applicable State, local, and Indian tribal laws and regulations, including the cost and price analysis requirements of those laws and regulations.[281]

The second response to any inquiry is that FEMA has provided some guidance on "cost analysis" for debris removal contracts in FEMA Fact Sheet No. 9580.201. But, it is important to recognize that FEMA has not provided guidance on "price analysis" for debris removal contracts and not provided guidance for a cost or price analysis for any other type of contact.

The third response to any inquiry is that—in light of the lack of guidance for price and cost analysis in the regulations and in FEMA policy—FEMA will generally utilize guiding principles in the Federal Acquisition Regulations as a guide to analyze the cost or price analysis conducted by the Public Assistance subgrantee. The following sections provide an overview of the Federal Acquisition Regulation's general pricing concepts and approach towards price and cost analysis.

iv. General Federal Acquisition Regulation Pricing Concepts

There are several general pricing concepts that one can extrapolate from the Federal Acquisition Regulations. The first concept is that the Federal Government's policy is to purchase supplies and services at fair and reasonable prices.

The second concept is the Federal Government must obtain necessary information in the least burdensome manner possible, given the circumstances of each procurement. A Federal contracting officer must generally use the following order of precedence (to the extent certified cost or pricing data is not required by law) when requesting information to determine price reasonableness:

- Request no additional information if the agreed upon price is based upon adequate

[281] Similarly, nonprofit organizations should follow their own procedures for cost and price analysis in compliance with any applicable (if any) State, local, and/or Indian tribal government laws and regulations.

price competition.

- If adequate price competition among competing offerors is not present, request additional price information from sources other than the offeror(s) to the maximum extent practicable.
- Request other than certified cost or pricing data if needed to determine fair and reasonable price.[282]

The third concept is that Federal contracting officers use a "proposal analysis" to determine if a proposed contract is fair and reasonable.[283] In performing proposal analyses, Federal contracting officers use a variety of techniques, with some techniques being required under certain circumstances. The analytical techniques described in the FAR may be used, singly or in combination with others, to ensure that the final price is fair and reasonable, and the complexity and circumstances of each acquisition determines the level of details of the analysis required.[284] Two of the four techniques are price analysis and cost analysis, which are further discussed below.[285]

a. *Price Analysis under the Federal Acquisition Regulations*

The Federal Acquisition Regulations describe price analysis as the process of examining and evaluating a proposed price[286] without evaluating its separate cost elements and proposed profit.[287] This is the minimum analysis a Federal contracting officer must use whenever acquiring commercial items,[288] and is the analysis normally used in sealed bidding.[289]

The techniques for conducting a price analysis include, but are not limited to, the following:

(1) Comparison of proposed prices received in response to the solicitation. ***Normally,***

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[282] 48 C.F.R. § 15.402(a)(2).

[283] 48 C.F.R. § 15.404-1(a).

[284] 48 C.F.R. § 15.404-1(a)(1).

[285] The other two techniques not discussed here are the "cost-realism analysis" and "technical analysis...".

[286] "Price" means cost plus any fee or profit applicable to the contract type. 48 C.F.R. § 15.401. This definition is anachronistic because it treats the sum of the cost and fee on a cost-reimbursable contract as a "price" when the term is usually associated with a fixed-price contract, which calls for the payment of a negotiated amount, established at the outset or by redetermination, for satisfactorily completed work.

[287] 48 C.F.R. § 15.404-1(b). "Profit" is the amount realized by a contractor after the costs of performance (both direct and indirect) are deducted from the amount to be paid under the terms of the contract. In procurement by negotiation where there is a cost-analysis, the government negotiates a projected amount of profit in accordance with 48 C.F.R. § 15.404-4.

[288] 48 C.F.R. § 14.403-3(c).

[289] 48 C.F.R. § 14-408.

adequate price competition establishes a fair and reasonable price.

(2) Comparison of the proposed prices to historical prices paid, whether by the government or other than the government, for the same or similar items.

Notably, the Federal Acquisition Regulation states that techniques (1) and (2) are the preferred techniques—but, if the Federal contracting officer determines that information on competitive proposed prices or previous contract prices is not available or is insufficient to determine that the price is fair and reasonable, the contracting officer may use the following techniques (3)-(7) as appropriate to the circumstances applicable to the acquisition.[290]

(3) Use of parametric estimating methods/application of rough yardsticks (such as dollars per horsepower or other units) to highlight significant inconsistencies that warrant additional pricing inquiry.

(4) Comparison with competitive published price lists, published market prices or commodities, similar indices, and discount or rebate arrangements.

(5) Comparison of proposed prices with independent government cost estimates.

(6) Comparison of proposed prices with prices obtained through market research for the same or similar items.

(7) Analysis of data other than certified cost or pricing data[291] provided by the offeror.

b. *Cost Analysis under the Federal Acquisition Regulations*

The Federal Acquisition Regulation describes cost analysis as the review and evaluation of the separate cost elements and proposed profit or fee contained in an offeror's or contractor's proposal in order to determine a fair and reasonable price and the application of judgment to determine how well the proposed costs represent what the cost of the contract should be, assuming reasonable economy and efficiency.[292] Cost analysis is used to establish the basis for negotiating contract prices when price competition is inadequate or lacking altogether and when price analysis, by itself, does not ensure price reasonableness.[293] Cost analysis is also required

[290] 48 C.F.R. § 15.404-1(b)(3).

[291] "Certified cost and pricing data" are cost or pricing data that are required to be submitted in accordance with 48 C.F.R. § 15.403-4 and 15.403-5 and have been required to be certified in accordance with § 15.406-2. This certification states that, to the best of the person's knowledge and belief, the cost and pricing data are accurate, complete, and current as of a date certain before contract award. Cost or pricing data are required to be certified in certain procurements, such as negotiated procurements expected to exceed $700,000 (subject to exceptions).

[292] 48 C.F.R. § 15.404-1(c).

[293] 48 C.F.R. § 16.104(c). One generally sees cost analysis in contracting by negotiation (which is equivalent to procurement through competitive proposals in the grant context).

when the offeror is required to submit certified cost and pricing data.

The Federal contracting officer may use various cost analysis techniques and procedures to ensure a fair and reasonable price, given the circumstances of the acquisition. Such techniques and procedures include the following:

(1) Verification of cost data or pricing data and evaluation of cost elements.

(2) Evaluation of the effect of current practices on future costs.

(3) Comparison of costs proposed for individual cost elements with previously incurred actual costs, previous cost estimates, independent government estimates, and forecasts.

(4) Verification that the offeror's cost submissions are in compliance with FAR cost principles and cost accounting standards.

(5) Identification of any cost or pricing data needed to make the proposal accurate, complete, and current.

2. Profit as a Separate Element of Price (44 C.F.R. § 13.36(f)(2))

An allowable cost under a Public Assistance project award includes reasonable fees or profit of the subgrantee's contractor, but not fee or profit of the subgrantee.[294] The subgrantee is required to negotiate profit as a separate element of cost for each contract in which there has been no price competition, and in all acquisitions in which the subgrantee performs a cost analysis.

To establish a fair and reasonable profit, the subgrantee should consider the complexity of the work to be performed, the risk undertaken by the contractor, the contractor's investment, the amount of subcontracting, the quality of the contractor's record of past performance, and industry profit rates in the surrounding geographical area for similar work.[295]

3. Costs or Prices Based on Estimated Costs (44 C.F.R. § 13.36(f)(3))

Costs or prices based on estimated costs for contracts under grants will he allowable only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with Federal cost principles.[296]

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[294] 44 C.F.R. § 13.36(f)(2); cf. 48 C.F.R. § 16.103 (Negotiating Contract Type) ("(a) The objective is to negotiate a contract type and price (or estimated cost and fee) that will result in reasonable contractor risk and provide the contractor with the greatest incentive for efficient and economical performance.").

[295] The geographic area served is the State, county, congressional district, and/or metropolitan statistical area where the vendor provides or delivers products and/or services.

[296] 44 C.F.R. § 13.36(f)(3)).

4. Cost Plus a Percentage of Cost and Percentage of Construction Costs Contracts (44 C.F.R. § 13.36(f)(4))

The regulation at 44 C.F.R. § 13.36(c)(4) prohibits subgrantees from using a cost plus percentage of cost or percentage of construction costs contract.[297] The purpose for this prohibition is to prohibit contracts that incentivize a contractor to increase its profits by increasing costs of performance.[298]

A cost plus percentage of cost contract is a cost reimbursement contract containing some element that obligates the subgrantee to pay the contractor an amount (in the form of either profit or cost), undetermined at the time the contract was made and to be incurred in the future, based on a percentage of future costs.[299] The following four-part test can be utilized to determine if a certain contract is a prohibited cost-plus-percentage-of-cost contract:

- Payment is on a pre-determined percentage rate;
- The pre-determined percentage rate is applied to actual performance costs;
- The contractor's entitlement is uncertain at the time of contracting; and
- The contractor's entitlement increased commensurately with increased performance costs.[300]

The prohibition applies to either a cost-reimbursement contract or a fixed-price contract if either contains any element that is paid as a percentage of other costs, thus permitting payment to increase if the contractor incurs greater costs.[301] The subgrantee must also apply the prohibition

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[297] A cost-plus-percentage-of-cost system of contracting is prohibited under Federal acquisition by 10 U.S.C. § 2306(a) and 41 U.S.C. § 3905(a). *See* 48 C.F.R. § 16.102(c).

[298] Cf. *Decision of the Comptroller General*, B-119292, 1954 U.S. Comp. Gen. LEXIS 649 (Oct. 8, 1954) ("Section 4(B) of the Armed Services Procurement Act of 1947 prohibits the use of the cost-plus-a-percentage-of-cost system of contracting. The intent of Congress in opposing this system is clearly discernible in the legislative history of this and other acts regulating government procurement. Conditions which it sought to prevent are those which provide an incentive and an opportunity for a contractor or subcontractor to increase his profit by increasing his costs at the expense of the government.").

[299] See Muschany v. United States, 324 U.S. 49, 61-62 (1944).

[300] *Federal Aviation Administration—Request for Advance Decision*, B-195173, 58 Comp. Gen. 654 (1979); *Marketing Consultants International Limited*, B-183705, 55 Comp. Gen. 554 (1975).

[301] Letter from Deborah Ingram, Assistant Administrator, FEMA Recovery Directorate, to Mark Ghilarducci, Secretary, California Emergency Management Agency *re: Second Appeal—Spanish Flat Water District, PA ID 055-UP3ZT-00, Sewer Treatment Plant Effluent Pond, FEMA -1646 -DR -CA, Project Worksheet (PW) 173*, Enclosed Analysis (Mar 22, 2012) ("It is clear from the above-quoted references in the March 1, 2007 contract to "contractor's fee of 15 percent" and "plus an allowance of 15 percent" that this is a CPPC contract."); *see also* Letter from Carlos Castillo, Assistant Administrator, FEMA Disaster Assistance Directorate, to Colonel Thomas Kirkpatrick (Ret), State Coordinating Officer, Louisiana Office of Homeland Security and Emergency Preparedness, *re: Second Appeal—City of New Orleans, PAID # 071-55000-00, Cleaning Storm Drains, FEMA-1603-DR-LA,*

to subcontracts in the case where the prime contract is a cost-reimbursement contract type or subject to price redetermination.[302] Lastly, the inclusion of a ceiling price does not make these forms of contracts acceptable.[303]

Example – Prohibited Cost-Plus-Percentage-of-Cost Contracts
DHS Office of Inspector General Report No. DD-13-11
FEMA Should Recover $46.2 Million of Improper Contracting Costs from Federal Funds Awarded to the Administrators of the Rule Educational Fund (Aug. 2013)

Background. Hurricane Katrina caused significant damage to Tulane University in August 2005 and, as a result, Tulane suspended most of its New Orleans-based activities and programs for the 2005 fall semester. Tulane placed great emphasis on reopening its main campus for the 2006 spring semester because it was concerned that its future would be imperiled if it could not quickly restore operations.

Tulane awarded a $205.4 million contract to a contractor (primary contractor) using a noncompetitive, cost-plus-percentage-of-cost contract that included $35.0 million in mark-up costs. As shown in the table below, the contractor added an average of 19.3 percent markups to hourly T&M billings for its own employees. These hourly rates were already fully burdened, which means they included profit and overhead. The primary contractor also added a 21 percent markup on pass-through costs for subcontractors and vendors that already included markups.

Description	Amounts Billed Before Markups	Markup Amounts	Mark up %	Amounts Billed After Markups	% of Total Billings
Time & Materials Billings	$ 45,124,626	$ 8,703,232	19.3%	$ 53,827,858	26.2%
Subcontractors & Vendors	125,239,350	26,300,261	21.0%	151,539,611	73.8%
Totals	$170,363,976	$35,003,493	20.5%	$205,367,469	100.0%

Project Worksheet (PW) 3715 (Feb. 5, 2008) ("The Applicant' s contract with MWH stated that the Applicant would pay MWH thirteen (13) percent of cost incurred on the project as profit. This meets the definition of the cost plus contract.").

[302] Cf. *Comptroller General Warren to the Secretary of War*, B-23293, 21 Comp. Gen. 858 (Mar. 13, 1942).

[303] Id.; see also *Secretary of the Air Force*, B-120546, 38 Comp. Gen. 38 (Jul. 21, 1958).

Summary of OIG Findings. The OIG "did not fault" Tulane for awarding this contract without competition because exigent circumstances existed at the time. Generally, the OIG stated, it considers circumstances to be exigent when lives or property are at stake or, in this case, when a city or community needs to reopen its schools. Notwithstanding, the OIG did find that the 19% markups on the primary contractor's T&M rates were not only prohibited, they also represented excessive profit because the T&M rates already included sufficient overhead and profit. The OIG also found that the 21% markup that the primary contractor added to the subcontractor costs represented duplicate costs and excessive profit because the primary contractor had already charged Tulane for managing subcontractors through its hourly rates. Based on these findings, the OIG recommended a disallowance of $35.0 million as excessive and prohibited markups.

F. AWARDING AGENCY PREAWARD REVIEW OF SUBGRANTEE PROCUREMENTS (44 C.F.R. § 13.36(g))

1. Review of Technical Specifications on Proposed Procurements (44 C.F.R. § 13.36(g)(1))

A subgrantee must make available, upon request of the awarding agency, technical specifications on proposed procurements when the awarding agency believes such review is needed to ensure that the item and/or service specified is the one being proposed for purchase.[304] An "awarding agency" means, with respect to a subgrant, the party that awarded the subgrant (which is the State or Indian tribal government in the case of the Public Assistance grant program).[305] In any case, FEMA reserves the right to review a subgrantee's technical specifications.[306]

This review will generally take place before the time when the specification is incorporated into a solicitation document.[307] However, if the subgrantee desires to perform the review after a solicitation has been developed, the awarding agency may still review the specifications, with its review usually limited to the technical aspects of the proposed purchase.[308]

2. Review of Other Procurement Documents (44 C.F.R. § 13.36(g)(2))

Subgrantees must, on request, make available for awarding agency pre-award review

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[304] 44 C.F.R. § 13.36(g)(1).

[305] 44 C.F.R. § 13.3.

[306] See 44 C.F.R. § 13.42(e) ("(e) *Access to records*—(1) *Records of grantees and subgrantees.* The awarding agency…shall have right of access to any pertinent books, documents, papers, or other records of grantees and subgrantees which are pertinent to the grant, in order to make audits, examinations, excerpts, and transcripts.").

[307] 44 C.F.R. § 13.36(g)(1).

[308] Id.

procurement documents, such as requests for proposals or invitations for bids; independent cost estimates, etc. when:

- A subgrantee's procurement procedures or operation fails to comply with the procurement standards in 44 C.F.R. § 13.36;
- The procurement is expected to exceed the simplified acquisition threshold ($150,000) and is to be awarded without competition or only one bid or offer is received in response to a solicitation;
- The procurement, which is expected to exceed the simplified acquisition threshold, specifies a "brand name" product;
- The proposed award is more than the simplified acquisition threshold and is to be awarded to other than the apparent low bidder under a sealed bid procurement; or
- A proposed contract modification changes the scope of a contract or increases the contract amount by more than the simplified acquisition threshold.[309]

A subgrantee may be exempt from the pre-award review above if the awarding agency determines that the subgrantee's procurement systems comply with the standards of 44 C.F.R. § 13.36.[310]

- A subgrantee may request that the awarding agency review its procurement system to determine whether the system meets the standards of 44 C.F.R. § 13.36 for its system to be certified. Generally, these reviews shall occur where there is a continuous high-dollar funding, and the subgrantee awards third-party contracts on a regular basis.[311]
- A subgrantee may self-certify its procurement system. Such self-certification shall not limit the awarding agency's right to survey the system. Under a self-certification procedure, awarding agencies may wish to rely on written assurances from the subgrantee that it is complying with these standards. A subgrantee will cite specific procedures, regulations, standards, etc., as being in compliance with these requirements and have its system available for review.[312]

G. CONTRACTOR BONDING REQUIREMENTS (44 C.F.R. § 13.36(h))

The regulation at 44 C.F.R. § 13.36(h) sets forth various bonding requirements for a subgrantee's contractor for construction or facility improvement contracts or subcontracts exceeding the

[309] 44 C.F.R. § 13.36(g)(2).

[310] 44 C.F.R. § 13.36(g)(3).

[311] 44 C.F.R. § 13.36(g)(3)(i).

[312] 44 C.F.R. § 13.36(g)(3)(ii).

simplified acquisition threshold ($150,000). As a preliminary matter, the awarding agency[313] may accept the bonding policy and requirements of a subgrantee provided the awarding agency has made a determination that the awarding agency's interest is adequately protected. If the awarding agency has not made such a determination, then the subgrantee shall follow the following minimum requirements for a bid guarantee, performance bond, and payment bond.

1. Bid Guarantee (44 C.F.R. § 13.36(h)(1))

Each bidder must provide a bid guarantee equivalent of 5 percent of the bid price. The "bid guarantee" shall consist of a firm commitment, such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.[314] The existence of a bid guarantee provides a subgrantee with assurance that the bidder has the financial means to accept the job for the price quoted in the bid and that the bidder, should it be successful in its bid, will enter into the required contract and execute the required performance and payment bonds.

In the case where the contractor is awarded the contract but fails to enter into the contract, as agreed, then the purpose of the guarantee is to provide financial protection to the subgrantee by paying the difference between the contractor's offer and the next closest offer. Notably, requiring a bid guarantee helps keep contractors from submitting frivolous bids, because they will be obligated to either perform the job or pay (either itself or through a surety) compensation to the subgrantee.

2. Performance and Payment Bonds (44 C.F.R. § 13.36(h)(2) and (3))

The contractor must provide both a performance bond and a payment bond, each for 100 percent of the contract price.[315] A bond means a written instrument executed by a contractor (the "principal"), and a second party ("the surety" or "sureties") to assure fulfillment of the principal's obligations to a third party (the "oblige" which, in this case, is the subgrantee), identified in the bond. If the principal's obligations are not met, the bond assures payment, to the extent stipulated, of any loss sustained by the obligation.[316]

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[313] The "awarding agency" for a local government is a State. The same is true for an Indian tribal government when the state is serving as the grantee—however, when the Indian tribal government is serving as grantee, then it is the awarding agency for all subgrantees and FEMA is the awarding agency for the Indian tribal government.

[314] 44 C.F.R. § 13.36(h)(1); cf. 48 C.F.R. § 28.001 ("Bid guarantee means a form of security assuring that the bidder (1) will not withdraw a bid within the period specified for acceptance and (2) will execute a written contract and furnish required bonds, including any necessary coinsurance or reinsurance agreements, within the time specified in the bid, unless a longer time is allowed, after receipt of the specified forms.").

[315] 44 C.F.R. § 13.36(h)(2) and (3).

[316] See 48 C.F.R. § 28.001. The term "bond" is not defined in 44 C.F.R. pt. 13.

A "performance bond" is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.[317] A "payment bond" is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

H. CONTRACT PROVISIONS (44 C.F.R. § 13.36(i))

A subgrantee's contracts must contain the provisions set forth in 44 C.F.R. § 13.36(i).[318] Some of the provisions are based on sound contracting principles and others are required by Federal law, executive order, or regulation. FEMA is permitted to require changes, remedies, changed conditions, access and records retention, suspension of work, and other clauses approved by the Office of Federal Procurement Policy ("OFPP"), but has yet to ever submit such proposed modification to OFPP.[319]

1. Provisions for Contractual Remedies (44 C.F.R. § 13.36(i)(1))

The subgrantee's contract must contain provisions concerning administrative, contractual, or legal "remedies" in instances where contractors violate or breach contract terms, and provide for sanctions and penalties as may be appropriate.[320] This requirement only applies in the case where a contract exceeds the simplified acquisition threshold of $150,000.[321]

By way of background, a "remedy" is the right of a contracting party when the other party does not fulfill its contractual obligations.[322] Parties may seek various judicial remedies for breach of contract, including damages, specific performance, and rescission or restitution.[323] In Federal Government contracting, however, most of the remedies available to the parties are spelled out in contract clauses. For example, the Federal Government has remedies for nonperformance under the termination for default clause and for defective performance under the inspection clause of the contract, and the contractor's remedies are generally for equitable adjustment or price adjustment under a variety of clauses.

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[317] Id.

[318] In addition to these mandatory contract provisions, subgrantees would also be prudent to include additional contract provisions with respect to other legal requirements under federal laws, regulations, and executive orders that pass-through to their contractors. A list of many of the various federal laws with which subgrantees must comply can be found in the DHS Standard Terms and Conditions (see supra note 40) and also in the assurances under Standard Forms 424B and 424D.

[319] 44 C.F.R. § 13.36(i).

[320] 44 C.F.R. § 13.36(i)(1).

[321] Id.

[322] Restatement (Second) of Contracts, ch. 16 (Remedies) (1981).

[323] Id.

In this case, the regulation at 44 C.F.R. § 13.36(i)(1) simply requires the subgrantee to spell out the remedies for breach of contract.

2. Provisions for Termination for Cause and Convenience (44 C.F.R. § 13.36(i)(2))

The subgrantee's contract must contain provisions concerning termination for cause and for convenience, including the manner by which it will be effected and the basis for settlement.[324] This requirement only applies in the case of contracts in excess of $10,000.[325]

"Termination for convenience" is the exercise of a subgrantee's right to completely or partially terminate the contractor's performance of work under a contract when it is in the subgrantee's interest.[326] On the other hand, "termination for cause" (or "default") is the exercise of a party's right to completely or partially terminate a contract because of the other party's actual or anticipated failure to perform its contractual obligations.[327]

3. Compliance with Executive Order 11,246 (44 C.F.R. § 13.36(i)(3))

Except as otherwise provided under 41 C.F.R. pt. 60, the subgrantee's contract must include the equal opportunity clause at 41 C.F.R. § 60-1.4(b), in accordance with Executive Order 11,246, *Equal Employment Opportunity* (Sep. 24, 1965) (as amended) and Department of Labor implementing regulations at 41 C.F.R. ch. 60 (Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor).[328] This requirement only applies in the case of construction[329] contracts in excess of $10,000.[330]

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[324] 44 C.F.R. § 13.36(i)(2).

[325] Id.

[326] The regulation does not define the phrase "termination for convenience," but cf. 48 C.F.R. § 2.101 ("Termination for convenience means the exercise of the Government's right to completely or partially terminate performance of work under a contract when it is in the Government's interest."). The Federal Government's process for termination for convenience is set forth at 48 C.F.R. subparts 49.1, 49.2, and 49.3. Notably, only the Federal Government—not the contractor—may terminate for convenience.

[327] The regulation does not define the phrase "termination for cause;" see 48 C.F.R. § 2.101 ("Termination for default means the exercise of the Government's right to completely or partially terminate a contract because of the contractor's actual or anticipated failure to perform its contractual obligations."). In Federal Government procurement, a contractor cannot terminate a contract for an alleged breach by the Federal Government, but rather has to continue performing and has to keep performing at the direction of the Federal contracting officer while the dispute is resolved. The Federal Government's process for termination for cause is set forth at 48 C.F.R. subpart 49.4.

[328] 44 C.F.R. § 13.36(i)(3).

[329] 41 C.F.R. § 60-1.3 ("Construction work means the construction, rehabilitation, alteration, conversion, extension, demolition or repair of buildings, highways, or other changes or improvements to real property, including facilities providing utility services. The term also includes the supervision, inspection, and other onsite functions incidental to the actual construction.").

The regulation at 41 C.F.R. § 60-1.4(b) requires the insertion of the following contract clause:

"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, 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, 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 considerations for employment without regard to race, color, religion, sex, or national origin.

(3) 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.

(4) 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.

(5) 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.

(6) 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

[330] 44 C.F.R. § 13.36(i)(3).

September 24, 1965, and such other sanctions as 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.

(7) The contractor will include the portion of the sentence immediately preceding paragraph (1) and the provisions of paragraphs (1) through (7) 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."

4. Compliance with Copeland Anti-Kickback Act (44 C.F.R. § 13.36(i)(4))

A subgrantee's contract must include a provision for compliance with the Copeland "Anti-Kickback" Act (18 U.S.C. § 874[331] and 40 U.S.C. § 3145[332]), as supplemented by Department of Labor regulations at 29 C.F.R. pt. 3 (Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States).[333] This requirement applies to all contracts for construction or repair.

By way of background, the Copeland Act provides that each contractor must be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he or she is otherwise entitled. The

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[331] 18 U.S.C. § 874 (Kickbacks from Public Works Employees) ("Whoever, by force, intimidation, or threat of procuring dismissal from employment, or by any other manner whatsoever induces any person employed in the construction, prosecution, completion or repair of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, to give up any part of the compensation to which he is entitled under his contract of employment, shall be fined under this title or imprisoned not more than five years, or both.").

[332] 40 U.S.C. § 3145 (Regulations Governing Contractors and Subcontractors):

(a) In General.—The Secretary of Labor shall prescribe reasonable regulations for contractors and subcontractors engaged in constructing, carrying out, completing, or repairing public buildings, public works, or buildings or works that at least partly are financed by a loan or grant from the Federal Government. The regulations shall include a provision that each contractor and subcontractor each week must furnish a statement on the wages paid each employee during the prior week.

(b) Application.—Section 1001 of title 18 applies to the statements.

[333] 44 C.F.R. § 13.36(i)(4).

Department of Labor implementing regulations for the Copeland Act are at 29 C.F.R. pt. 3, and the regulation at 29 C.F.R § 3.11 provides that:

> "All contracts made with respect to the construction, prosecution, completion, or repair of any…work financed in whole or in part by loans or grants from the United States covered by the regulations in this part shall expressly bind the contractor or subcontractor to comply with such of the regulations in this part as may be applicable. In this regard, see § 5.5(a) of this title."

The regulation at 29 C.F.R. § 5.5(a) does provide the required contract clause that applies to compliance with both the Davis-Bacon and Copeland Acts. However, as discussed in the next subsection, the Davis-Bacon Act does not apply to Public Assistance grantees and subgrantees. As such, FEMA requires the following contract clause:

"Compliance with the Copeland "Anti-Kickback" Act

(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 the 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."

5. Compliance with the Davis-Bacon Act (44 C.F.R. § 13.36(i)(5))

The regulation at 44 C.F.R. § 13.36(i)(5) requires that a subgrantee include a contract clause providing for the compliance with the Davis Bacon Act (40 U.S.C. §§ 276a to 276a-7) as supplemented by Department of Labor regulations at 29 C.F.R. pt. 5. This requirement, however, only applies to construction contracts awarded by subgrantees in excess of $2000 *when required by Federal grant program legislation.*[334] In this case, the sections of the Stafford Act authorizing the Public Assistance grant program do not require compliance with the Davis-Bacon Act. As such, there is no requirement for a subgrantee to place any clauses into its contracts for compliance with the Davis-Bacon Act.

[334] 44 C.F.R. § 13.36(i)(5).

6. Compliance with the Contract Work Hours and Safety Standards Act (44 C.F.R. § 13.36(i)(6))

Subgrantees must include a provision into their contracts that requires compliance with Sections 103 and 107 of the Contract Work Hours and Safety Standards Act[335] as supplemented by Department of Labor regulations at 29 C.F.R. pt 5.[336] The Contract Work Hours and Safety Standards Act applies to subgrantee contracts and subcontracts "financed at least in part by loans or grants from…the [Federal] Government."[337] Although the original law required its application in any construction contract over $2,000 or non-construction contract to which the Act applied over $2,500 (and language to that effect is still found in 44 C.F.R. 13.36(i)(6)), the Contract Work Hours and Safety Standards Act no longer applies to any "contract in an amount that is not greater than $100,000."[338]

The regulation at 29 C.F.R. § 5.5(b) provides the required contract clause concerning compliance with the Contract Work Hours and Safety Standards Act:

"Compliance with the Contract Work Hours and Safety Standards Act

(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 (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 (1) of this section, in the sum of $10 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 (1) of this section.

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[335] Contract Work Hours and Safety Standards Act, Pub. L. No. 87-581, 76 Stat. 357, §§ 103 and 107 (1962) (codified as amended at 40 U.S.C. §§ 3701-3708).

[336] 44 C.F.R. § 13.36(i)(6).

[337] 40 U.S.C. § 3701(b)(1)(B)(iii) and (b)(2); 29 C.F.R. § 5.2(h).

[338] 40 U.S.C. § 3701(b)(3)(A)(iii).

(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 (2) of this section.

(4) Subcontracts. The contractor or subcontractor shall insert in any subcontracts the clauses set forth in paragraph (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 (1) through (4) of this section."

7. Notice of Awarding Agency Requirements and Regulations Pertaining to Reporting (44 C.F.R. § 13.36(i)(7))

A subgrantee's contract must include notice of the awarding agency's[339] requirement and regulations pertaining to reporting.[340] In the case of subgrantees that are local governments and Indian tribal governments, this means that the subgrantee must include notice of the state's requirements and regulations for reporting. As such, the subgrantee should work with the state to identify the required contract clauses. FEMA recommends to states that their reporting requirements for subgrantees enable the state to meet FEMA's reporting requirements, and FEMA also recommends that the State require subgrantees to include the "notice of FEMA reporting requirements and regulations" clause below. This clause is required for states to include in their contracts, whether acting as grantee or a subgrantee.

In the case of Indian tribal governments serving as grantees, the Indian tribal government must include notice of FEMA's reporting requirements and regulations in its contracts and must require all of its subgrantees to include notice in the subgrantee's contracts of the Indian tribal government's reporting requirements and regulations. The following provides the clause required by FEMA for grantees as it relates to reporting:

"Notice of Federal Emergency Management Agency (FEMA) Reporting Requirements and Regulations

[339] 44 C.F.R. § 13.3 ("Awarding agency means (1) with respect to a grant, the Federal agency, and (2) with respect to a subgrant, the party that awarded the subgrant.").

[340] 44 C.F.R. § 13.36(i)(7).

(1) General. The (name of state agency or the local or Indian tribal government entity) is using Public Assistance grant funding awarded by FEMA to the (insert name of grantee) to pay, in whole or in part, for the costs incurred under this contract. As a condition of Public Assistance funding under (major disaster or emergency) declaration FEMA-XXXX-XX, FEMA requires the (insert name of grantee) to provide various financial and performance reporting.

a. It is important that the contractor is aware of these reporting requirements, as the (name of state agency or the local or Indian tribal government entity) may require the contractor to provide certain information, documentation, and other reporting in order to satisfy reporting requirements to (insert name of grantee) which, in turn, will enable (insert name of grantee) to satisfy reporting requirements to FEMA.

b. Failure of (insert name of grantee) to satisfy reporting requirements to FEMA is a material breach of the FEMA-State Agreement, and could result in loss of Federal financial assistance awarded to fund this contract.

(2) Applicable Regulations and Policy. The applicable regulations, FEMA policy, and other sources setting forth these reporting requirements are as follows:

a. 44 C.F.R. § 13.40 (Monitoring and Reporting Program Performance)

b. 44 C.F.R. § 13.41 (Financial Reporting)

c. 44 C.F.R § 13.50(b) (Reports)

d. 44 C.F.R. § 206.204(f) (Progress Reports)

e. FEMA Standard Operating Procedure No. 9570.14, *Public Assistance Program Management and Grant Closeout Standard Operating Procedure* (Dec. 2013)

f. FEMA-State (or Tribal) Agreement

(3) Financial Reporting. The (insert name of grantee) is required to submit to the following financial reports to FEMA:

a. Initial Report. An initial Federal Financial Report (SF 425) no later than 30 days after FEMA has approved the first Public Assistance project under FEMA-XXXX-XX.

b. Quarterly Reports. Following submission of the initial report, quarterly Federal Financial Reports until submission of the final report described in the following subparagraph. Reports are due on January 30, April 30, July 30, and October 30.

c. Final Report. A final Federal Financial Report within 90 days of the end of the period of performance for the Public Assistance grant.

(4) Performance Reporting. The (insert name of grantee) is required to submit to the following financial reports to FEMA:

a. Initial Report. An initial performance report no later than 30 days after FEMA has approved the first Public Assistance project under FEMA-XXXX-XX.

b. Quarterly Reports. Following submission of the initial report, quarterly performance reports until submission of the final report described in the following subparagraph. Reports are due on January 30, April 30, July 30, and October 30.

c. Final Report. A final performance report within 90 days of the end of the period of performance for the Public Assistance grant."

8. Notice of Awarding Agency Requirements and Regulations Pertaining to Patent Rights, Copyrights, and Rights in Data (44 C.F.R. § 13.36(i)(8) and (9))

The regulations require a subgrantee's contract to include notice of the awarding agency's[341] requirements and regulations pertaining to patent rights with respect to a discovery or invention which arises or is developed in the course of or under such contract.[342] Similarly, the regulations also require inclusion of the awarding agency's requirements and regulations pertaining to copyrights and rights in data.[343]

Patents, copyrights, and rights in data requirements arise within the context of federally assisted projects, the purpose of which is to finance the development of a product or information. These requirements apply in the case of contracts involving experimental, development, or research work, and do not apply to capital projects or operating projects.[344]

The Public Assistance grant program does not authorize any work associated with experimental, developmental, or research work, such that patent rights, copyrights, and rights in data would be implicated. There are, therefore, no required contract clauses.

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[341] 44 C.F.R. § 13.3 ("Awarding agency means (1) with respect to a grant, the Federal agency, and (2) with respect to a subgrant, the party that awarded the subgrant.").

[342] 44 C.F.R. § 13.36(i)(8).

[343] 44 C.F.R. § 13.36(i)(9).

[344] Cf. 48 C.F.R. subparts 27.3 (Patent Rights under Government Contracts) and 27.4 (Rights in Data and Copyrights).

9. Access to Records (44 C.F.R. § 13.36(i)(10))

The regulations require a subgrantee to include a contract clause that provides for access by the grantee, subgrantee, FEMA, the Comptroller General of the United States, or any of their duly authorized representatives to any books, documents, papers, and records of the contractor which are directly pertinent to that specific contract for the purpose of making audits, examinations, excerpts, and transcriptions.

The following provides the clause that a local government or Indian tribal government (acting as either subgrantee or grantee) must include in all contracts:

"Access to Records. The following access to records requirements apply to this contract:

(1) The contractor agrees to provide (insert name of state agency or local or Indian tribal government), (insert name of grantee), the FEMA Administrator, the Comptroller General of the United States, or any of their authorized representatives access to any books, documents, papers, and records of the Contractor which are directly pertinent to this contract for the purposes of making audits, examinations, excerpts, and transcriptions.

(2) The Contractor agrees to permit any of the foregoing parties to reproduce by any means whatsoever or to copy excerpts and transcriptions as reasonably needed.

(3) The contractor agrees to provide the FEMA Administrator or his authorized representatives access to construction or other work sites pertaining to the work being completed under the contract."

10. Retention of Records (44 C.F.R. § 13.36(i)(11))

The regulation at 44 C.F.R. § 13.36(i)(11) requires a subgrantee to include a contract clause pertaining to the retention of records for three years after the subgrantee makes final payment and all other pending matters are closed.[345]

The following provides the clause that a local government or Indian tribal government (acting as either subgrantee or grantee) must include in all contracts:

"Retention of Records. The contractor agrees to maintain all books, records, accounts and reports required under this contract for a period of not less than three years after the date of termination or expiration of this contract, except in the event of litigation or settlement of claims arising from the performance of this contract, in which case contractor agrees to maintain same until the (name of the state agency or local or Indian tribal government), (name of grantee), the

[345] 44 C.F.R. § 13.36(i)(11).

FEMA Administrator, the Comptroller General of the United States, or any of their duly authorized representatives, have disposed of all such litigation, appeals, claims or exceptions related to the litigation or settlement of claims."

11. Compliance with the Clean Air Act and Clean Water Act (44 C.F.R. § 13.36(i)(12))

The regulation at 44 C.F.R. § 13.36(i)(12) requires a subgrantee to include a clause in its contracts providing for compliance with all applicable standards, orders, or requirements issued pursuant to the Clean Air Act (42 U.S.C. §§ 7401-7671q) and the Federal Water Pollution Control Act as amended (33 U.S.C. §§ 1251-1387). This requirement applies to all contracts in excess of $100,000.

The following provides clauses that a local government or Indian tribal government (acting as either subgrantee or grantee) must include in all contracts exceeding $100,000:

"Clean Air Act

(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 the state agency or local or Indian tribal government) and understands and agrees that the (name of the state agency or local or Indian tribal government) will, in turn, report each violation as required to assure notification to the (name of grantee), Federal Emergency Management Agency, and the appropriate Environmental Protection Agency Regional Office.

(3) The contractor agrees to include these requirements in each subcontract exceeding $100,000 financed in whole or in part with Federal assistance provided by FEMA.

Federal Water Pollution Control Act

(1) 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.*

(2) The contractor agrees to report each violation to the (name of the state agency or local or Indian tribal government) and understands and agrees that the (name of the state agency or local or Indian tribal government) will, in turn, report each violation as required to assure notification to the (name of grantee), Federal Emergency Management Agency, and the appropriate Environmental Protection Agency Regional Office

(3) The contractor agrees to include these requirements in each subcontract exceeding $100,000 financed in whole or in part with Federal assistance provided by FEMA."

12. Energy Efficiency (44 C.F.R. § 13.36(i)(13))

The regulation at 44 C.F.R. § 13.36(i)(13) requires the subgrantee to include a clause in its contracts concerning mandatory standards and policies related to energy efficiency that are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act.

The local government or Indian tribal government (acting as either subgrantee or grantee) must include the following clause in all contracts:

"Energy Conservation. The contractor agrees to comply with mandatory standards and policies relating to energy efficiency which are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act."

13. Suspension and Debarment

The policy of the Federal Government is to do business with, or award assistance to, persons that are "presently responsible."[346] To further this policy, the Federal Government may exclude, disqualify, or declare ineligible non-Federal persons (which include organizations and specific individuals) from Federal assistance agreements and procurement contracts. Exclusion can be based on a person's poor integrity, poor financial capability, violations of law and regulations, or poor performance.

The President has issued two executive orders addressing debarment and suspension, which are Executive Order 12,549, *Debarment and Suspension* (Feb. 18, 1986) and Executive Order 12,689, *Debarment and Suspension* (Aug. 16, 1989). The Office of Management and Budget has provided guidance for Federal agencies on the governmentwide debarment and suspension system for nonprocurement programs and activities at 2 C.F.R. pt. 180. This is often referred to as the "nonprocurement common rule." The Department of Homeland Security has, in turn, issued regulations at 2 C.F.R. pt. 3000 that adopt the nonprocurement common rule and provide supplemental policies and procedures.[347] The Department has also issued a directive and associated instruction on suspension and debarment.[348]

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[346] See 2 C.F.R. § 180.800(a)(4), (d).

[347] See 2 C.F.R. § 3000.10 ("This part adopts the Office of Management and Budget (OMB) guidance in Subparts A through I of 2 CFR part 180, as supplemented by this part, as the Department of Homeland Security policies and procedures for nonprocurement debarment and suspension. It thereby gives regulatory effect for the Department of Homeland Security to the OMB guidance as supplemented by this part. This part satisfies the requirements in section 3 of Executive Order 12549, "Debarment and Suspension" (3 CFR 1986 Comp., p. 189), Executive Order 12689, "Debarment and Suspension" (3 CFR 1989 Comp., p. 235) and 31 U.S.C. 6101 note (Section 2455, Pub. L. 103-355, 108 Stat. 3327).").

[348] DHS Directive No. 146-01, *Suspension and Debarment Program* (May 31, 2012); DHS Instruction No. 146-01-001, *Suspension and Debarment Instruction* (May 31, 2012). One of the key items in the instruction is the DHS

In general, an "excluded" party cannot receive a Federal grant award or a contract within the meaning of a "covered transaction," to include subawards and subcontracts. This includes parties that receive Federal funding indirectly, such as contractors to grantees and subgrantees. The key to the exclusion is whether there is a "covered transaction," which is any nonprocurement transaction (unless excepted[349]) at either a "primary" or "secondary" tier. Although "covered transactions" do not include contracts awarded by the Federal Government for purposes of the nonprocurement common rule and DHS's implementing regulations, it does include some contracts awarded by grantees and subgrantees.[350]

Specifically, a covered transaction includes the following contracts for goods or services:

(1) The contract is awarded by a grantee or subgrantee in the amount of at least $25,000.

(2) The contract requires the approval of FEMA, regardless of amount.

(3) The contract is for federally-required audit services.

(4) A subcontract is also a covered transaction if it is awarded by the contractor of a grantee or subgrantee and requires either the approval of FEMA or is in excess of $25,000.[351]

The two forms of exclusion are "suspension" and "debarment." Suspensions and debarments can be extended to include subsidiaries, parent companies, and other individuals.[352]

Suspension is an action taken by a suspending official that excludes a person from participating in a covered transaction for a temporary period, pending completion of an investigation or legal, debarment, or other proceedings.[353] Suspension, for a set period of time determined on a case-by-case basis, may be based on indictments, information, or adequate evidence involving environmental crimes, contract fraud, embezzlement, theft, forgery, bribery, poor performance, nonperformance, or false statements.[354] They are temporary actions that may last up to 18

Chief Financial Officer, and the Components, may approve limited exceptions to let an excluded person participate in covered non-procurement transactions, including grants. Id. V(G).

[349] 2 C.F.R. § 3000.137 ("Within the Department of Homeland Security, the Secretary of Homeland Security has delegated the authority to grant an exception to let an excluded person participate in a covered transaction to the Head of the Contracting Activity for each DHS component as provided in the OMB guidance at 2 CFR 180.135.").

[350] See 2 C.F.R. § 180.220 .

[351] 2 C.F.R. § 180.220; 2 C.F.R. § 3000.220.

[352] 2 C..F.R. § 180.625

[353] 2 C.F.R. § 180.1015.

[354] 2 C.F.R. §§ 180.700 and 180.800.

months and are effective immediately.[355]

Debarment, on the other hand, is an action taken by a debarring official to exclude a person from participating in a covered transaction for a specified period.[356] Debarment may be based on convictions, civil judgments, or fact-based cases involving crimes, contract fraud, embezzlement, theft, forgery, bribery, poor performance, nonperformance, or false statements, as well as other causes.[357] Statutory debarments occur by operation of law following criminal convictions under certain laws, i.e., the Clean Water Act and Clean Air Act.[358] These last until the debarring official certifies that the condition giving rise to the conviction has been corrected.

DHS regulations require a grantee, subgrantee, and contractor to include a term or condition in any lower-tier covered transaction into which it enters that requires the participant of that transaction to (a) comply with subpart C of the OMB guidance in 2 C.F.R. pt. 180 and (b) include a similar term or condition in any covered transaction into which it enters at the next lowest tier.[359]

The following provides a recommended clause that a local government or Indian tribal government (acting as either subgrantee or grantee) should include in all contracts that are "covered transactions." It incorporates an optional method of verifying that contractors are not excluded or disqualified.

"Suspension and Debarment

(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, its 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 subgrantee). 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

[355] 2 C.F.R. § 180.760.

[356] 2 C.F.R. § 180.925.

[357] 2 C.F.R. § 180.800.

[358] See 2 C.F.R. pt. 1532.

[359] 2 C.F.R. §§ 3000.332 and 437.

(name of state agency serving as grantee and name of subgrantee), the Federal Government may pursue available remedies, including but not limited to suspension and/or debarment.

(4) The 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."

V. PROCUREMENT BY INSTITUTIONS OF HIGHER EDUCATION, HOSPITALS, AND OTHER NONPROFIT ORGANIZATIONS

The procurement standards for institutions of higher education, hospitals, and other nonprofit organizations (collectively referred to as "subgrantees" in this section) are set forth at 2 C.F.R. §§ 215.41 through 215.48.[360] These standards are intended to ensure that subgrantees "procure supplies and services in an effective manner, and in compliance with the provisions of applicable Federal statutes and executive orders."[361] The procurement standards for institutions of higher education,[362] hospitals, and other nonprofit organizations are similar to, but not the same as, the standards for local and Indian tribal governments under 44 C.F.R. § 13.36.

The standards under 2 C.F.R. pt. 215 are generally not as prescriptive as the standards under 44 C.F.R. § 13.36. For example, 44 C.F.R. § 13.36 sets forth the various methods of competitive procurement (small purchase procedures, sealed bidding, and procurement through competitive proposals), and 2 C.F.R. pt. 215 does not describe any such methods. Similarly, 44 C.F.R. § 13.36(d) describes the necessary conditions precedent for a local or Indian tribal government to noncompetitively procure goods and services, whereas 2 C.F.R. pt. 215 does not have any such conditions precedent (only that a subgrantee shall conduct procurement transactions to provide, "to the maximum extent practical," open and free competition).

A. SETTLEMENT AND SATISFACTOR OF ALL CONTRACTUAL AND ADMINISTRATIVE ISSUES (2 C.F.R. § 215.41)

The subgrantee is the responsible authority, without recourse to FEMA, regarding the settlement and satisfaction of all contractual and administrative issues arising out of its procurements entered into in support of an award or other agreement.[363] This includes disputes, claims, protests of awards, source evaluation, or other matters of a contractual nature.[364] If a subgrantee's contractor violates a law in the course of carrying out the contract, then the subgrantee must report that violation to such Federal, State, or local authority as may have proper jurisdiction.[365]

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[360] OMB Circular A-110, *Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Nonprofit Organizations* is codified at 2 C.F.R. pt. 215.

[361] 2 C.F.R. § 215.40.

[362] This includes all institutions of higher education, even if part of a State or local government. See, e.g. DHS Office of Inspector General, Report No. DA-13-03, *FEMA Should Recover $5.3 Million of Public Assistance Grant Funds Awarded to University of Southern Mississippi-Hurricane Katrina* (Nov. 6, 2012).

[363] 2 C.F.R. § 215.41.

[364] See section IV(A)(8) of this Field Manual for a discussion of the meaning of "disputes," "protests," and "claims."

[365] 2 C.F.R. § 215.41.

B. WRITTEN STANDARDS OF CONDUCT (2 C.F.R. § 215.42)

The subgrantee must maintain written standards of conduct governing the performance of its employees engaged in the award and administration of contracts.[366] FEMA expects an applicant, when contracting with Public Assistance grant funding, to ensure that procurement transactions are conducted in a manner beyond reproach, at arm's length, with impartiality, and without preferential treatment. FEMA's regulations require the subgrantee's written standards to provide for, at a minimum, the following items.

1. No Personal Conflicts of Interest

None of the subgrantee's employees, officers, or agents shall participate in the selection, award, or administration of a contract supported by FEMA funding if a real or apparent conflict of interest would be involved.[367] Such a conflict would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization that employs, or is about to employ, any of those parties has a financial or other interest in the contractor that is selected.[368]

Although the term "financial interest" is not defined or otherwise described in the regulation, the following provides a non-exhaustive list of the types of financial interest that may give rise to a personal conflict of interest:

- Compensation, including wages, salaries, commissions, professional fees, or fees for business referrals;
- Consulting relationships (such as commercial and professional consulting and service arrangements);
- Investment in the form of stock or bond ownership or partnership interest;
- Real estate investments; and
- Business ownership

2. Prohibitions Against Gratuities

A subgrantee's officers, employees, and agents may not solicit or accept gratuities, favors, or anything of monetary value from contractors or parties to subagreements.[369] This would include entertainment, hospitality, loan, and forbearance. It would also include services as well as gifts

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[366] 2 C.F.R. § 215.42 .

[367] Id.

[368] Id.

[369] Id.

of training, transportation, local travel, and lodgings and meals, whether provided in-kind, by purchase of a ticket, payment in advance, or reimbursement after the expense has been incurred.[370]

3. Permitted Conflicts of Interests and Gifts

As an exception to the general prohibition against gratuities and financial interests, subgrantees may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value.[371] The regulations do not provide any additional clarity as to what comprises "substantial" or "nominal intrinsic value," such that the content of any such exception is left to the discretion of the subgrantee.

Notwithstanding, the Standards of Conduct for Employees of the Executive Branch provide a useful guide in analyzing a subgrantee's exceptions. First, the regulations at 5 C.F.R. pt. 2640 set forth exemptions concerning prohibited conflicts of interest for certain financial interests that are too remote or too inconsequential to affect the integrity of the services of Federal officers or employees.[372] Second, 5 C.F.R. pt. 2640 provides guidance to Federal agencies on the factors to consider when issuing individual waivers from the conflict of interest prohibitions based on a conclusion that the financial interest is not so substantial as to be deemed likely to affect the integrity of the services of Federal officers and employees.[373] Third, the regulations at 5 C.F.R. pt. 2635 provide certain exclusions and exceptions from the gifts from outside sources prohibitions.[374]

4. Requirement for Disciplinary Action

The subgrantee's procurement standards of conduct must provide for disciplinary action when its employees, officers, or agents violate the standards.[375]

5. Arms-Length Transactions and Apparent Conflict of Interest

There may be circumstances where a subgrantee's employee, officer, or agent acts in a way so as

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[370] Cf. 5 C.F.R. § 2635.203(b) (defining "gift" under the Standards of Conduct for Employees of the Executive Branch).

[371] 2 C.F.R. § 215.42.

[372] 5 C.F.R. pt. 2640, subpart B (exemptions to certain financial interests). These regulations were issued to implement 18 U.S.C. § 208(b)(2).

[373] 5 C.F.R. pt. 2640, subpart and C (individual waivers). These regulations provide guidance to Federal agencies when considering individual waivers pursuant to 18 U.S.C. § 208(b)(1).

[374] See 5 C.F.R. §§ 2635.203 (providing exclusions for the meaning of gift, such modest items of food and refreshments offered other than part of a meal); 2635.204 (providing exceptions to the gift prohibitions, such unsolicited non-cash gifts of a fair market value of $20 per occasion with a limit of $50 per year per source).

[375] 2 C.F.R. § 215.42.

to avoid an actual conflict of interest, but where the commercial transaction in question comprises an apparent conflict of interest or something less than an arms-length transaction.[376] "Arms-length," although not defined in the Circular, means "of or relating to dealings between two parties who are not related or not on close terms and who are presumed to have roughly equal bargaining power."[377] The "arms-length" requirement is part of sound business practice directed at avoiding conflicts of interest or the appearance of same.[378]

First, FEMA may conclude that a subgrantee's officer, employee, or agent's participation or other involvement in the award and administration of a contract—although not an actual conflict of interest—may still be an apparent conflict of interest.

Second, a subgrantee may conduct a procurement and award a contract inconsistent with an arms-length transaction, and OMB Circular A-122 offers guidance in this regard.[379] Paragraph A.2.a of OMB Circular A-122 (applicable to nonprofit organizations) provides that, in order to be allowable under an award, a cost must "[b]e reasonable for the performance of the award and be allocable thereto under these principles. Paragraph A.3 defines "reasonable costs," and, subparagraph A.3.b provides that:

"in determining the reasonableness of a given cost, consideration shall be given to…[t]he restraints or requirements imposed by such factors as generally accepted sound business practices, *arms-length bargaining*, Federal and State law and regulations, and terms and conditions of the award."[380]

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[376] See, e.g. DHS Office of Inspector General, Report No. DD-13-11, *FEMA Should Recover $46.2 Million of Improper Contracting Costs from Federal Funds Awarded to the Administrators of the Tulane Educational Fund, New Orleans, Louisiana*, pp. 16-18 (Aug. 15, 2013):

> "Additionally, Tulane and the primary contractor awarded three contracts or subcontracts to vendors who had previously or later made contributions to Tulane, one of the most significant of which was a $2.0 million donation from the primary contractor. Also, Tulane awarded several other disaster contracts to entities with relationships with Tulane, including previously used contractors, alumni, and members of various Tulane boards. Tulane representatives said that it made these awards in a manner consistent with its internal policies, and were not aware of the open and free competition requirements. ***Certain of these awards could potentially represent real or apparent organizational conflicts of interest*** under 2 C.F.R. § 215.43." (emphasis added)

[377] Black's Law Dictionary 123 (9th Ed. 2009).

[378] Cf. Department of Health and Human Services Departmental Appeals Board, Appellate Division, Decision No. 2079, *Kansas Advocacy & Protective Services*, pp. 15-16 (Apr. 30, 2007) and Decision No. 976, *All Indian Pueblo Council, Inc.* (Aug. 10, 1988).

[379] OMB Circular A-122, *Cost Principles for Non-Profit Organizations* (codified at 2 C.F.R. pt. 230).

[380] 2 C.F.R. pt. 230, Appendix A, ¶ A.2.a.

Example – Apparent Conflict of Interest and Arms-Length Transaction

A private nonprofit (PNP) organization owns and operates numerous facilities that are damaged by a major disaster, and seeks financial assistance under the Public Assistance Program for debris removal, emergency protective measures, and permanent restorative work for these facilities. The PNP desires a contractor to perform a number of project management tasks, including Project Worksheet development, meeting with FEMA, and myriad other tasks that FEMA considers eligible as direct administrative costs under a Public Assistance project.

The PNP's Vice President participated in the development and approval of the request for proposals issued by the PNP. The Vice President happens to be experienced in the services to be performed as detailed in the solicitation, and submits a response to the solicitation. The Vice President, along with other PNP officials, reviews each of the submissions to the solicitation, although the Vice President recuses herself in the evaluation of her own submission and in the final award decision.

The PNP informs the Vice President that it has decided to award the contract to her. Because the PNP's written standards of conduct prohibit any PNP officer from entering into a contract or consultant agreement with the PNP, the Vice President resigns her position. The PNP, on the day after the resignation, awards the contract to the former Vice President.

From the manner in which the PNP procured the services of the Vice President, FEMA would likely conclude that—at the very least—there was an apparent conflict of interest in violation of 2 C.F.R. § 215.42 resulting from the Vice President's involvement in the procurement, even though she was not involved in the final award decision or reviewing her own solicitation.

C. COMPETITION (2 C.F.R. § 215.43)

The subgrantee must, pursuant to 2 C.F.R. § 215.43, conduct all procurement transactions "in a manner to provide, ***to the maximum extent practical***, open and free competition."[381] Although not defined in the regulation, "open and free competition"[382] generally means that a complete requirement is publicly solicited and all responsible sources are permitted to compete.[383] There

[381] 2 C.F.R. § 215.43 (emphasis added).

[382] Cf. 48 C.F.R. § 2.101 ("Full and open competition, when used with respect to a contract action, means that all responsible sources are permitted to compete."). We note that the procurement standards applicable to local and Indian tribal governments use the phrase "full and open" as opposed to "free and open." 44 C.F.R. § 13.36(c). FEMA does not consider the words "free" or "full" as distinguishable.

[383] Department of Homeland Security, Office of Inspector General,OIG-14-12-D, *FEMA Should Recover $10.9 Million of Improper Contracting Costs from Grant Funds Awarded to Columbus Regional Hospital, Columbus, Indiana*, p. 4 (Dec. 4, 2013) ("Generally, open and free competition means that all responsible sources are allowed to compete for contracts.")

are numerous benefits to free and open competition, such as an increased probability of reasonable pricing from the most qualified contractor.[384] Such competition also works to prevent fraud, favoritism, collusion, waste, and abuse.[385] Open and free competition also increases the probability of achieving reasonable pricing from the most qualified contractors and allows greater opportunity for small businesses, minority firms, and women's enterprises to compete for federally funded work.[386]

The free and open competition requirement has proven to be one of the most common problems with subgrantee procurements in recent years and comprises a majority of audit findings by OIG. One noncompetitive practice often encountered during audits of subgrantees has been the solicitation of a requirement from only a limited number or pool of contractors.[387] Another

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[384] Department of Homeland Security, Office of Inspector General, OIG-14-46-D, *FEMA's Dissemination of Procurement Advice Early in Disaster Response Periods,* pp. 5-6 (Feb. 28, 2014); DHS Office of Inspector General, Report No. DA-13-03, *FEMA Should Recover $5.3 Million of Public Assistance Grant Funds Awarded to the University of Southern Mississippi – Hurricane Katrina* (Nov. 6, 2012).

[385] Id.

[386] Department of Homeland Security, Office of Inspector General, OIG-14-12-D, *FEMA Should Recover $10.9 Million of Improper Contracting Costs from Grant Funds Awarded to Columbus Regional Hospital, Columbus, Indiana*, p. 6 (Dec. 04, 2013)

[387] See, e.g. the following audit reports:

(1) DHS Office of Inspector General Audit No. 14-12-D, *FEMA Should Recover $10.9 Million of Improper Contracting Costs from Grant Funds Awarded to Columbus Regional Hospital*, pp. 6-7 (Dec. 13, 2014) ("The Hospital awarded two contracts totaling $8,699,025 for nonexigent work without open and free competition. In addition, at least one of the contracts included unreasonable prices. Generally, open and free competition means that all responsible sources are allowed to compete for contracts. However, the Hospital did not publicly advertise the two contracts, but rather invited a limited number of preselected contractors to bid.");

(2) DHS Office of Inspector General Report No. DD-13-11, *FEMA Should Recover $46.2 Million of Improper Contracting Costs from Federal Funds Awarded to the Administrators of the Rule Educational Fund* (Aug. 15, 2013) ("Tulane awarded four noncompetitive contracts totaling $5,677,034 after exigent circumstances no longer existed. We consider the exigency to have ended in June 2006 just before Tulane opened its Medical School campus to students. Federal regulations at 2 CFR Part 215.43 require all procurement transactions be conducted in a manner to provide, to the maximum extent practical, open and free competition, which means that all responsible sources are allowed to compete for contracts. However, rather than publicly advertising these four contracts, Tulane invited only preselected contractors to bid on them."); and

(3) DHS Office of Inspector General Report No. 14-95-D, *FEMA Should Recover $8.0 Million of $26.6 Million in Public Assistance Grant Funds Awarded to St. Stanislaus College Preparatory in Mississippi – Hurricane Katrina* (May 22, 2014) ("Under Project 9689, St. Stanislaus did not promote an open and free procurement process when it hired a contractor to demolish its damaged dining hall. Instead of soliciting bids from all sources for the work totaling $156,350, St. Stanislaus contacted several specific contractors to obtain quotes and selected a firm that had previously performed debris cleanup work for the school. However, this process restricted competition because it did not provide an opportunity for all interested contractors to bid for the contract work.").

impermissible practice is the sole-source procurement of services from a single vendor who has existing business relationships with the subgrantee[388] or familiarity with the work in question.

Noncompetitive Procurement by Nonprofit Organization – Solicitation of Requirement from a Limited Number of Vendors

DHS Office of the Inspector General Report No. DA-13-20 (Jun. 2013)
FEMA Should Recover $3.8 Million of Public Assistance Grant Funds Awarded to Kenergy Corporation, Henderson, Kentucky

Background. A severe winter storm impacted Kentucky in January 2009, and damaged the electrical distribution system of Kenergy, a private nonprofit electric utility cooperative. Kenergy awarded two noncompetitive T&M contracts for the permanent repairs performed after February 18, 2009, which was after emergency electrical power had been restored to all of Kenergy's customers. For two contracts valued at $1,989,277, Kenergy did not openly compete the work, but instead requested information from several contractors that Kenergy officials believed were capable of doing the work. They prequalified several contractors and sent requests for quotations to those contractors, awarding the contract work to the lowest bidders.

General Summary of OIG Finding. The OIG concluded that the need to restore electrical power constituted exigent circumstances that warranted the use of noncompetitive contracts through February 18, 2009, because lives and property were at risk. However, Kenergy should have openly competed the permanent repair work after that date because exigent circumstances no longer existed to justify the use of noncompetitive contracts.

[388] See, e.g. the following audit reports:

(1) DHS Office of Inspector General, Report No. DA-12-18, FEMA Public Assistance Funds Awarded to Henderson Point Water and Sewer District, Pass Christian, Mississippi (May 11, 2012) ("The District used a contractor with which it had an existing business relationship to complete the work authorized under the FEMA projects. District officials said that they made that decision because they were operating under a state of emergency at the time the replacement and repair work began on the sewer system. However, both projects were for permanent repair work (Category F) and should have been openly competed."); and

(2) DHS Office of Inspector General, Report No. DA-11-23, *FEMA Public Assistance Grant Funds Awarded to Gulf Coast Community Action Agency, Gulfport, Mississippi* (Aug. 26, 2011) ("The Agency did not openly compete $273,137 of contracted architectural and engineering (A&E) services under Project 11134 for permanent construction work (A.E. Perkins facility) that began approximately 1 year after the disaster. ***Instead, the Agency used a firm with which it had an existing relationship under a pre-Katrina contract to perform the services.*** Federal regulation 2 CFR 215.43 requires all procurement transactions to be conducted in a manner to provide, to the maximum extent practical, open and free competition. The Agency's board meeting notes from September 2006 indicated that there were no other architectural firms that were operational or that could handle the size of the rebuilding project. However, the procurement files contained no documentation to indicate how the Agency reached such a decision.") (emphasis added).

1. Noncompetitive Procurements

Noncompetitive procurements not providing for free and open competition will be scrutinized by FEMA and/or likely be challenged by the OIG during an audit, even if they result in the same or lower price than if the procurement was conducted through free and open competition. Notably, there is no specific guidance in 2 C.F.R. pt. 215 as to when a noncompetitive procurement is appropriate, which is a key distinction from the procurement standards at 44 C.F.R. § 13.36 for local and Indian tribal governments.

As discussed in section IV(C)(4) of this Field Manual, 44 C.F.R. § 13.36(d) sets forth the two conditions precedent that must be met in order for local and Indian tribal governments to conduct a noncompetitive procurement. The first condition precedent is that the award of a contract must be "*infeasible*" under small purchase procedures, sealed bids, or competitive proposals.[389] The second condition precedent is that one of four circumstances applies, and the most frequently relied upon circumstance is where the public *exigency* or *emergency* for the requirement will not permit delay resulting from competitive solicitation.

The regulations at 2 C.F.R. pt. 215, however, contain no such conditions precedent, and FEMA will evaluate the appropriateness of a noncompetitive procurement by using the "maximum extent practical" standard. The term "practical," while not defined by the regulation generally means "capable of being put to use or account," "of, relating to, or manifested in practice or action: not theoretical or ideal."[390]

When evaluating whether a noncompetitive procurement was permissible, the OIG has focused on whether or not there were "exigent" circumstances that would warrant something less than free and open competition. Its view of what is "exigent" in many cases focuses on a life, health,

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[389] 44 C.F.R. § 13.36(d)(4)(i).

[390] "Practical." Merriam-Webster.com. Accessed June 18, 2014. http://www.merriam-webster.com/dictionary/practical:

(1) a: of, relating to, or manifested in practice or action : not theoretical or ideal <a practical question> <for all practical purposes>

b: being such in practice or effect : virtual <a practical failure

(2) actively engaged in some course of action or occupation <a practical farmer>

(3) capable of being put to use or account : useful <he had a practical knowledge of French>

(4) a: disposed to action as opposed to speculation or abstraction

b: (1): qualified by practice or practical training <a good practical mechanic> (2): designed to supplement theoretical training by experience

(5) concerned with voluntary action and ethical decisions <practical reason>

and safety standard.[391] For example, in the case of private nonprofit electric cooperatives awarding a noncompetitive contract, the OIG stated the following:

> "The contracts were awarded for work after February 18, 2009, when emergency electrical power had been restored to all of Kenergy's customers. We concluded that the need to restore electric power constituted exigent circumstances that warranted the use of noncompetitive contracts through February 18, 2009, because lives and property were at risk. However, Kenergy should have openly competed permanent repair work after such date because exigent circumstances no longer existed to justify the use of noncompetitive contracts."[392]

Despite the focus on lives and safety in the case of determining "exigent" circumstances for institutions of higher education, hospitals, and other private nonprofit organizations, the OIG has also recognized other types of "exigent" circumstances where an applicant needed to perform restorative activities critical to reopening a hospital to its full operating capability,[393] reopening an institution of higher education,[394] and reopening a private nonprofit educational facility.[395]

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[391] See also the discussion of exigency and emergency in the OIG decisions cited in section IV(C)(4) of this Field Manual. Notably, the OIG does not appear to draw and distinctions in its evaluation of an exigency or emergency when evaluating the procurement under 44 C.F.R. § 13.36 (for local and Indian tribal governments) and 2 C.F.R. pt. 215 (for institutions of higher education, hospitals, and other private nonprofit organizations).

[392] See DHS Office of Inspector General Report No. DA-13-20, *FEMA Should Recover $3.8 Million of Public Assistance Grant Funds Awarded to Kenergy Corporation, Henderson, Kentucky*, p. 3 (Jun. 18, 2013); *compare* DHS Office of Inspector General Report No. 14-11, *FEMA Should Recover $6.1 Million of Public Assistance Grant Funds to Orlando Utilities Commission under Hurricane Frances* (Dec. 2013), where the Office of Inspector General asserted the same meaning of "exigency" under 44 C.F.R. § 13.36(d) with respect to a *public* utilities commission ("The Utility restored electrical power to almost all of its customers by September 9, 2004, which we consider the end of the emergency period. We did not question about $2.6 million in contract costs the Utility claimed under Project 3927 for emergency restoration of power during this period. The $6.1 million we question is for debris removal and electrical repair work that the Utility completed after it restored emergency power to its customers. After such time, exigent circumstances no longer existed to warrant the use of noncompetitive contracts.").

[393] See DHS Office of Inspector General Audit No. 14-12-D, *FEMA Should Recover $10.9 Million of Improper Contracting Costs from Grant Funds Awarded to Columbus Regional Hospital*, pp. 6-7 (Dec. 13, 2014) ("...we did not question all of the costs for the two contracts because contractors performed the majority of the work under exigent circumstances to restore the Hospital to its full operating capability.").

[394] See DHS Office of Inspector General Report No. DD-13-11, *FEMA Should Recover $46.2 Million of Improper Contracting Costs from Federal Funds Awarded to the Administrators of the Rule Educational Fund* (Aug. 15, 2013) ("We did not fault Tulane for awarding this contract without competition because exigent circumstances existed at the time. Generally, we consider circumstances to be exigent when lives or property are at stake, or in this case, when a city or community needs to reopen its schools.").

[395] See DHS Office of Inspector General Report No. 14-95-D, *FEMA Should Recover $8.0 Million of $26.6 Million in Public Assistance Grant Funds Awarded to St. Stanislaus College Preparatory in Mississippi – Hurricane Katrina*, p.5 (May 2014) ("Our review of Projects 10695 and 10291 revealed that St. Stanislaus did not comply with Federal contracting requirements for contract work procured under the projects. However, we did not question any

2. Organizational Conflicts of Interest, Award Decisions, and Solicitations

The regulation at 2 C.F.R. § 215.43 provides additional guidance as it relates to organizational conflict of interest, award decisions, and solicitations, which are addressed below.

i. Organizational Conflicts of Interest

A subgrantee is required to be alert to organizational conflicts of interest.[396] In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, invitations for bid, and/or requests for proposals shall be excluded from competing for such procurements.[397] The regulation, however, does not define nor provide additional guidance as to the scope and meaning of "organizational conflict of interest." It is, therefore, helpful to understand the meaning and scope of organizational conflicts of interest with respect to Federal contracting, and section IV(B)(5) of this Field Manual contains a detailed description of the applicable rules and prohibitions.

ii. Noncompetitive Practices

A subgrantee is also required to be alert to noncompetitive practices among contractors that may restrict or eliminate competition or otherwise restrain trade.[398] Noncompetitive practices are different than organizational conflicts of interest, in that there is often some form of misconduct. The regulation, however, does not define noncompetitive practices nor provide any additional explanation of what would comprise such a practice. The most common form of noncompetitive practice is "bid rigging," which is discussed in detailed at section IV(B)(1)(iii) of this Field Manual.

iii. Clear Specifications and Requirements

The subgrantee's solicitations must clearly set forth all requirements that the bidder or offeror shall fulfill in order for the bid or offer to be evaluated by the subgrantee.[399] The purpose of this requirement is to enable bidders or offerors to understand the requirements and prepare sound

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costs under those projects because (1) the contract work was for activities critical to reopening the school, and (2) FEMA had taken corrective action on the noncompliance issues by disallowing unreasonable and ineligible contract costs before our audit.").

[396] 2 C.F.R. § 215.43.

[397] Id.; see DHS Office of Inspector General, Report No. DD-11-15, *FEMA Public Assistance Grant Awarded to Saint Mary's Academy (SMA), New Orleans, Louisiana*, p. 3 (Aug. 5, 2011) (The subgrantee gave an unfair competitive advantage to a subcontractor on an $8.7 million contract by allowing the subcontractor to prepare drawings and specifications for the scope of work.).

[398] Id.

[399] Id.

proposals to satisfy those requirements. In addition, the subgrantee's written procurement procedures must provide for a solicitation for goods and services to have certain elements, discussed in section V(D) below.

iv. Basis for Contract Award

A subgrantee must make an award to the bidder or offeror whose bid or offer is responsive to the solicitation and is most advantageous to the subgrantee, price, quality, and other factors considered.[400]

Qualifications-Based Procurement of Architectural/Engineering Services

The regulation at 2 C.F.R. § 215.43 states that a subgrantee must make an award to the bidder or offeror whose bid or offer is responsive to the solicitation and is "most advantageous to the subgrantee, price, quality, and other factors considered." There is, however, no specific method of procurement identified in 2 C.F.R. pt. 215 that must be followed by a nonprofit organization to ensure free and open competition and to ensure an award is made to the bidder or offeror whose bid or offer was most responsive. There is also no specific mention of any unique processes applicable to architectural and engineering services where price is not considered as one of the evaluation factors.

These are important distinctions from 44 C.F.R. § 13.36, which sets forth the procurement requirements for local and Indian tribal governments under grants. Notably, this regulation provides that a local or Indian tribal government may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services where competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. [401]

Similar to 44 C.F.R. § 13.36, the Federal Acquisition Regulation authorizes the Federal Government to acquire architect-engineering services through competitive proposals, where contractors responding to a solicitation are evaluated and ranked by an evaluation board according to non-price selection criteria.[402] The final selection authority selects a contractor and, once the selection is made, the contracting officer negotiates a final contract, inclusive of a fair and reasonable price for the services.[403] There is a requirement for the Federal

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[400] Id.

[401] 44 C.F.R. § 13.36(d)(3)(5).

[402] 41 C.F.R. pt. 36 (Construction Contracts), subpart 36.6 (Architect-Engineering Services).

[403] 41 C.F.R. § 36.606 (Negotiation). Negotiations must be conducted in accordance with 41 C.F.R. pt. 15 (Contracting by Negotiation).

government to prepare an independent cost estimate before commencing negotiations.[404]

FEMA has, accordingly, taken the position that a subgrantee subject to 2 C.F.R. pt. 215 may conduct a qualifications-based procurement for A/E professional services in the same manner as detailed in 44 C.F.R. pt. 13. There is, notably, still a requirement to perform a cost or price analysis.

v. Rejection of Bids and Offers

A subgrantee may reject any and all bids when it is in the interest of the subgrantee to do so.[405] Notwithstanding, the subgrantee should contemporaneously memorialize the rationale for the rejection of a bid or offer, specifically in the case where the rejected bid or offer was the lowest price and otherwise responsive to the solicitation.

D. PROCUREMENT PROCEDURES (2 C.F.R. § 215.44(a))

A subgrantee must establish written procedures that provide for, at a minimum, the three items set forth at 2 C.F.R. § 215.44(a)(1)-(3).[406] These are the minimum requirements, and the subgrantee is free to adopt any other procedures so long as they do not conflict with the Federal procurements standards at 2 C.F.R. pt. 215.

1. Purchasing Only Necessary Items and Services (2 C.F.R. § 215.44(a)(1))

The subgrantee's written procedures must provide for procedures to avoid the purchase of unnecessary items.[407] The purpose of this requirement is to limit purchases with Federal assistance to only the items and services necessary to carry out the award.

2. Lease vs. Purchase (2 C.F.R. § 215.44(a)(2))

A subgrantee's written procedures must provide for, where appropriate, an analysis of lease vs. purchase alternatives to determine which would be the most economical and practical procurement for the Federal Government.[408] Within the context of the Public Assistance Program, there will be numerous occasions when a subgrantee would perform this analysis, such as the acquisition of equipment necessary to respond or recover to a major disaster or temporary facilities (which is detailed at Section IV(A)(3) of this Field Manual).

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[404] 41 C.F.R. § 36.605 (Government Cost Estimate for Architect-Engineering Work).

[405] 2 C.F.R. § 215.43.

[406] See DHS Office of Inspector General, Report No. DD-13-08, *FEMA Should Disallow $4.1 Million of the $48.5 Million Public Assistance Grant Awarded to ARK Valley Electric Cooperative, Kansas* (Apr. 16, 2013).

[407] 44 C.F.R. § 215.44(a)(1).

[408] 44 C.F.R. § 215.44(a)(2).

3. Solicitations for Goods and Services (2 C.F.R. § 215.44(a)(3))

The regulation at 2 C.F.R. § 215.44(a)(3) sets forth various requirements that a subgrantee's solicitation for goods and services must provide for.

i. Description of Technical Requirements

The solicitation must provide for a clear and accurate description of the technical requirements for the material, product, or service to be procured.[409] In competitive procurements, such a description must not contain features which unduly restrict competition.[410] The description of the technical requirements must be stated, whenever practicable, in terms of functions to be performed or performance required, including the range of acceptable characteristics or minimum acceptable standards.[411] In addition, the solicitation must provide specific features of "brand name or equal" descriptions that bidders are required to meet when such items are included in the solicitation.[412]

This regulation notably expresses a preference for performance or functional specifications, but does not prohibit the use of detailed technical specifications when appropriate. A performance specification describes an end result, an objective, or standard to be achieved, and leaves the determination of how to reach the result to the contractor.[413] Using such a model, the subgrantee should describe what the product should be able to do or the services to accomplish without imposing unnecessarily detailed requirements on how to accomplish the tasks.

ii. Evaluation Factors

The solicitation must state the requirements which the bidder/offeror must fulfill and all other factors to be used in evaluating bids or proposals.[414]

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[409] 44 C.F.R. § 215.44(a)(3)(i); see DHS Office of Inspector General, Report No. 14-12-D, *FEMA Should Recover $10.9 Million of Improper Contracting Costs from Grant Funds Awarded to Columbus Regional Hospital*, p. 5 (Dec. 4, 2013) (subgrantee did not develop a scope of work for certain contracts before award).

[410] 44 C.F.R. § 215.44(a)(3)(i).

[411] 44 C.F.R. § 215.44(a)(3)(iii).

[412] 44 C.F.R. § 215.44(a)(3)(iv); see DHS Office of Inspector General, Report No. DD-11-15, *FEMA Public Assistance Grant Awarded to Saint Mary's Academy (SMA), New Orleans, Louisiana*, p. 3 (Aug. 5, 2011) (subgrantee gave a particular contractor an additional advantage on the same contract because it identified "[contractor name] or equal" in its request for bid documents but did not describe the specific technical requirements that would equal that contractor's product).

[413] See Stuyvesant Dredging Co. v. United States, 834 F.2d 1576 (Fed. Cir. 1987). Design specifications, on other hand, set forth in detail the materials to be employed and the manner in which the work is to be performed, and the contractor is required to follow them as one would a road map and without deviation. See L.L. Simmons Co. v. United States, 412 F.2d 1360 (Ct. Cl. 1969).

[414] 44 C.F.R. § 215.44(a)(3)(ii).

iii. Conservation and Protection

The solicitation must include a preference, to the extent practicable and economically feasible, for products and services that conserve natural resources and protect the environment and are energy efficient.[415]

iv. Metric System

The solicitation must provide for the acceptance, to the extent practicable and economically feasible, of products and services dimensioned in the metric system of measurement.[416] FEMA, as a matter of practice, generally treats this requirement as nonmaterial during its evaluation of subgrantee procurements.

E. CONTRACTING WITH SMALL BUSINESSES, MINORITY-OWNED FIRMS, AND WOMEN'S BUSINESS ENTERPRISES

1. Steps to Further Goal of Using Small Businesses, Minority-Owned Firms, and Women's Business Enterprises (2 C.F.R. § 215.44(b))

The regulation at 2 C.F.R. § 215.44(b) requires a subgrantee to make "positive efforts... to utilize small businesses, minority-owned firms, and women's business enterprises, whenever possible."[417] In order to further this goal, the regulations require a subgrantee to take five specific steps described below. The regulation does not preclude a subgrantee from taking additional steps, but rather sets a baseline level of effort.

- ***Use of Such Firms to the Fullest Extent Practicable.*** A subgrantee must ensure that small businesses, minority-owned firms, and women's business enterprises are used "to the fullest extent practicable."[418]
- ***Advertise and Schedule.*** A subgrantee must make information on forthcoming opportunities available and arrange time frames for purchases and contracts to encourage and facilitate participation by small businesses, minority-owned firms, and women's business enterprises.[419]
- ***Subcontracting.*** A subgrantee must consider in the contract process whether firms competing for larger contracts intend to subcontract with small businesses, minority-

[415] 2 C.F.R. § 215.44(a)(3)(vi).

[416] 2 C.F.R. § 215.44(a)(3)(v).

[417] 2 C.F.R. § 215.44(b).

[418] 2 C.F.R. § 215.44(b)(1).

[419] 2 C.F.R. § 215.44(b)(2).

owned firms, and women's business enterprises.[420]

- ***Consortiums.*** A subgrantee must encourage contracting with consortiums of small businesses, minority-owned firms, and women's business enterprises when a contract is too large for one of these firms to handle individually.[421]
- ***Use of Certain Federal Services.*** A subgrantee must use the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Department of Commerce's Minority Business Development Agency in the solicitation and utilization of small businesses, minority-owned firms, and women's business enterprises.[422]

The failure to take the steps above is one of the most common findings in OIG audits.[423] Furthermore, the following example demonstrates that failure to take the required steps can result in the potential disallowance of costs, even if the subgrantee otherwise conducts a procurement in a manner consistent with free and open competition.

Example – Taking Affirmative Steps to Assure the Use of Small and Minority Firms, Women's Business Enterprises, and Labor Surplus Area Firms

DHS Office of Inspector General Report No. DS-13-14 (Sep. 2013)
FEMA Should Recover $7.5 Million of the $43.2 Million Public Assistance Grant Awarded to Craighead Electric Cooperative Corporation, Arkansas

Background. A nonprofit rural electric cooperative ("Cooperative") serves eight counties in northeast Arkansas and provides electricity to more than 27,000 customers. A severe winter storm impacts the State of Arkansas damages or destroys roughly 8000 utility poles throughout the Cooperative's service area, and these damaged or destroyed poles caused power outages to approximately 25,000 of the Cooperative's customers. The Cooperative used free and open competition in awarding $5.6 million in contracts for permanent work.

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[420] 2 C.F.R. § 215.44(b)(3).

[421] 2 C.F.R. § 215.44(b)(4).

[422] 2 C.F.R. § 215.44(b)(5).

[423] DHS Office of Inspector General, Report No. 14-12-D, *FEMA Should Recover $10.9 Million of Improper Contracting Costs from Grant Funds Awarded to Columbus Regional Hospital*, p. 5 (Dec. 4, 2013); DHS Office of Inspector General, Report No. DD-13-14, *FEMA Should Recover $7.5 Million of the $43.2 Million Public Assistance Grant Awarded to Craighead Electric Cooperative Corporation, Arkansas* (Sep. 2013); DHS Office of Inspector General, Report No. DD-13-11, *FEMA Should Recover $46.2 Million of Improper Contracting Costs from Federal Funds Awarded to the Administrators of the Tulane Educational Fund, New Orleans, Louisiana*, pp. 16-18 (Aug. 15, 2013); DHS Office of Inspector General, Report No. DD-12-15, *FEMA Public Assistance Grant Funds Awarded to Ochsner Clinic Foundation, New Orleans, Louisiana* (Jun. 20, 2012); DHS Office of Inspector General, Report No. DD-11-21, *FEMA Public Assistance Grant Awarded to Jesuit High School, New Orleans, Louisiana* (Sep. 26, 2011).

However, the Cooperative did not take the required steps to assure that it used small businesses, minority-owned firms, and women's business enterprises when possible. Cooperative officials said that they were not aware of this requirement and that all businesses had an equal opportunity to bid because they advertised the projects in the newspaper. Cooperative officials also said that they were concerned about cost and contractor experience, rather than a contractor's business affiliation. The Cooperative also did not include the required provisions in its contracts

Summary of Relevant Finding. The OIG found that the Cooperative did not comply with the requirement to take affirmative steps to use small businesses, minority-owned firms, and women's business enterprises, and recommended disallowance of the $5.6 million in contract costs. FEMA did not concur with this recommendation to disallow all costs. FEMA evaluated the costs for reasonableness, found them reasonable, and elected not to take any enforcement remedy.

2. Meaning of Small Business, Minority-Owned Firm, and Women's Business Enterprise

The regulation at 2 C.F.R. § 215.45 does not, unfortunately, define the terms women's businesses enterprise, small business, or minority-owned firm. In the absence of such definitions, FEMA applies the meaning of those terms described in section IV(D) of this Field Manual.

3. Set Asides for Small Businesses, Minority-Owned Firms, and Women's Business Enterprises

See section IV(D) for a discussion of this issue.

F. TYPES OF CONTRACTS (2 C.F.R. § 215.44(c))

Subgrantees have the discretion of determining the type of contract to be used (such as fixed price, cost-reimbursement, and incentive[424] contracts), but the type of contract must be "appropriate for the particular procurement and for promoting the best interest of the program or project involved."[425]

[424] An "incentive contract" is one where a contractor stands to make more money if its performance is superior or ahead of schedule. The guidance on the use of such contracts by the Federal Government in its procurement is forth in the Federal Acquisition Regulations, 48 C.F.R. subpart 16.4.

[425] 2 C.F.R. § 215.44(c). The Federal Acquisition Regulations set forth its guidance concerning the Federal Government's selection of a contract type in its procurements at 48 C.F.R. subpart 16.1.

1. Cost-Plus-Percentage-of-Cost Contract

The regulation at 2 C.F.R. § 215.44(c) specifically prohibits the cost-plus-percentage-of-cost or percentage-of-construction cost" methods of contracting. The reason for this prohibition is that such contracts provide a disincentive for contractors to control costs—the more contractors charge, the more profit they make. Section IV(E)(4) of this Field Manual contains a detailed discussion of these types of prohibited contracts.

Prohibited Use of Cost-Plus-Percentage of Cost Contract

DHS Office of Inspector General Audit No. 14-12-D (Dec. 13, 2014)
FEMA Should Recover $10.9 Million of Improper Contracting Costs from Grant Funds Awarded to Columbus Regional Hospital

Background. Severe storms and flooding impacted the State of Indiana from May 30 to June 27, 2008, and damaged the Columbus Regional Hospital ("Hospital"), which is a county nonprofit regional health care facility that provides healthcare services to residents of multiple counties. Floodwaters from the incident inundated the entire basement and first floor of the Hospital, and Hospital officials closed the facility as a result of the flood and partially reopened it in October 2008. The OIG determined that exigent circumstances existed until April 2009, when the hospital returned to full capacity.

The Hospital awarded two contracts totaling $44,725,020 using prohibited cost-plus-percentage-of-cost-contracts. First, the Hospital awarded a cost-plus-percentage-of-cost contract for the phase 1 rebuilding of the hospital, and the contractor added a 4.5 percent mark-up to all subcontractor/vendor costs. Second, the Hospital also used the same type of cost-plus contract for emergency clean-up after the flooding, which included a 15 percent mark-up on all costs.

General Summary of* Relevant *OIG Finding. The OIG determined that both contracts were entirely ineligible, but did not question all of the costs for the two contracts because contractors performed the majority of the work under exigent circumstances to restore the hospital to its full operating capacity. However, because the Hospital "should have known better than to use cost-plus-percentage-of-costs contract and because such contracts are so egregious," the OIG believed that "FEMA should at least disallow the mark-ups on costs."[426]

2. Time and Materials Contracts

One notable distinction between 44 C.F.R. § 13.36(b)-(i) and 2 C.F.R. § 215.44(c) concerns T&M contracts. For local and Indian tribal governments, 44 C.F.R. § 13.36(b)(10) provides that

[426] There were many other contracts at issue under this audit and many other audit findings not discussed here.

a local or Indian tribal government subgrantee may use a T&M contract only after a determination that no other contract is suitable, and if the contract includes a ceiling price that the contractor exceeds at its own risk.[427] The regulation at 2 C.F.R. § 215.44(c) contains no such equivalent conditions precedent. In other words, the regulation does not require the subgrantee to make a determination that no other contract type is suitable and include a ceiling price.

Notwithstanding, FEMA will review a hospital's, institution of higher education's, or other nonprofit organization's selection of a T&M contract to analyze whether the contract was "appropriate for the particular procurement" and "promotes the best interest" of the Public Assistance project. FEMA has also promulgated (as discussed in Section IV(A)(6) of this Field Manual) various policies concerning the use of T&M contracts that are applicable to all Public Assistance applicants, including hospitals, institutions of higher education, or other nonprofit organizations.

We note that the OIG has made findings during audits of private nonprofit organizations that—in the case where the organization used a T&M contract—the organization did not include a cost ceiling or a not-to-exceed clause, referencing the Public Assistance Guide as the source of this requirement. For example, in the audit of Kenergy Corporation discussed in section V(C)(1) above, the subgrantee awarded two noncompetitive T&M contracts for permanent repairs to its electrical distribution system. In addition to issues over the noncompetitive nature of the contracts beyond the exigent period, the OIG stated that "Kenergy awarded the contracts without a cost ceiling or not-to-exceed clause...," and cited to the language in the Public Assistance Guide that states "Applicants must carefully monitor and document contractor expenses [under T&M contracts], and a cost ceiling or not to exceed provision must be included in the contract."[428]

In addition to the statements in the Public Assistance Guide concerning the need to include cost ceilings, the OIG has also focused on the following statement about the use of T&M contracts for only a limited period during audits of institutions of higher education, hospitals, and other private nonprofit organizations:

> "Applicants should avoid using time and materials contracts. FEMA may provide assistance for work completed under such contracts for a limited period (generally not more than 70 hours) for work that is necessary immediately after the disaster has

[427] See supra section IV(A)(6) of this Field Manual.

[428] DHS Office of Inspector General, Report No. DA-13-20, *FEMA Should Recover $3.8 Million of Public Assistance Grant Funds Awarded to Kenergy Corporation, Henderson, Kentucky* (Jun. 18, 2013) ("In addition, FEMA Public Assistance Guide (FEMA 322, October 2007, pp. 39-40[*sic*]) specifies that—...Time-and-materials contracts must be carefully monitored and a cost ceiling or "not to exceed" provision must be included in the contract.").

occurred when a clear scope of work cannot be developed."[429]

Relying upon the Public Assistance Guide and FEMA disaster assistance policies, the OIG may recommend total disallowance of costs based on the inappropriate use of a T&M contract beyond a limited period and where a scope of work can be developed.

Inappropriate Use of Time and Materials Contract by an Institution of Higher Education

DHS Office of Inspector General Report No. DA-13-03 (Nov. 2012)
FEMA Should Recover $5.3 Million of Public Assistance Grant Funds Awarded to the University of Southern Mississippi – Hurricane Katrina

Background. Hurricane Katrina impacted the State of Mississippi in 2005, and damaged the buildings, equipment, utilities, and recreational facilities at the University of Southern Mississippi ("University"). The University awarded, among other things, a T&M contract for permanent repairs conducted under six projects (repairs included such things as electrical, replacement of heating, ventilation, and air-conditioning units, temporary roof replacement, drywall replacement, etc.). The contract work was completed in July 2006, 11 months after Hurricane Katrina.

Summary of Relevant OIG Finding. The OIG found that the project files did not contain adequate justification for the use of the T&M contract. First, project documentation showed that a clear scope of work had been developed at the time the contract was awarded. Second, the contract was completed 11 months after the major disaster and FEMA's Public Assistance Guide "states that time-and-materials contracts should be avoided but may be used for a limited period (generally not more than 70 hours) for work that is necessary immediately after the disaster. Therefore, the OIG stated that the University should have used a more appropriate type of contracting method to accomplish the work and questioned all contract costs.[430]

G. RESPONSIBLE CONTRACTORS AND DEBARMENT (2 C.F.R. § 215.44(d))

A subgrantee must make contracts with "responsible contractors" who possess the ability to perform successfully under the terms and conditions of the proposed procurement.[431] In making such a determination, the subgrantee must consider contractor integrity, record of past performance, and financial and technical resources or accessibility to other necessary

[429] Public Assistance Guide, supra note 90, p. 53.

[430] DHS Office of Inspector General Report No. DA-13-03, *FEMA Should Recover $5.3 Million of Public Assistance Grant Funds Awarded to the University of Southern Mississippi – Hurricane Katrina*, p. 5 (Nov. 6, 2012).

[431] 2 C.F.R. § 215.44(d).

resources.[432]

As a preliminary matter, a subgrantee may not enter into a contract with a contractor that is debarred or suspended.[433] But it is important to recognize that a contractor, even if not debarred or suspended, may still not be a "responsible" contractor for the purposes of 2 C.F.R. § 215.44(d). For example, a contractor may not have the necessary "technical and financial resources" to properly perform a contract, such as the necessary equipment and technical skills (or the ability to obtain them) to perform a particular scope of work. The Federal Acquisition Regulations set forth general standards for determining contractor responsibility that provide a useful reference in determining contractor responsibility, which are detailed at section IV(A)(4) of this Field Manual.

H. FEMA PREAWARD REVIEW OF SUBGRANTEE CONTRACTING (2 C.F.R. § 215.44(e))

FEMA can review a subgrantee's preaward procurement documents, such as a request for proposal, invitation for bids, or independent cost estimates when any of the following five circumstances apply.[434]

- ***Noncompliance.*** A subgrantee's procurement procedures or operation fails to comply with the procurement standards at 2 C.F.R. pt. 215.
- ***Noncompetitive Award.*** The procurement is expected to exceed the small purchase threshold (currently $150,000) and is to be awarded without competition or only one bid or offer is received in response to a solicitation.
- ***Brand-Name.*** The procurement is expected to exceed the small purchase threshold (currently $150,000) and specifies a "brand name" product.[435]
- ***Award to Other than Lowest Bidder.*** The proposed award over the small purchase threshold is to be awarded to other than the apparent low bidder under a sealed bid procurement.
- ***Contract Modifications.*** A proposed contract modification changes the scope of a contract or increased the contract amount by more than the amount of the small purchase threshold (currently set at $150,000).

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[432] *Id.*

[433] See supra section IV(H)(13) of this Field Manual for a detailed description of the rules concerning debarment and suspension.

[434] 2 C.F.R. § 214.44(e).

[435] See, e.g. DHS Office of Inspector General, DD-11-15, *FEMA Public Assistance Grant Awarded to Saint Mary's Academy (SMA), New Orleans, Louisiana*, pp. 3-4 (Aug. 05, 2011) (Subgrantee gave a contractor, "Southwest," an unfair competitive advantage by soliciting "Southwest or equal" in its request for bid documents but did not describe the specific technical requirements that would equal Southwest's product.

I. COST AND PRICE ANALYSIS (2 C.F.R. § 215.45)

The subgrantee must perform and document some form of price or cost analysis in connection with every procurement action pursuant to 2 C.F.R. § 215.45.[436] A cost or price analysis decreases the likelihood of unreasonably high or low prices, contractor misrepresentations, and errors in pricing relative to the scope of work.[437] A cost or price analysis is required in the case where a subgrantee performs a noncompetitive procurement.[438]

- ***Price Analysis.*** The regulation provides that a "price analysis" may be accomplished in various ways, including the comparison of price quotations submitted, market prices and similar indicia, together with discounts.[439] For example, in the case of sealed bidding, the comparison of apparent winner's bid prices to the other bids satisfies price analysis.
- ***Cost Analysis.*** The regulation then states that a "cost analysis" is the review and evaluation of each element of cost to determine reasonableness, allocability, and allowability.[440]

It is important to recognize the distinctions between the cost and price analysis requirements set forth at 44 C.F.R. § 13.36(f) for local and Indian tribal governments and the requirements at 2 C.F.R. § 215.45 for an institution of higher education, hospital, or other nonprofit organization. The requirements at 44 C.F.R. § 13.36(f) are much more prescriptive, and require a cost analysis in certain circumstances (such as noncompetitive procurements). The requirements at 2 C.F.R. § 215.45 are much more permissive, and do not mandate any particular form of analysis (only that the subgrantee perform one).

J. PROCUREMENT RECORDS (2 C.F.R. § 215.46)

A subgrantee must create procurement records and files for contracts in excess of the small

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[436] 2 C.F.R. § 214.45.

[437] See DHS Office of Inspector General, Report No. DA-13-03, *FEMA Should Recover $5.3 Million of Public Assistance Grant Funds Awarded to the University of Southern Mississippi – Hurricane Katrina*, p. 6 (Nov. 2012).

[438] See DHS Office of Inspector General, Report No. 14-12-D, *FEMA Should Recover $10.9 Million of Improper Contracting Costs from Grant Funds Awarded to Columbus Regional Hospital*, p. 8 (Dec. 4, 2013) ("Regarding the lease on the modular kitchens, Hospital officials said that it was their only alternative. Hospital officials said they contacted three companies, and only one was responsive to their needs. ***Regardless, even when only one source is available all procurements require a cost or price analysis.***") (emphasis added); see also DHS Office of Inspector General, Report No. DA-12-18, *FEMA Public Assistance Funds Awarded to Henderson Point Water and Sewer District, Pass Christian, Mississippi* (May 11, 2012) (subgrantee did not openly compete certain contracts and "accepted the contractor's proposed prices without performing an independent analysis of the prices to ensure reasonableness.").

[439] 2 C.F.R. § 214.45.

[440] Id.

purchase threshold (currently $150,000).[441] These records and files must include, at minimum, the following:

- Basis for contractor selection;
- Justification for lack of competition when competitive bids or offers are not obtained; and
- Basis for award cost or price.

Subject to certain exceptions, the subgrantee must retain the procurement records for three years after the event that commences the record retention time frame.[442]

K. CONTRACT ADMINISTRATION (2 C.F.R. § 215.47)

The subgrantee must maintain a system for contract administration to ensure contractor conformance with the terms, conditions, and specifications in the contract and to ensure adequate and timely follow up of all purchases.[443] As part of this system, the subgrantee must evaluate contractor performance and document, as appropriate, whether contractors have met the terms, conditions, and specifications of the contract.[444]

L. BONDING REQUIREMENTS (2 C.F.R. § 215.48(c))

The subgrantee must follow certain bonding rules for contracts and subcontracts for Public Assistance projects requiring construction or facility improvements.[445] If the contract does not involve construction or facility improvements, then the bonding requirements below do not apply.

1. Contracts Less than $100,000

Except as otherwise provided by Federal law, the subgrantee must follow its *own* requirements related to bid guarantees, performance bonds, and payment bonds for contracts and subcontracts less than $100,000.

2. Contracts Over $100,000

For coutracts or subcontracts exceeding $100,000, FEMA may accept the bonding policy and requirements of the subgrantee, provided that FEMA has made a determination that the Federal

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[441] 2 C.F.R. § 214.46.

[442] 2 C.F.R. § 214.53(b).

[443] 2 C.F.R. § 215.47.

[444] Id.

[445] 2 C.F.R. § 215.48(c).

Government's interest is adequately protected. If FEMA has not made such a determination, then the subgrantee must meet the following requirements:

- ***Bid Guarantee.*** The subgrantee must require a bid guarantee from each bidder equivalent to five percent of the bid price.[446] The "bid guarantee" must consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder shall, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.[447]
- ***Performance Bond.*** The subgrantee must require a performance bond on the part of the contractor for 100 percent of the contract price.[448] A "performance bond" is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.[449]
- ***Payment Bond.*** The subgrantee must require a payment bond on the part of the contractor for 100 percent of the contract price.[450] A "payment bond" is one executed in connection with a contract to assure payment as required by statute of all persons supplying labor and material in the execution of the work provided for in the contract.[451]

Where bonds are required in the situations above, the bonds shall be obtained from companies holding certificates of authority as acceptable sureties pursuant to 31 C.F.R. pt. 223 (Surety Companies Doing Business with the United States).[452]

M. REQUIRED CONTRACT PROVISIONS (2 C.F.R. § 215.48 and Appendix A)

A subgrantee's contracts must include, in addition to provisions to define a sound and complete agreement, the provisions set forth at 2 C.F.R. § 215.48 and 2 C.F.R. pt. 215, Appendix A. Some of the provisions are based on sound contracting principles and others are required by Federal law, executive order, or regulation. The failure to include the required contract provisions is one of the most common findings under OIG audits of institutions of higher education, hospitals, and other private nonprofit organizations.[453]

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[446] 2 C.F.R. § 215.48(c)(1).

[447] Id.

[448] 2 C.F.R. § 215.48(c)(2).

[449] Id.

[450] 2 C.F.R. § 215.48(c)(3).

[451] Id.

[452] 2 C.F.R. § 215.48(c)(4).

[453] See, e.g. DHS Office of Inspector General, Report No. DD-13-14, *FEMA Should Recover $7.5 Million of the $43.2 Million Public Assistance Grant Awarded to Craighead Electric Cooperative Corporation, Arkansas* (Sep. 20, 2013); DHS Office of Inspector General, Report No. DD-13-08, *FEMA Should Disallow $4.1 Million of the $48.5*

1. Provisions for Contractual Remedies (2 C.F.R. § 215.48(a))

The subgrantee's contract must include contractual provisions or conditions that allow for administrative, contractual, or legal remedies in instances where a contractor violates or breaches the contract terms, and provide for such remedial actions as may be appropriate.[454] This requirement only applies in the case where a contract exceeds the simplified acquisition threshold of $150,000.[455]

2. Provisions for Termination for Cause and Convenience (2 C.F.R. § 215.48(b))

The subgrantee's contract must include suitable provisions for termination for cause and convenience by the subgrantee for contracts exceeding the simplified acquisition threshold of $150,000.[456]

"Termination for convenience" is the exercise of a subgrantee's right to completely or partially, and the relevant contract provisions must include the manner by which termination shall be effected and the basis for settlement.[457] "Termination for cause" (or "default") is the exercise of a party's right to completely or partially terminate a contract because of the other party's actual or anticipated failure to perform its contractual obligations, the relevant contract provisions must describe conditions under which the contract may be terminated for default.[458] Lastly, the contract must describe the conditions where the contract may be terminated because of circumstances beyond the control of the contractor, which is known as a "force majeure" clause.[459] These types of clauses also serve as the basis for excusing contractor performance until the "force" has abated.

3. Contract Clause Regarding Government Access to Records (2 C.F.R. § 215.48(d))

A subgrantee must include—in all "negotiated contracts" greater than the simplified acquisition threshold of $150,000—a provision to the effect that the subgrantee, FEMA, the grantee, Comptroller General of the United States, or any of their duly authorized representatives shall have access to any books, documents, papers, and records of the contractor which are directly

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Million Public Assistance Grant Awarded to ARK Valley Electric Cooperative, Kansas (Apr. 16, 2013); DHS Office of Inspector General, Report No. DD-12-15, *FEMA Public Assistance Grant Funds Awarded to Ochsner Clinic Foundation, New Orleans, Louisiana* (Jun. 20, 2012).

[454] 2 C.F.R. § 215.48(a).

[455] Id.

[456] 2 C.F.R. § 215.48(b).

[457] Id.

[458] Id.

[459] Id.

pertinent to a specific program for the purpose of making audits, examinations, excerpts, and transcriptions.[460] A "negotiated contract" is any contract awarded by a form of procurement other than sealed bidding, which are procurement through competitive proposals, small purchase procedures, and noncompetitive procurements.

4. Compliance with Executive Order 11,246 (2 C.F.R. pt. 215, Appendix A, ¶ 1)

All subgrantee federally assisted construction contracts[461] must contain a provision requiring compliance with Executive Order 11,246, *Equal Employment Opportunity* (Sep. 24, 1965) (as amended) as supplemented by Department of Labor implementing regulations at 41 C.F.R. ch. 60 (Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor).[462] The specific language of the required contract clause is set forth at section IV(H)(3) of this Field Manual.[463]

5. Compliance with the Copeland Anti-Kickback Act (2 C.F.R. pt. 215, Appendix A, ¶ 2)

A subgrantee's contract must include a provision for compliance with the Copeland "Anti-Kickback" Act (18 U.S.C. § 874 and 40 U.S.C. § 3145), as supplemented by Department of Labor regulations at 29 C.F.R. pt. 3 (Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States).[464] This requirement applies to all contracts for construction or repair in excess of $2000. The specific language of the required contract clause is set forth at section IV(H)(4) of this Field Manual.

6. Compliance with the Davis-Bacon Act (2 C.F.R. pt. 215, Appendix A, ¶ 3)

A subgrantee' contract must include a clause providing for the compliance with the Davis Bacon

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[460] 2 C.F.R. § 215.48(d).

[461] A "federally assisted construction contract" means any "agreement or modification thereof between any applicant and a person for ***construction work*** which is paid for in whole or in part with funds obtained from the Government...pursuant to any Federal program involving a ***grant***, contract, loan, insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, or any application or modification thereof approved by the Government for a grant, contract, loan, insurance, or guarantee under which the applicant itself participates in the construction work." 41 C.F.R. § 60-1.3 (emphasis added). "Construction work" means the "construction, rehabilitation, alteration, conversion, extension, demolition or repair of buildings, highways, or other changes or improvements to real property, including facilities providing utility services. The term also includes the supervision, inspection, and other onsite functions incidental to the actual construction." Id.

[462] 2 C.F.R. pt. 215, Appendix A, ¶ 1.

[463] The regulation at 44 C.F.R. § 13.36(i)(3) only requires local and Indian tribal governments to insert the contract clause in federally assistance construction contracts over $10,000, where the regulation at 2 C.F.R. pt. 215, Appendix A, ¶ 1 has no such minimum threshold.

[464] 44 C.F.R. § 13.36(i)(4).

Act (40 U.S.C. §§ 276a to 276a-7) as supplemented by Department of Labor regulations at 29 C.F.R. pt. 5.[465] This requirement, however, only applies to construction contracts awarded by subgrantees in excess of $2000 *when required by Federal grant program legislation.* In this case, the sections of the Stafford Act authorizing the Public Assistance grant program do not require compliance with the Davis-Bacon Act. As such, there is no requirement for a subgrantee to place any clauses into its contracts for compliance with the Davis-Bacon Act.

7. Compliance with the Contract Work Hours and Safety Standards Act (2 C.F.R. pt. 215, Appendix A, ¶ 4)

A subgrantee's contract must, where applicable, include a provision for compliance with Sections 103 and 107 of the Contract Work Hours and Safety Standards Act, as supplemented by Department of Labor regulations at 29 C.F.R. pt 5 for construction contracts in excess of $2000 for other contracts involving laborers and mechanics in excess of $2500.[466] Although the original law required its application in any construction contract over $2,000 or non-construction contract to which the Act applied over $2,500 (and language to that effect is still found in the regulation), the Contract Work Hours and Safety Standards Act no longer applies to any "contract in an amount that is not greater than $100,000."[467] The specific language of the required contract clause is set forth at section IV(H)(6) of this Field Manual.

8. Rights to Inventions (2 C.F.R. pt. 215, Appendix A, ¶ 5)

A subgrantee's contracts or agreements for the performance of experimental, developmental, or research work shall provide for the right of the Federal Government in any resulting invention in accordance with 37 C.F.R. pt. 401 (Rights to Inventions Made by Nonprofit Organizations and Small Business Firms under Government Grants, Contracts, and Cooperative Agreements) and any implementing regulations promulgated by FEMA.[468] This is a requirement that flows from the Bayh-Dole Act,[469] which sets the parameters for patent rights in inventions made with Federal assistance. The implementing regulation for the Bayh-Dole Act at 37 C.F.R. § 401.14

[465] 2 C.F.R. pt. 215, Appendix A, ¶ 3.

[466] 2 C.F.R. pt. 215, Appendix A, ¶ 4.

[467] 40 U.S.C. § 3701(b)(3)(A)(iii).

[468] 2 C.F.R. pt. 215, Appendix A, ¶ 5.

[469] Bayh-Dole Act, Pub. L. No. 96-517, 94 Stat. 1019 (1980) (codified as amended at 35 U.S.C. chap. 18). The Bayh-Dole Act provides the primary statutory basis for Federal technology transfers, including the patenting and licensing of inventions made under Federal funding agreements such as a grant. This statute authorizes recipients of Federal funding to elect to take title of any invention that they produce or discover under a Federal grant award. If the recipient elects to take title, then it must take certain procedural steps, such as filing patent applications, seek commercialization activities, and report back to the funding agency on its activities to utilize the invention. What the Federal Government gets is a nonexclusive, nontransferable, irrevocable, paid-up-license to make or practice the invention.

sets forth the text of the required contract clause for inclusion in subgrantee contracts.[470]

The Public Assistance Grant Program does not provide financial assistance associated with experimental, developmental, or research work that would result in an invention,[471] rendering this contract clause requirement inapplicable. There is, therefore, no required contract clause in this regard.

An issue related to "inventions" is that concerning the production of works by a subgrantee which are copyrightable under Federal law.[472] The Public Assistance grantee and subgrantee hold the copyright to works they produce or purchase under a Public Assistance award. FEMA and the Federal Government hold a royalty-free, nonexclusive, and irrevocable license to produce, publish, or to otherwise authorize others to use, for Federal Government purposes, copyrighted material that was developed under a Federal award or purchased under a Federal award.[473] There is no required contract clause in this regard, but a subgrantee may wish to include such a clause so as to provide notice to its contractors and subcontractors.

9. Clean Air Act and Clean Water Act (2 C.F.R. pt. 215, Appendix A, ¶ 6)

A subgrantee must include a clause in its contracts providing for compliance with all applicable standards, orders, or requirements issued pursuant to the Clean Air Act (42 U.S.C. §§ 7401-7671q) and the Federal Water Pollution Control Act as amended (33 U.S.C. §§ 1251-1387). This requirement applies to all contracts in excess of $100,000. The specific language of the required contract clause is set forth at section IV(H)(11) of this Field Manual.

10. Byrd Anti-Lobbying Amendment (2 C.F.R. pt. 215, Appendix A, ¶ 7)

The Byrd Anti-Lobbying Amendment prohibits any appropriated funds to be expended by the recipient of a Federal contract, grant, loan, or cooperative agreement to pay any person for influencing or attempting to influence an officer or employee of any Federal agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in

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[470] 37 C.F.R. §§ 401.3, 401.14; see also 35 U.S.C. chapter 18 (Patent Rights in Inventions Made with Federal Assistance).

[471] See 35 U.S.C. § 201(e); 37 C.F.R. § 401.2(e) ("The term invention means any invention or discovery which is or may be patentable or otherwise protectable under Title 35 of the United States Code, or any novel variety of plant which is or may be protectable under the Plant Variety Protection Act (7 U.S.C. 2321 et seq.).").

[472] Copyright protects original works of authorship that have been tangibly expressed and fixed in some medium, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of machine or device. 17 U.S.C. § 102. Works of authorship included, among other things, architectural works. Id. § 102(a)(8). Based on the nature of work completed under the Public Assistance and Hazard Mitigation Grant Programs, the issue of copyright will likely not arise, although it could arise in the case of architectural works (the design of a building) completed as part of a project.

[473] 2 C.F.R. § 215.36.

connection with certain Federal actions.[474] The grantee signs a certification as to lobbying as part of the FEMA-State or FEMA-Tribal Agreement, and this certification requires the grantee to include the language of the certification into the award documents for all subawards at all tiers (including subgrants and contracts under grants) and that all subrecipients shall certify and disclose accordingly

The following provides the clause that a subgrantee must include in all contracts:

"Byrd Anti-Lobbying Amendment, 31 U.S.C. § 1352 (as amended)

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."

APPENDIX A, 44 C.F.R. PART 18 – CERTIFICATION REGARDING LOBBYING

Certification for Contracts, Grants, Loans, and Cooperative Agreements

(To be submitted with each bid or offer exceeding $100,000)

The undersigned [Contractor] certifies, to the best of his or her knowledge, that:

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

[474] 31 U.S.C. § 1352. The prohibition applies to the following "Federal actions": (1) the awarding of any Federal contract; (2) the making of any Federal grant; (3) the making of any Federal loan; (4) the entering into of any cooperative agreement; and (5) the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement. Id. § 1352(a)(2).

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 31, U.S.C. § 1352 (as amended by the Lobbying Disclosure Act of 1995). 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. § 3801 *et seq.*, apply to this certification and disclosure, if any.

_____
Signature of Contractor's Authorized Official

_____
Name and Title of Contractor's Authorized Official

_____
Date"

11. Debarment and Suspension (2 C.F.R. pt. 215, Appendix A, ¶ 8)

Paragraph 8 of Appendix A to 2 C.F.R. pt. 215 states the prohibition that subgrantees must not make certain contract awards with parties listed on the government-wide Excluded Parties List System, in accordance with guidelines at 2 C.F.R. pt. 180.[475] Section IV(H)(13) of this Field Manual contains a detailed discussion of suspension and debarment, which is equally applicable to institutions of higher education, hospitals, and other private nonprofit organizations.

Appendix A does not provide any required contract clause; notwithstanding, the following provides a recommended clause that a subgrantee should include in all contracts that are "covered transactions." It incorporates an optional method of verifying that contractors are not excluded or disqualified.

[475] 2 C.F.R. pt. 215, Appendix A, ¶ 8.

"Suspension and Debarment

(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, its 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 subgrantee). 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 (name of State agency serving as grantee and name of subgrantee), the Federal Government may pursue available remedies, including but not limited to suspension and/or debarment.

(4) The 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."

APPENDIX A

SYPNOSES OF DHS OFFICE OF INSPECTOR GENERAL AUDIT REPORTS CONCERNING PROCUREMENT UNDER PUBLIC ASSISTANCE GRANTS

LIST OF AUDIT REPORTS

OIG AUDIT REPORT NUMBER	TITLE	DATE	PAGE
OIG-15-03-D	The State of North Dakota Needs to Assist Ramsey County in Completing $24 Million of FEMA Public Assistance Projects for Three Federally Declared Disasters that Occurred in 2009–2011	Oct.14, 2014	A-9
OIG-14-148-D	FEMA Should Disallow $9.6 Million of Disaster-Related Costs Incurred by the University of New Orleans Research and Technology Foundation, New Orleans, Louisiana	Sept. 19, 2014	A-10
OIG-14-136-D	The Village of Corrales, New Mexico, Needs Assistance to Ensure Compliance with FEMA Public Assistance Grant Requirements	Sept. 10, 2014	A-11
OIG-14-136-D	The City of Albuquerque, New Mexico, Needs Assistance to Ensure Compliance with FEMA Public Assistance Grant Requirements	Sept. 10, 2014	A-12
OIG-14-133-D	Louisiana Should Monitor $39.8 Million of FEMA Funds Awarded to Pontchartrain Housing Corporation I to Ensure Compliance with Federal Regulations	Sept. 5, 2014	A-13
OIG-14-128-D	Santa Clara Pueblo, New Mexico, Needs Assistance to Ensure Compliance with FEMA Public Assistance Grant Requirements	Aug. 26, 2014	A-14
OIG-14-127-D	FEMA Should Recover $4.9 Million of $87.7 Million in Public Assistance Grant Funds Awarded to the Hancock County, Mississippi, Board of Supervisors for Hurricane Katrina Damages	Aug. 26, 2014	A-15
OIG-14-124-D	FEMA Should Recover $985,887 of Ineligible and Unneeded Public Assistance Grant Funds Awarded to Cobb County, Georgia, as a Result of Severe Storms and Flooding	Aug. 7, 2014	A-16
OIG-14-120-D	New York City's Department of Transportation Needs Assistance to Ensure Compliance with Federal Regulations	July 31, 2013	A-17

OIG AUDIT REPORT NUMBER	TITLE	DATE	PAGE
OIG-14-115-D	New York City's Department of Design and Construction Needs Assistance To Ensure Compliance with Federal Regulations	July 21, 2013	A-18
OIG-14-114-D	FEMA Should Recover $3.9 Million of Public Assistance Grant Funds Awarded to Jefferson County, Alabama, as a Result of Severe Storms in April 2011	July 21, 2013	A-19
OIG-14-109-D	FEMA Should Recover $258,488 of Public Assistance Grant Funds Awarded to the Graton Community Services District, California	June 25, 2014	A-20
OIG-14-107-D	FEMA Should Recover $1.3 Million of Public Assistance Grant Funds Awarded to Desire Street Ministries, New Orleans, Louisiana, for Hurricane Katrina	June 17, 2014	A-21
OIG-14-95-D	FEMA Should Recover $8.0 Million of $26.6 Million in Public Assistance Grant Funds Awarded to St. Stanislaus College Preparatory in Mississippi - Hurricane Katrina	May 22, 2014	A-22
OIG-14-63-D	FEMA Should Recover $1.7 Million of Public Assistance Grant Funds Awarded to the City of Waveland, Mississippi-Hurricane Katrina	Apr. 15, 2014	A-23
OIG-14-49-D	FEMA Should Recover $8.2 Million of the $14.9 Million of Public Assistance Grant Funds Awarded to the Harrison County School District, Mississippi - Hurricane Katrina	Mar. 13, 2014	A-24
OIG-14-46-D	FEMA's Dissemination of Procurement Advice Early in Disaster Response Periods	Feb. 28, 2014	A-25
OIG-14-44-D	FEMA Should Recover $5.3 Million of the $52.1 Million of Public Assistance Grant Funds Awarded to the Bay St. Louis Waveland School District in Mississippi-Hurricane Katrina	Feb. 25, 2014	A-26
OIG-14-12-D	FEMA Should Recover $10.9 Million of Improper Contracting Costs from Grant Funds Awarded to Columbus Regional Hospital, Columbus, Indiana	Dec. 4, 2013	A-28

OIG AUDIT REPORT NUMBER	TITLE	DATE	PAGE
OIG-14-11-D	FEMA Should Recover $6.1 Million of Public Assistance Grant Funds Awarded to Orlando Utilities Commission under Hurricane Frances	Dec. 3, 2013	A-30
OIG-14-08-D	FEMA Should Recover $615,613 of Public Assistance Grant Funds Awarded to Orlando Utilities Commission under Hurricane Jeanne	Nov. 21, 2013	A-31
OIG-DS-13-14	FEMA Should Recover $4.2 Million of Public Assistance Grant Funds Awarded to the Department of Design and Construction, Honolulu, Hawaii	Sept. 24, 2013	A-32
OIG-DD-13-14	FEMA Should Recover $7.5 Million of the $43.2 Million Public Assistance Grant Awarded to Craighead Electric Cooperative Corporation, Arkansas	Sept. 20, 2013	A-33
OIG-DD-13-11	FEMA Should Recover $46.2 Million of Improper Contracting Costs from Federal Funds Awarded to the Administrators of the Tulane Educational Fund, New Orleans, Louisiana	Aug. 15, 2013	A-34
OIG-DS-13-11	Los Angeles County, CA, Did Not Properly Account For and Expend $3.9 Million in FEMA Public Assistance Grant Funds for Debris-Related Costs	July 18, 2013	A-36
OIG-13-24	FEMA Should Recover $951,221 of Public Assistance Grant Funds Awarded to Palm Beach County, Florida Hurricane Jeanne	July 10, 2013	A-37
OIG-DA-13-23	FEMA Should Recover $4.9 Million of Public Assistance Grant Funds Awarded to Palm Beach County, Florida Hurricane Wilma	July 10, 2013	A-38
OIG-DA-13-20	FEMA Should Recover $3.8 Million of Public Assistance Grant Funds Awarded to Kenergy Corporation, Henderson, Kentucky	June 18, 2013	A-39
OIG-DA-13-17	FEMA Should Recover $3.5 Million of Public Assistance Grant Funds Awarded to the City of Gautier, Mississippi- Hurricane Katrina	June 7, 2013	A-40
OIG-DA-13-18	FEMA Should Recover $4.1 Million of Public Assistance Grant Funds Awarded to Orlando Utilities Commission -Hurricane Charley	June 5, 2013	A-41
OIG-DS-13-09	The Alaska Department of Transportation and Public Facilities Did Not Properly Account for and Expend $1.5 Million in FEMA Public Assistance	Apr. 30, 2013	A-42

OIG AUDIT REPORT NUMBER	TITLE	DATE	PAGE
	Grant Funds		
OIG-DD-13-08	FEMA Should Disallow $4.1 Million of the $48.5 Million Public Assistance Grant Awarded to ARK Valley Electric Cooperative, Kansas	Apr. 16, 2013	A-44
OIG-DD-13-05	The California Department of Parks and Recreation Did Not Account for or Expend $1.8 Million in FEMA Public Assistance Grant Funds According to Federal Regulations and FEMA Guidelines	Mar. 27, 2013	A-45
OIG-DA-13-13	FEMA Should Recover $3.2 Million of Public Assistance Grant Funds Awarded to the Moss Point School District Hurricane Katrina	Mar. 15, 2013	A-46
OIG-DA-13-11	FEMA Should Recover $131,064 from a $3.0 Million Public Assistance Grant Awarded to the City of Norfolk, Virginia, for Tropical Storm Ida and a Nor'easter	Mar. 12, 2013	A-48
OIG-DD-13-07	FEMA Should Recover $881,956 of Ineligible Public Assistance Funds and $862,983 of Unused Funds Awarded to St. Charles Parish School Board, Luling, Louisiana	Feb. 27, 2013	A-49
OIG-DD-13-06	FEMA Should Recover $6.7 Million of Ineligible or Unused Public Assistance Funds Awarded to Cameron Parish, Louisiana, for Hurricane Rita	Feb. 27, 2013	A-51
OIG-DA-13-10	FEMA Should Recover $8.5 Million of Public Assistance for Grant Funds Awarded to the City of Gulfport Mississippi, for Debris Removal and Emergency Protective Measures--Hurricane Katrina	Feb. 22, 2013	A-53
OIG-DA-13-09	FEMA Should Recover $1.9 Million of Public Assistance Grant Funds Awarded to the Hancock County Utility Authority Hurricane Katrina	Feb. 15, 2013	A-54
OIG-DD-13-02	FEMA Public Assistance Grant Funds Awarded to St. John the Baptist Parish, Louisiana	Jan. 3, 2013	A-55
OIG-DA-13-08	FEMA Should Recover $470,244 of Public Assistance Grant Funds	Dec. 4, 2012	A-56

OIG AUDIT REPORT NUMBER	TITLE	DATE	PAGE
	Awarded to the City of Lake Worth, Florida-Hurricanes Frances and Jeanne		
OIG-DA-13-07	FEMA Should Recover $701,028 of Public Assistance Grant Funds Awarded to Memphis Light, Gas and Water Division – Severe Weather February 2008	Nov. 20, 2012	A-57
OIG-DA-13-06	FEMA Should Recover $894,764 of Public Assistance Grant Funds Awarded to the Town of Dauphin Island, Alabama - Hurricane Katrina	Nov. 20, 2012	A-58
OIG-DA-13-05	FEMA Should Recover $2.2 Million of Public Assistance Grant Funds Awarded to Memphis Light, Gas and Water Division - Severe Weather, June 2009	Nov. 20, 2012	A-59
OIG-DA-13-04	FEMA Should Recover $7.7 Million of Public Assistance Grant Funds Awarded to the City of Lake Worth, Florida Hurricane Wilma	Nov. 20, 2012	A-60
OIG-DA-13-03	FEMA Should Recover $5.3 Million of Public Assistance Grant Funds Awarded to University of Southern Mississippi-Hurricane Katrina	Nov. 6, 2012	A-61
OIG-DD-12-20	FEMA Public Assistance Grant Funds Awarded to St. Charles Parish, Louisiana	Sept. 12, 2012	A-62
OIG-DS-12-12	FEMA Public Assistance Grant Funds Awarded to the Alaska Department of Transportation and Public Facilities, Central Region, Anchorage, Alaska	July 18, 2012	A-63
OIG-DD-12-04	FEMA Public Assistance Grant Funds Awarded to Cameron Parish School Board, Cameron, Louisiana	July 18, 2012	A-65
OIG-DA-12-22	FEMA Public Assistance Grant Funds Awarded to the Long Beach Port Commission, Long Beach, Mississippi	July 18, 2012	A-66
OIG-DA-12-20	FEMA Public Assistance Grant Funds Awarded to City of Miramar; Florida-Hurricane Wilma	July 15, 2012	A-67
OIG-DS-12-11	FEMA Public Assistance Grant Funds Awarded to County, EI Dorado,	July 3, 2012	A-68

OIG AUDIT REPORT NUMBER	TITLE	DATE	PAGE
	California		
OIG-DD-12-15	FEMA Public Assistance Grant Funds Awarded to Ochsner Clinic Foundation, New Orleans, Louisiana	June 20, 2012	A-69
OIG-DA-12-18	FEMA Public Assistance Grant Funds Awarded to Henderson Point Water and Sewer District, Pass Christian Mississippi	May 11, 2012	A-71
OIG-DA-12-15	FEMA Public Assistance Grant Funds Awarded to City of Coral Springs, Florida - Hurricane Wilma	Apr. 1, 2012	A-72
OIG-DA-12-13	FEMA Public Assistance Grant Funds Awarded to Harrison County Library System, Gulfport, Mississippi	Mar. 20, 2012	A-73
OIG-DD-12-06	FEMA Public Assistance Grant Funds Awarded to St. Charles Parish, Louisiana	Feb. 22, 2012	A-74
OIG-DS-12-03	FEMA Public Assistance Grant Funds Awarded to Paso Robles Joint Unified School District, California	Feb. 9, 2012	A-75
OIG-DS-12-01	FEMA Public Assistance Grant Funds Awarded to Town of Fairfax, California	Dec. 16, 2011	A-76
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DHS OIG Audit Report: OIG-15-03-D
Procurements Under Grants Synopsis

Date: October 15, 2014

Subject: *The State of North Dakota Needs to Assist Ramsey County in Completing $24 Million of FEMA Public Assistance Projects for Three Federally Declared Disasters that Occurred in 2009–2011*

Terms: local government, socioeconomic contracting, required provisions

Background: Ramsey County (subgrantee) in North Dakota received Public Assistance awards for three federally declared flooding events.

Procurement Related Findings:

1) Although the subgrantee competitively awarded the contracts, it did not comply with Federal requirements to take affirmative steps to ensure the use of small and minority firms, women's business enterprises, and labor surplus area firms when possible. These affirmative steps should include using the services and assistance of the Small Business Administration and the Minority Business Development Agency of the Department of Commerce and requiring the prime contractor, if using subcontracts, to take the affirmative steps listed in Federal regulations 44 C.F.R. § 13.36(e)(2)(i) through (v). OIG-15-03-D at 8-9, 44 C.F.R. § 13.36(e).

2) Subgrantee did not include all required provisions in its contracts. OIG-15-03-D at 8-9, 44 C.F.R. § 13.36(i).

DHS OIG Audit Report: OIG-14-148-D
Procurements Under Grants Synopsis

Date: September 19, 2014

Subject: *FEMA Should Disallow $9.6 Million of Disaster-Related Costs Incurred by the University of New Orleans Research and Technology Foundation, New Orleans, Louisiana*

Terms: private nonprofit, free and open competition, preselected firms, socioeconomic contracting, cost-plus-percentage-of-cost basis contract, required provisions

Background: The University of New Orleans Research and Technology Foundation (subgrantee) is a private nonprofit entity that supports the University to New Orleans and the Louisiana State University system with any appropriate programs, facilities, research, and educational opportunities. Subgrantee sustained damages resulting from Hurricane Katrina on August 29, 2005 and was awarded Public Assistance grant funds from the State of Louisiana.

Procurement Related Findings:

1) Subgrantee awarded contracts for nonexigent work without open and free competition. It did not publicly advertise the work. Instead, it notified contractors by word-of-mouth or by phoning known contractors about the required pre-bid conference. OIG-14-148-D at 4-6, 2 C.F.R. § 215.43.

2) Subgrantee did not take the required steps on to ensure the use of small businesses, minority-firms, and women's business enterprises. OIG-14-148-D at 4-7, 2 C.F.R. § 215.44(b).

3) Subgrantee awarded a prohibited cost-plus-percentage-of-cost basis contract for exigent work where the contractor charged markups of 10 percent to 20 percent on top of its agreed-upon time-and-materials rates. OIG-14-148-D at 4-7, 2 C.F.R. § 215.44(c).

4) Subgrantee did not include required contract provisions. OIG-14-148-D at 4-7, 2 C.F.R. § 215.48, Appendix A pt. 215.

DHS OIG Audit Report: OIG-14-143-D
Procurements Under Grants Synopsis

Date: September 16, 2014

Subject: *The Village of Corrales, New Mexico, Needs Assistance to Ensure Compliance with FEMA Public Assistance Grant Requirements*

Terms: local government, cost and price analysis, T&M contracts, required provisions

Background: The Village of Corrales (subgrantee) received Public Assistance (PA) grant funds for damages resulting from rain and flooding. The OIG conducted an audit early in the PA process to identify areas where subgrantee may need additional technical assistance or monitoring to ensure compliance with federal regulations.

Procurement Related Findings

1) Subgrantee did not maintain evidence that it conducted cost or price analyses before receiving contract bids or proposals.[476] Subgrantee issued task and purchase orders against two pre-existing, on-call, time-and-material contracts without performing a cost or price analysis. OIG-14-143-D at 5-6, 44 C.F.R. § 13.36(f)(1).

2) Subgrantee did not determine that no other type of contract is suitable when using time and material contracts and did not include a contract ceiling. OIG-14-143-D at 5-6, 44 C.F.R. § 13.36(c).

3) Subgrantee did not include all federally required provisions in its contracts. OIG-14-143-D at 5-6, 44 C.F.R. § 13.36(i).

[476] OIG Interpretive Guidance: The absence of a cost or price analysis increases the likelihood of unreasonable contract costs and misinterpretations or errors in pricing.

DHS OIG Audit Report: OIG-14-136-D
Procurements Under Grants Synopsis

Date: September 10, 2014

Subject: *The City of Albuquerque, New Mexico, Needs Assistance to Ensure Compliance with FEMA Public Assistance Grant Requirements*

Terms: local government, cost-plus-percentage-of-cost contracting, T&M contracts, required provisions

Background: The City of Albuquerque (subgrantee) received Public Assistance (PA) grant funds for damages resulting from severe storms and flooding. The OIG conducted an audit early in the PA process to identify areas where subgrantee may need additional technical assistance or monitoring to ensure compliance with federal regulations.

Procurement Related Findings:

1) Subgrantee included prohibited cost-plus-percentage-of-cost terms in four contracts. OIG-14-136-D at 4-6, 44 C.F.R. § 13.36(f)(4).

2) Subgrantee did not determine that no other contract was suitable before using a time-and-material contract and did not include a ceiling price in its time-and-material contract. OIG-14-136-D at 4-6, 44 C.F.R. § 13.36(c).

3) Subgrantee did not include all required contract provisions in its contracts. OIG-14-136-D at 4-6, 44 C.F.R. § 13.36(i).

DHS OIG Audit Report: OIG-14-133-D
Procurements Under Grants Synopsis

Date: September 5, 2014

Subject: *Louisiana Should Monitor $39.8 Million of FEMA Funds Awarded to Pontchartrain Housing Corporation I to Ensure Compliance with Federal Regulations*

Terms: local government, socioeconomic contracting, required provisions

Background: Pontchartrain Housing Corporation I (subgrantee) is a private nonprofit entity that operated 12 low-income housing buildings. Hurricane Katrina destroyed all 12 buildings, and in December 2010, FEMA approved subgrantee's request for an alternate project to purchase and renovate an administrative building.

Procurement Related Findings:

1) Subgrantee did not include in its contracts all the applicable provisions. OIG-14-133-D at 4, 2 C.F.R. § 215.48, Appendix A pt. 215.

2) Subgrantee did not take required steps to ensure the use of small businesses, minority-owned firms, and women's business enterprises when possible. OIG-14-133-D at 4, 2 C.F.R. § 215.44(b).

DHS OIG Audit Report: OIG-14-128-D
Procurements Under Grants Synopsis

Date: August 26, 2014

Subject: *Santa Clara Pueblo, New Mexico, Needs Assistance to Ensure Compliance with FEMA Public Assistance Grant Requirements*

Terms: Indian tribal government, the Sandy Recovery Improvement Act, socioeconomic contracting

Background: For the first time, Santa Clara Pueblo (grantee), a tribal government, received Public Assistance grant funds directly as a grantee. The OIG conducted an audit early in the PA process to identify areas where grantee may need additional technical assistance or monitoring to ensure compliance with federal regulations.

Procurement Related Findings:

1) Early in the disaster, FEMA Regional officials incorrectly advised grantee that based on the Sandy Recovery Improvement Act (Act), it should follow the same policies and procedures it uses for procurements from its non-Federal funds—just as any state grantee would. The Act allows tribes to independently request disaster declarations just as states make requests, as grantees. However, the Act does not state that tribes should be able to use Federal procurement regulations applicable to states rather than those applicable to other grantees. Tribal grantees should follow 44 C.F.R. § 13.36(b) through (i), rather than 44 C.F.R. § 13.36(a). OIG-14-128-D at 4-5.

2) In soliciting proposals for previous disaster work using subgrants, Santa Clara Pueblo had not taken all necessary affirmative steps to assure the use of small and minority firms, women's business enterprises, and labor surplus area firms when possible. OIG-14-128-D at 5-6, 44 C.F.R. § 13.36(e).

3) Santa Clara Pueblo's previous disaster contracts using subgrants did not include all the provisions that Federal regulations require. OIG-14-128-D at 6, 44 C.F.R. § 13.36(i).

DHS OIG Audit Report: OIG-14-127-D
Procurements Under Grants Synopsis

Date: August 26, 2014

Subject: *FEMA Should Recover $4.9 Million of $87.7 Million in Public Assistance Grant Funds Awarded to the Hancock County, Mississippi, Board of Supervisors for Hurricane Katrina Damages*

Terms: local government, A/E contract, full and open competition, competitive proposal procedures

Background: Hancock County (subgrantee) received a Public Assistance grant award for damages resulting from Hurricane Katrina, which occurred in August 2005.

Procurement Related Findings:

Subgrantee did not comply with Federal procurement requirements when awarding architectural and engineering (A/E) contracts totaling $1,207,217 for nonemergency work. Instead of soliciting competitive proposals subgrantee used an A/E firm that it used before Hurricane Katrina. OIG-14-127-D at 4-5, 44 C.F.R. § 13.36(c), 44 C.F.R. § 13.36(d)(3)(v).

DHS OIG Audit Report: OIG-14-124-D
Procurements Under Grants Synopsis

Date: August 7, 2014

Subject: *FEMA Should Recover $985,887 of Ineligible and Unneeded Public Assistance Grant Funds Awarded to Cobb County, Georgia, as a Result of Severe Storms and Flooding*

Terms: local government, required provisions

Background: Cobb County (subgrantee) received a Public Assistance grant award for damages resulting from severe storms and flooding, which occurred in September 2009.

Procurement Related Findings:

1) Subgrantee did not take affirmative steps to solicit small, minority firms, and women-owned firms. OIG-14-124-D at 5, 44 C.F.R. § 13.36(e)

2) Subgrantee did not include all required contract provisions in its contracts. OIG-14-124-D at 5, 44 C.F.R. § 13.36(i).

DHS OIG Audit Report: OIG-14-120-D
Procurements Under Grants Synopsis

Date: July 31, 2014

Subject: *New York City's Department of Transportation Needs Assistance to Ensure Compliance with Federal Regulations*

Terms: local government, full and open competition, socioeconomic contracting

Background: New York City's Department of Transportation (subgrantee) received Public Assistance (PA) grant funds for damages resulting from Hurricane Sandy. The OIG conducted an audit early in the PA process to identify areas where subgrantee may need additional technical assistance or monitoring to ensure compliance with federal regulations.

Procurement Related Findings:

1) Subgrantee awarded contracts without full and open competition as it did not publicly advertise the solicitations for proposals so that all qualified contractors had an opportunity to bid. Instead, subgrantee invited five preselected contractors to bid. OIG-14-120-D at 4-5, 44 C.F.R. § 13.36(c).

2) Subgrantee did not take sufficient steps to provide opportunities to small businesses, minority-owned firms, women's business enterprises, and labor surplus area firms when it awarded two contracts totaling $4.4 million. OIG-14-120-D at 4-6, 44 C.F.R. § 13.36(e).

DHS OIG Audit Report: OIG-14-115-D
Procurements Under Grants Synopsis

Date: July 21, 2014

Subject: *New York City's Department of Design and Construction Needs Assistance To Ensure Compliance with Federal Regulations*

Terms: local government, full and open competition, public exigency or emergency, procurement by noncompetitive proposals

Background: New York City's Department of Design and Construction (subgrantee) received Public Assistance (PA) grant funds for damages resulting from Hurricane Sandy. The OIG conducted an audit early in the PA process to identify areas where subgrantee may need additional technical assistance or monitoring to ensure compliance with federal regulations.

Procurement Related Findings:

Subgrantee awarded contracts without full and open competition, inviting only preselected contractors to submit bids and proposals. Subgrantee considered the circumstances to be exigent since the hurricane damage was unforeseeable, and therefore believed that Federal regulations allowed them to contract without full and open competition. FEMA agreed with the Department's position. According to OIG, while the hurricane scattered debris across the city and severely damaged sidewalks, debris and sidewalk damage do not normally present a threat to life or property. However, OIG agreed that some immediate debris removal and temporary repairs may have been necessary to make sidewalks since inaccessible sidewalks in a densely populated area could put pedestrians at risk. OIG-14-115-D at 3-4, 44 C.F.R. § 13.36(c), 44 C.F.R. § 13.36(d)(4)(i)(B).

DHS OIG Audit Report: OIG-14-114-D

Procurements Under Grants Synopsis

Date: July 21, 2014

Subject: *FEMA Should Recover $3.9 Million of Public Assistance Grant Funds Awarded to Jefferson County, Alabama, as a Result of Severe Storms in April 2011*

Terms: local government, full and open competition, breaking out procurements to obtain a more economical purchase, necessary and reasonable costs

Background: The County (subgrantee) received a Public Assistance subgrant award for damage resulting from tornados, straight-line winds, and flooding that occurred in April 2011.

Procurement Related Findings:

Subgrantee did not break out procurement to obtain a more economical purchase, and costs were not necessary and reasonable for efficient and reasonable performance and administration of the grant to be eligible under a Federal award. Subgrantee solicited and received unit price quotes from 13 debris removal contractors for both (1) vegetative debris removal work and (1) construction and demolition debris removal work. Subgrantee selected a contractor that had the lowest bid for both tasks combined, instead of breaking out the procurement into two activities and awarding two contracts (one for vegetative debris removal work and another for construction and demolition debris removal work) to contractors that had the lowest bid for each of the two tasks. This resulted in $2,740,002 in excessive costs. OIG-14-114-D at 3-5, 44. C.F.R. § 13.36(b)(4), 2 C.F.R. § 225, Cost Principles for State, Local, and Indian Tribal Governments, Appendix A, § C.1(a).

DHS OIG Audit Report: OIG-14-109-D
Procurements Under Grants Synopsis

Date: June 25, 2014

Subject: *FEMA Should Recover $258,488 of Public Assistance Grant Funds Awarded to the Graton Community Services District, California*

Terms: local government, A/E contract, full and open competition, noncompetitive proposal procedures, T&M contract, cost or price analysis, reasonable cost, monitoring

Background: Graton Community Services District (subgrantee) received a Public Assistance grant award for damages resulting from severe storms, flooding, mudslides, and landslides from December 17, 2005, through January 3, 2006.

Procurement Related Findings:

1) Subgrantee did not conduct procurements in a manner providing full and open competition in its A/E contract. It used noncompetitive proposals method of contracting without satisfying the requirement for its use. OIG-14-109-D at 4-7, 44 C.F.R. § 13.36(c), 44 C.F.R. § 13.36(d)(4)(i).

2) Subgrantee did not determine that no other contract was suitable before using a time-and-material contract and did not include a ceiling price in its time-and-material contract. OIG-14-109-D at 4-7, 44 C.F.R. § 13.36(b)(10).

3) Subgrantee did not conduct a cost or price analysis before receiving contract proposals to determine reasonable costs for the work needed. OIG-14-109-D at 4-7, 44 C.F.R. § 13.36(f)(1).

3) Subgrantee did not properly monitor the contractor's performance to ensure cost reasonableness. OIG-14-109-D at 4-7, 44 C.F.R. § 13.36(b)(2).

DHS OIG Audit Report: OIG-14-107-D
Procurements Under Grants Synopsis

Date: June 17, 2014

Subject: *FEMA Should Recover $1.3 Million of Public Assistance Grant Funds Awarded to Desire Street Ministries, New Orleans, Louisiana, for Hurricane Katrina*

Terms: private nonprofit, cost or price analysis, contracting, required provisions

Background: Desire Street Ministries, Inc. (subgrantee), a private nonprofit organization that operates a junior-senior level high school, received a Public Assistance grant award for damages resulting from Hurricane Katrina, which occurred on August 29, 2005.

Procurement Related Findings:

1) Subgrantee did not perform a cost or price analysis before awarding the A/E services contracts.[477] OIG-14-12-D at 4, 2 C.F.R. § 215.45.

2) Subgrantee did not include required contract provisions in all contracts and subcontracts as applicable. OIG-14-12-D at 4, 2 C.F.R. § 215.48.

[477] OIG Interpretive Guidance: By not performing a cost or price analysis, subgrantee increased the likelihood of unreasonably high or low prices, contractor misinterpretations, and errors in pricing relative to the scope of work.

DHS OIG Audit Report: OIG-14-95-D
Procurements Under Grants Synopsis

Date: May 22, 2014

Subject: *FEMA Should Recover $8.0 Million of $26.6 Million in Public Assistance Grant Funds Awarded to St. Stanislaus College Preparatory in Mississippi - Hurricane Katrina*

Terms: private nonprofit, free and open competition, preselected firms, socioeconomic contracting, grantee management

Background: St. Stanislaus (subgrantee) is a Catholic school that received a Public Assistance subgrant award to cover disaster-related damage as a private nonprofit facility.

Procurement Related Findings:

1) Subgrantee could not provide evidence that it made efforts to include small businesses, minority-firms, and women's business enterprises. OIG-14-95-D at 4, 2 C.F.R. § 215.44(b).

2) Subgrantee did not competitively bid contracts for demolition work and professional A/E services.[478] Instead of soliciting bids from all sources for the demolition work the subgrantee contacted several specific contractors to obtain quotes and selected a firm that had previously performed debris cleanup work for the school. However, this process restricted competition because it did not provide an opportunity for all interested contractors to bid for the contract work. The subgrantee did not seek competitive bids for the A/E contracts. OIG-14-95-D at 5, 2 C.F.R. § 215.43.

3) State did not fulfill its grantee responsibility to ensure that the subgrantee followed Federal procurement regulations. The nature and extent of ineligible costs identified demonstrate that the State should have done a better job of reviewing the subgrantee's contracting methods. OIG-14-95-D at 6, 44 C.F.R. § 13.37(a)(2), 44 C.F.R. § 13.40(a).

[478] OIG Interpretive Guidance: Open and free competition increases the probability of reasonable pricing from the most qualified contractors and helps discourage and prevent favoritism, collusion, fraud, waste, and abuse.

DHS OIG Audit Report: OIG-14-63-D
Procurements Under Grants Synopsis

Date: April 15, 2014

Subject: *FEMA Should Recover $1.7 Million of Public Assistance Grant Funds Awarded to the City of Waveland, Mississippi-Hurricane Katrina*

Terms: local government, full and open competition, contract administration

Background: Hurricane Katrina severely damaged the City's (subgrantee) sewer collection system. The City determined that it could not make repairs to the existing system in a timely or cost effective manner. Therefore, the City elected to replace the damaged portion of the sewer collection system.

Procurement Related Findings:

1) The subgrantee failed to maintain an adequate contract administration system. OIG-14-63-D at 4, 44 C.F.R. § 13.36(b)(2)

2) Subgrantee did not solicit competitive bids[479] for architectural and engineering (A/E) contract work.[480] Instead of seeking competitive bids for the A/E work, the subgrantee hired an A/E firm it had used for projects before Hurricane Katrina to perform the disaster-related work. OIG-14-63-D at 5, 44 C.F.R. § 13.36(c)

[479] OIG Interpretive Guidance: Although Federal regulation 44 C.F.R. § 13.36(d)(4)(i)(B) allows procurements by noncompetitive proposals when the public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation, the contract work in question was not for emergency work and did not occur during exigent circumstances. It was for permanent repair work that the City began in May 2007 (21 months after the disaster) and completed in December 2008.

[480] OIG Interpretive Guidance: Full and open competition increases the probability of reasonable pricing from the most qualified contractors and helps discourage and prevent favoritism, collusion, fraud, waste, and abuse.

DHS OIG Audit Report: OIG-14-49-D
Procurements Under Grants Synopsis

Date: March 13, 2014

Subject: *FEMA Should Recover $8.2 Million of the $14.9 Million of Public Assistance Grant Funds Awarded to the Harrison County School District, Mississippi - Hurricane Katrina*

Terms: local government, full and open competition, socioeconomic contracting

Background: The District (subgrantee) received a Public Assistance subgrant award for damages resulting from Hurricane Katrina, which occurred in August 2005.

Procurement Related Findings:

1) Subgrantee could not provide evidence that it took affirmative steps to include minority firms, women's enterprises, and labor surplus area firms for nonemergency permanent contract work. OIG-14-49-D at 4, 44 C.F.R. § 13.36(e).

2) Subgrantee did not solicit competitive bids when hiring a contractor for architectural and engineering (A/E) contract work.[481] Subgrantee sent bid invitations (based on qualifications) to nine sources, but did not advertise publicly to allow other qualified parties the opportunity to bid. OIG-14-49-D at 4-5, 44 C.F.R. § 13.36(c).

[481] OIG Interpretive Guidance: Full and open competition increases the probability of reasonable pricing from the most qualified contractors and helps discourage and prevent favoritism, collusion, fraud, waste, and abuse.

DHS OIG Audit Report: OIG-14-46-D
Procurements Under Grants Synopsis

Date: February 28, 2014

Subject: *FEMA's Dissemination of Procurement Advice Early in Disaster Response Periods*

Terms: FEMA personnel, inaccurate information

Background: From May 18 to 20, 2013, Oklahoma City, OK, (subgrantee) experienced severe storms and tornadoes, including an EF-5 tornado that struck the City of Moore on May 20, 2013.

Procurement Related Findings:

1) 44 C.F.R. § 13.36(a) allows States to use their own procurement procedures. Other grantees and subgrantees may also use their own procurement procedures, but must conform to federal law and standards stated in 44 C.F.R. § 13.36(b)-(i). If a subgrantee is an institution of higher education, hospital, or other non-profit organization, it must conform to 2 C.F.R. § 215.40-215.48. OIG-14-46 at 3.

2) FEMA personnel provided applicants incomplete and inaccurate contracting information during applicant Kickoff Meetings by telling applicants they needed to follow State law or their own contracting procedures.[482] FEMA's draft *Public Assistance Program Field Operations Pocket Guide, September 2012,* contributed to the problem because its appendix includes this same incomplete contracting guidance.[483] OIG-14-46 at 3.

[482] OIG Interpretive Guidance: "This is incomplete information because, for grant recipients other than States, this is true only if the contracting procedures happen to meet the specific Federal requirements. In our experience, local governments and private non-profit organizations typically do not use contracting procedures that mirror Federal requirements."

[483] OIG Interpretive Guidance: At kickoff meetings the OIG emphasized compliance with federal procurement requirements. In particular, to (1) bid contracts competitively; (2) include specific provisions in contracts; (3) take affirmative steps to include small, minority, and women-owned businesses; and (4) maintain documentation to support costs, including those related to procurement process. Applicants were not aware of these requirements or that noncompliance with the requirements could put their grant funds at risk.

DHS OIG Audit Report: OIG-14-44-D
Procurements Under Grants Synopsis

Date: February 25, 2014

Subject: *FEMA Should Recover $5.3 Million of the $52.1 Million of Public Assistance Grant Funds Awarded to the Bay St. Louis Waveland School District in Mississippi-Hurricane Katrina*

Terms: local government, cost-plus-percentage-of-cost, full and open competition, socioeconomic contracting, cost or price analysis

Background: The District (subgrantee) received a Public Assistance subgrant award for damages resulting from Hurricane Katrina.

Procurement Related Findings:

1) Subgrantee used a cost-plus-percentage-of-cost contract (subgrantee paid markups on fully burdened time and material rates) and profit/overhead mark-ups were thus questioned.[484] OIG-14-44-D at 3-4, 44 C.F.R. § 13.36(f)(4). Subgrantee argued that this was the only contract type that was reasonably available as the scope of work was impossible to determine – OIG responded that subgrantee could have used T&M contract with a cost ceiling

2) Subgrantee did not perform cost or price analyses in order to determine cost reasonableness.[485] OIG-14-44-D at 4, 44 C.F.R. § 13.36(f)(1).

3) Subgrantee did not solicit competitive bids for architectural and engineering (A/E) services.[486] Instead of seeking competitive bids for the A/E work, the subgrantee hired a firm it used before Hurricane Katrina. Subgrantee said they were familiar with the contractor's work and that other firms did not have the capacity to meet their requirements, however, the subgrantee did not provide any evidence to support their assertion that no other qualified A/E firms were available for the project work. OIG-14-44-D at 4-5, 44 C.F.R. § 13.36(c). The subgrantee argued exigent circumstances; however, the OIG responded that the services were acquired 17 months after disaster.

4) Subgrantee did not take affirmative steps to assure the use of small businesses, minority firms,

[484] OIG Interpretive Guidance: "Federal regulations prohibit cost-plus-percentage-of-cost contracts because they provide no incentive for contractors to control costs—the more contractors charge, the more profit they make." OIG-14-44-D at 4.

[485] OIG Interpretive Guidance: "A cost or price analysis decreases the likelihood of unreasonably high or low prices, contractor misinterpretations, and errors in pricing relative to the scope of work." OIG-14-44-D at 4.

[486] OIG Interpretive Guidance: "Full and open competition increases the probability of reasonable pricing from the most qualified contractors and helps discourage and prevent favoritism, collusion, fraud, waste, and abuse." OIG-14-44-D at 4.

women's business enterprises, and labor surplus area firms when possible. OIG-14-44-D at 4-5, 44 C.F.R. § 13.36(e).

DHS OIG Audit Report: OIG-14-12-D
Procurements Under Grants Synopsis

Date: December 4, 2013

Subject: *FEMA Should Recover $10.9 Million of Improper Contracting Costs from Grant Funds Awarded to Columbus Regional Hospital, Columbus, Indiana*

Terms: private nonprofit, free and open competition, preselected firms, scope of work, cost-plus-percentage-of-cost, socioeconomic contracting, cost or price analysis, scope of work, required provisions

Background: Columbus Regional Hospital (subgrantee) is a nonprofit healthcare facility. On June 7, 2008, flood waters inundated the entire basement of the Hospital.

Procurement Related Findings: 1) Subgrantee awarded contracts for nonexigent work without open and free competition, inviting only preselected firms to bid.[487] OIG-14-12-D at 4-5, 2 C.F.R. § 215.43

2) Subgrantee did not have documentation defining the scope of work for two contracts. OIG-14-12-D at 5, 2 C.F.R. 215.44(a)(3)(i)-(ii).

3) Subgrantee awarded contracts using prohibited cost-plus-percentage-of-cost contracts. OIG-14-12-D at 6, 2 C.F.R § 215.44(c).

4) Subgrantee did not include all required provisions in its contracts. OIG-14-12-D at 7, 2 C.F.R. § 215.48, Appendix A pt. 215.

5) Subgrantee did not make efforts to assure use of small businesses, minority owned firms, and women's business enterprises whenever possible. OIG-14-12-D at 7, 2 C.F.R. § 215.44(b).

6) Subgrantee awarded contracts without performing a cost or price analysis.[488] OIG-14-12-D at 7, 2 C.F.R. § 215.45.

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[487] OIG Interpretive Guidance: "Generally, open and free competition means that all responsible sources are allowed to compete for contracts." OIG-14-12-D at 4. "Open and free competition also increases the probability of achieving reasonable pricing from the most qualified contractors and allows greater opportunity for small businesses, minority firms, and women's enterprises to compete for federally funded work. Open and free competition also helps discourage and prevent favoritism, collusion, fraud, waste, and abuse." *Id.* at 6. Further, "...without open and free competition there is no assurance that another contractor would not have been able to perform the...at lower rates." *Id.* at 5. Finally, as to "project administration" services during the exigent period to assist in responding quickly to FEMA's requests for information to formulate disaster projects, "project administration is not exigent work to save lives or property." *Id.*

[488] OIG Interpretive Guidance: "The absence of a cost or price analysis increases the likelihood of unreasonable contract costs and misinterpretations or errors in pricing relative to scopes of work." *Id* at 8.

7) Subgrantee did not develop a scope of work for certain contracts prior to award.[489] OIG-14-12-D at 8, 2 C.F.R § 215.44(a)(3)(i)-(ii).

[489] OIG Interpretive Guidance "Exigent circumstances do not negate the necessity to follow Federal regulations even when doing so is difficult...FEMA initially develops project worksheets to estimate disaster damages and obligate project funding; the project worksheet is not FEMA's approval of procurement procedures [emphasis added]." OIG-14-12-D at 9.

DHS OIG Audit Report: OIG-14-11-D
Procurements Under Grants Synopsis

Date: December 3, 2013

Subject: *FEMA Should Recover $6.1 Million of Public Assistance Grant Funds Awarded to Orlando Utilities Commission under Hurricane Frances*

Terms: local government, full and open competition, socioeconomic contracting, maintain records, cost or price analysis

Background: The Utility (subgrantee) received a Public Assistance subgrant award for damages resulting from Hurricane Frances, which occurred in September 2004.

Procurement Related Findings:

1) Subgrantee did not openly solicit competitive bids and instead solicited bids only from companies with which it had previously contracted.[490] OIG-14-11-D at3, 44 C.F.R. § 13.36(c).

2) Subgrantee did not take affirmative steps to use minority firms, women's business enterprises, and labor surplus area firms for nonemergency contract work. OIG-14-11-D at 3, 44 C.F.R. § 13.36(e).

3) Subgrantee did not have adequate documentation to show that it performed a cost or price analysis to determine cost reasonableness. OIG-14-11-D at 3, 44 C.F.R. § 13.36(f)(1).

4) Subgrantee did not maintain sufficient records to detail the significant history of the procurement, such as the rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price. OIG-14-11-D at 3, 44 C.F.R. § 13.36(b)(9).

[490] OIG Interpretive Guidance: The exigent circumstances allowing for noncompetitive awards ended after the subgrantee "restored emergency power to its customers. After such time, exigent circumstances no longer existed to warrant the use of noncompetitive contracts. The Utility should have procured such work through open competition, because exigent circumstances no longer existed to justify the use of noncompetitive contracts. Full and open competition increases the probability of reasonable pricing from the most qualified contractors, and helps discourage and prevent favoritism, collusion, fraud, waste, and abuse. It also allows the opportunity for minority firms, women's business enterprises, and labor surplus area firms to participate in federally-funded work."

DHS OIG Audit Report: OIG-14-08-D
Procurements Under Grants Synopsis

Date: November 21, 2013

Subject: *FEMA Should Recover $615,613 of Public Assistance Grant Funds Awarded to Orlando Utilities Commission under Hurricane Jeanne*

Terms: local government, full and open competition, socioeconomic contracting, cost or price analysis

Background: The Utility (subgrantee) received a Public Assistance subgrant award for damages resulting from Hurricane Jeanne, which occurred in September 2004.

Procurement Related Findings:

1) Subgrantee did not solicit competitive bids. Subgrantee solicited bids only from contractors that it had used before the storm or ones that it believed had the requisite knowledge, expertise, and work force to perform the required work.[491] OIG-14-08-d at 3, 44 C.F.R. § 13.36(c).

2) Subgrantee did not take affirmative steps to use minority firms, women's business enterprises, and labor surplus area firms for nonemergency contract work valued. OIG-14-08-d at 3. OIG-14-08-d at 3, 44 C.F.R. § 13.36(c), 44 C.F.R. § 13.36(c), 44 C.F.R. § 13.36(e).

2) Subgrantee did not have adequate documentation to show that it performed a cost or price analysis in connection with every procurement action.[492] OIG-14-08-d at 3, 44 C.F.R. § 13.36(f)(1).

[491] OIG Interpretive Guidance: The subgrantee restored electrical power to almost all of its customers by September 29, 2004, which the OIG considered the end of the emergency period. The five contracts in question were for electrical repair and debris removal work that the subgrantee performed after September 29, 2004, and that it continued for several months. The subgrantee should have procured such work through open competition because exigent circumstances no longer existed to justify the use of noncompetitive contracts. Full and open competition increases the probability of reasonable pricing from the most qualified contractors, and helps discourage and prevent favoritism, collusion, fraud, waste, and abuse. It also allows the opportunity for minority firms, women's business enterprises, and labor surplus area firms to participate in federally-funded work.

[492] OIG Interpretive Guidance: A cost or price analysis decreases the likelihood of unreasonably high or low prices, contractor misinterpretations, and errors in pricing relative to the scope of work.

DHS OIG Audit Report: DS-13-14
Procurements Under Grants Synopsis

Date: September 24, 2013

Subject: *FEMA Should Recover $4.2 Million of Public Assistance Grant Funds Awarded to the Department of Design and Construction, Honolulu, Hawaii*

Terms: local government, unsupported costs, contract scope, full and open competition, improper procurement, legal responsibility, improper accounting of large project costs, grant management

Background: The Department (subgrantee) received a Public Assistance subgrant award for costs resulting from severe storms, flooding, landslides, and mudslides.

Procurement Related Findings:

1) Subgrantee circumvented full and open competition and invited four *specific* contractors—with whom they were familiar—to bid on roadwork repairs. Subgrantee could not justify why full and open competition did not occur. Subgrantee provided that the City Procurement Manager approved the contract under emergency procurement procedures, which allowed them to streamline the procurement process. However, the OIG determined that emergency procurement for this project did not apply. Specifically, the subgrantee performed the work over 11 months after the disaster, and the work itself was permanent in nature and not emergency-oriented.[493] OIG DS-13-14 at 6, 44 C.F.R. § 13.36(c).

2) Subgrantee did not take all necessary affirmative steps to assure that small businesses, minority firms, women's business enterprises, and labor surplus area firms were used when possible. OIG DS-13-14 at 6, 44 C.F.R. § 13.36(e).

3) Grantee failed to provide adequate oversight to the subgrantee's activities. Federal regulations require grantees to ensure that subgrantees are aware of Federal regulations, and manage the day-to-day operations of subgrant activity and monitor subgrant activity to ensure compliance. OIG-13-14 at 10, 44 C.F.R. § 13.40(a).

[493] OIG Interpretive Guidance: "Full and open competition increases the opportunity for obtaining reasonable pricing from the most qualified contractors and allows the opportunity for minority firms, women's business enterprises, and labor surplus area firms to participate in Federally funded work. In addition, full and open competition helps discourage and prevent favoritism, collusion, fraud, waste, and abuse. We do not believe that it is prudent to waive Federal procurement standards unless lives and property are at risk, because the goals of proper contracting relate to more than just reasonable costs. Once the roads are clear, power is restored, and the danger is over, cities, counties, and other entities should follow Federal regulations or risk losing Federal funding."

DHS OIG Audit Report: DD-13-14
Procurements Under Grants Synopsis

Date: September 20, 2013

Subject: *FEMA Should Recover $7.5 Million of the $43.2 Million Public Assistance Grant Awarded to Craighead Electric Cooperative Corporation, Arkansas*

Terms: private nonprofit, A/E, verbal agreement, socioeconomic contracting, required contract provisions

Background: The Cooperative (subgrantee) received a Public Assistance subgrant award for damages resulting from a severe winter storm, which occurred January 26 through 30, 2009.

Procurement Related Findings:

1) Subgrantee did not take the required steps to assure that it used small businesses, minority-owned firms, and women's business enterprises when possible.[494] DD-13-14 at 3-4, 2 C.F.R. § 215.44(b).

2) Subgrantee did not include federally required provisions in its contracts. DD-13-14 at 3-4, 2 C.F.R. § 215.48, Appendix A pt. 215.

[494] Subgrantee provided that they were not aware of this requirement, that all businesses had an equal opportunity to bid because they advertised the projects in the newspaper, and that they were concerned about cost and contractor experience, rather than a contractor's business affiliation. None of these statements provided a basis sufficient to obviate the need to comply with the requirement to required steps to assure that it used small businesses, minority-owned firms, and women's business enterprises when possible.

DHS OIG Audit Report: DD-13-11
Procurements Under Grants Synopsis

Date: August 15, 2013

Subject: *FEMA Should Recover $46.2 Million of Improper Contracting Costs from Federal Funds Awarded to the Administrators of the Tulane Educational Fund, New Orleans, Louisiana*

Terms: private nonprofit, full and open competition, cost-plus percentage, cost/price analysis, contract requirements, socioeconomic contracting, exigent circumstances

Background: Tulane (subgrantee) received a Public Assistance subgrant award for costs resulting from Hurricane Katrina.

Procurement Related Findings:

1) Subgrantee awarded a noncompetitive, cost-plus-percentage-of-cost contract with excessive and prohibited markups[495] OIG DD-13-11 at 7, 2 C.F.R. § 215.43, 2 C.F.R § 215.44(c) and was awarded with a cost/price analysis. OIG DD-13-11 at 16, 2 C.F.R. § 215.45. Markups on T&M were excessive profit. Subcontractor markups were duplicate costs and excessive profit.

2) Subgrantee awarded four noncompetitive contracts after exigent circumstances ended. 2 C.F.R. § 215.43, 2 C.F.R. § 215.44(b).

3) Subgrantee did not include required provision in eight of its contracts. OIG DD-13-11 at17, 2 C.F.R. § 215.48, Appendix A pt. 215.

4) Subgrantee did not take steps to assure use of small businesses, minority firms, and women's business enterprises for any of its awards. OIG DD-13-11 at 17, 2 C.F.R. § 215.44(b).

5) Subgrantee awarded contracts with potential organizational conflict of interest.[496] OIG-13-11

[495] OIG Interpretive Guidance: FEMA approved this contract despite being aware of its provisions for markups. The OIG did not fault the subgrantee for awarding this contract without competition because of exigent circumstances. Generally, the OIG considers circumstances to be exigent when lives or property are at stake, or in this case, when a city or community needs to reopen its schools. Approximately 93 percent of the students returned for the 2006 spring semester on the main campus and the subgrantee reopened its medical-related campuses in July 2006. Therefore, we consider the exigent period to have ended in June 2006. OIG-13-11 at 6-7.

[496] The subgrantee and the primary contractor awarded three contracts or subcontracts to vendors who had previously or later made contributions to the subgrantee, one of the most significant of which was a $2.0 million donation from the primary contractor. Also, the subgrantee awarded several other disaster contracts to entities with relationships with the subgrantee, including previously used contractors, alumni, and members of various boards. Subgrantee representatives said that it made these awards in a manner consistent with its internal policies, and were not aware of the open and free competition requirements. Certain of these awards could potentially represent real or apparent organizational conflicts of interest.

at 16-18.

DHS OIG Audit Report: DS-13-11
Procurements Under Grants Synopsis

Date: July 18, 2013

Subject: *Los Angeles County, CA, Did Not Properly Account For and Expend $3.9 Million in FEMA Public Assistance Grant Funds for Debris-Related Costs*

Terms: local government, improper procurement, full and open competition, T&M contract, ineligible costs, unsupported costs

Background: Los Angeles County (subgrantee) received a Public Assistance subgrant award for costs resulting from storms, flooding, debris flows, and mudslides.

Procurement Related Findings:

1) Subgrantee noncompetitively awarded debris-related contracts after the exigent period and when a scope of work could be formulated.[497] OIG DS-13-11 at 4, 44 C.F.R. 13.36(c).

2) Subgrantee awarded time-and-material contracts with neither a determination that no other contract is suitable nor a contract provision providing ceiling price that the contractor exceeds at its own risk. OIG DS-13-11 at 5, 44 C.F.R. § 13.36(b)(10)(i)-(ii). Subgrantee also failed to closely monitor the contract. FEMA's PA Guide (FEMA 322, October 1999, p. 40), PA Applicant Handbook (FEMA 323, Sep. 1999, pp. 28-29).

3) Subgrantee claimed equipment costs without sufficient documentation and claimed costs for the use of equipment that could not be matched to the operators of that equipment. Consequently, OIG was unable to verify whether the equipment hours claimed were the actual number of hours the equipment was in operation. OIG-13-11 at 13-14. Subgrantees must have fiscal controls and maintain records that adequately identify the source and application of funds provided for financially assisted activities. 44 C.F.R. § 13.20(a)(2) and (b)(2). Cost Principles for State, Local, and Indian Tribal Governments require that costs be adequately documented to be allowable under a Federal award. Office of Management and Budget Circular A-87, Attachment A, Section C.1.j and FEMA's Public Assistance Guide (FEMA 322, October 1999, pp. 113–114) states the applicant should establish and maintain accurate records of events and expenditures related to disaster recovery work.

[497] OIG Interpretive Guidance: Full and open competition helps provide assurance that contract costs are reasonable; increases the number of available contracting sources, and thereby increases the opportunity for obtaining reasonable pricing from the most qualified contractors; and helps discourage and prevent favoritism, collusion, fraud, waste, and abuse.

DHS OIG Audit Report: DA-13-24
Procurements Under Grants Synopsis

Date: July 10, 2013

Subject: *FEMA Should Recover* $951,221 *of Public* Assistance *Grant Funds Awarded to Palm Beach County, Florida Hurricane Jeanne*

Terms: local government, full and open competition, cost and price analysis, exigent circumstances, cost-plus-percentage-of-cost contract, T&M contract reasonable costs, *FEMA Public Assistance Guide (1999)*

Background: The County (subgrantee) received a Public Assistance subgrant award for damages resulting from Hurricane Jeanne, which occurred in September 2004.

Procurement Related Findings

1) Subgrantee did not perform a cost or price analysis on two contracts awarded noncompetitively under exigent circumstances.[498] DA-13-24 at 5, 44 C.F.R. § 13.36(f)(1).

2) Subgrantee awarded a prohibited cost-plus-percentage-of-cost contract. DA 13-24 at 5, 44 C.F.R. § 13.36(f)(4).

[498] OIG Interpretive Guidance: While exigent circumstances warranted the use of noncompetitive proposals, the subgrantee did not perform a cost or price analysis on the contractors' proposed prices and awarded one contract as a time and materials contract and the other as a cost plus percentage of cost contract, a contracting method strictly prohibited by Federal regulations. Because of the subgrantee's improper procurement actions, FEMA has no assurance that the contract costs are reasonable.

DHS OIG Audit Report: DA-13-23
Procurements Under Grants Synopsis

Date: July 10, 2013

Subject: *FEMA Should Recover $4.9 Million of Public Assistance Grant Funds Awarded to Palm Beach County, Florida Hurricane Wilma*

Terms: local government, cost and price analysis, exigent circumstances, cost-plus-percentage-of-cost contract, reasonable costs, *FEMA Public Assistance Guide (1999)*

Background: The County (subgrantee) received a Public Assistance subgrant grant award for damages resulting from Hurricane Wilma, which occurred in October 2005.

Procurement Related Findings

1) Subgrantee did not perform a cost or price analysis on contracts awarded noncompetitively under exigent circumstances using local emergency contracting procedures.[499] DA-13-23 at 4, 44 C.F.R. § 13.36(f)(1).

2) Subgrantee awarded a prohibited cost-plus-percentage-of-cost contract. DA 13-23 at 5, 44 C.F.R. § 13.36(f)(4).

[499] OIG Interpretive Guidance: Although exigent circumstances warranted the use of a noncompetitive proposal, the subgrantee did not perform a cost or price analysis on the contractor's proposed price and awarded the contract as a cost plus percentage of cost contract, which is strictly prohibited by Federal regulation. As a result of the subgrantee's actions, FEMA has no assurance that the costs are reasonable.

DHS OIG Audit Report: DA-13-20
Procurements Under Grants Synopsis

Date: June 18, 2013

Subject: *FEMA Should Recover $3.8 Million of Public Assistance Grant Funds Awarded to Kenergy Corporation, Henderson, Kentucky*

Terms: private nonprofit, exigent circumstances, free and open competition, required provisions, cost and price analysis, socioeconomic contracting, small purchase threshold, maintain doeuments

Background: Kenergy (subgrantee) received a Public Assistance subgrant award for damages resulting from a severe winter storm, which occurred in January 2009.

Procurement Related Findings:

1) Subgrantee noncompetitively awarded contracts for permanent repair work in nonexigent circumstances.[500] DA-13-20 at 3, 2 C.F.R. § 215.43.

2) Subgrantee did not take sufficient steps to assure the use of small businesses, minority owned firms, women's business enterprises, and labor surplus area firms. DA-13-20 at 3, 2 C.F.R. § 215.44.

3) Subgrantee awarded two T&M contracts without including a cost ceiling. DA-13-20 at 3, FEMA *Public Assistance Guide* (FEMA 322, October 2007, pp. 39–40).

[500] OIG Interpretive Guidance: Two contracts were awarded for work after February 18, 2009, when emergency electrical power had been restored to all of subgrantee's customers. OIG concluded that the need to restore electric power constituted exigent circumstances that warranted the use of noncompetitive contracts through February 18, 2009, because lives and property were at risk. Subgrantee should have openly competed permanent repair work after such date because exigent circumstances no longer existed to justify the use of noncompetitive contracts.

DHS OIG Audit Report: DA-13-17
Procurements Under Grants Synopsis

Date: June 7, 2013

Subject: *FEMA Should Recover* $3.5 *Million of Public Assistance Grant Funds Awarded to the City of Gautier, Mississippi- Hurricane Katrina*

Terms: local government, socioeconomic contracting, full and open competition, cost and price analysis, T&M contracts, exigent circumstances, qualifications-based contracting, unsupported costs, *FEMA Policy Digest* (2001)

Background: The City (subgrantee) received a Public Assistance subgrant award for damages resulting from Hurricane Katrina, which occurred in August 2005.

Procurement Related Findings

1) Subgrantee did not take affirmative steps to assure the use of small businesses, minority owned firms, women's business enterprises, and labor surplus area firms. DA-13-17 at 3, 44 C.F.R. § 13.36(e)(1).

2) Subgrantee did not solicit competitive bids for non-emergency debris removal work and permanent repair work.[501] DA-13-17 at 3, 44 C.F.R. § 13.36(c).

3) Subgrantee did not perform a cost or price analysis or compete a contract for debris monitoring services.[502] DA-13-17 at 4, 44 C.F.R. § 13.36(f)(1), 44 C.F.R. § 13.36(c).

[501] OIG Interpretive Guidance: In several cases, subgrantee hired debris removal contractors without competition for work that began 10 -14 months after the disaster. The subgrantee had sufficient time to compete the contracts. The circumstances were not exigent.

[502] OIG Interpretive Guidance: Subgrantee said they did not compete the debris monitoring services because State purchasing laws, by which they abide by, did not require that professional services be competed and they believed that a cost or price analysis was not required because the contracted services were with an engineering firm. However, Federal regulations require competition for all procurement except under certain circumstances, one of which is when the public exigency or emergency will not permit a delay resulting from competitive solicitation. A public exigency or emergency did not exist to warrant the use of noncompetitive contracts for the contracts in question. Further, although the City hired an A/E firm for the monitoring services, this type of work is not professional A/E services. In addition, Federal regulations require that a cost or price analysis be performed for all procurement transactions, irrespective of the type of goods or services being procured. In conclusion, the subgrantee said that they followed the State's purchasing laws for all procurement actions. However, a local government subgrantee's procurement procedures must also conform to applicable Federal law and the standards at 44 C.F.R. § 13.36(b).

DHS OIG Audit Report: DA-13-18
Procurements Under Grants Synopsis

Date: June 5, 2013

Subject: *FEMA Should Recover $4.1 Million of Public Assistance Grant Funds Awarded to Orlando Utilities Commission -Hurricane Charley*

Terms: local government, socioeconomic contracting, full and open competition, cost and price analysis, exigent circumstances

Background: The Utility (subgrantee) received a Public Assistance subgrant award for damages resulting from Hurricane Charley, which occurred in August 2004.

Procurement Related Findings

1) Subgrantee did not take affirmative steps to assure the use of small businesses, minority owned firms, women's business enterprises, and labor surplus area firms. DD-13-18 at 3, 44 C.F.R. § 13.36(e)(1).

2) Subgrantee did not solicit competitive bids.[503] Subgrantee should have openly competed the work because exigent circumstances did not exist to justify the use of noncompetitive contracts. Subgrantee restored electrical power to almost all of its customers on August 22, 2004, which OIG considered the end of the emergency period. The contracts in question were for work performed after August 22, 2004. DA-13-18 at 3, 44 C.F.R. § 13.36(c).

3) Subgrantee did not perform a cost or price analysis to determine the reasonableness of the contractor's prices. DA-13-18 at 4, 44 C.F.R. § 13.36(f)(1).

[503] OIG Interpretive Guidance: Full and open competition increases the probability of reasonable pricing from the most qualified contractors, and helps discourage and prevent favoritism, collusion, fraud, waste, and abuse. It also allows the opportunity for firms, women's business enterprises, and labor surplus area firms to participate in federally funded work.

DHS OIG Audit Report: DS-13-09
Procurements Under Grants Synopsis

Date: April 30, 2013

Subject: *The Alaska Department of Transportation and Public Facilities Did Not Properly Account for and Expend $1.5 Million in FEMA Public Assistance Grant Funds*

Terms: State, full and open competition, improper procurement, piggybacking, ineligible costs, fringe benefits

Background: The Department (subgrantee) received a Public Assistance subgrant award for costs resulting from severe storms, flooding, landslides, and mudslides.

Procurement Related Findings:

1) Subgrantee did not comply with Federal and State procurement requirements in the solicitation and award of a contract requiring full and open competition (piggybacking) and FEMA thus had no assurance that the subgrantee paid a reasonable price.[504] 44 C.F.R. §13.36, FEMA Public Assistance Guide, FEMA 322, October 1999, p. 39, OIG-13-09 at 3-7.

2) Subgrantee officials claimed ineligible costs, including fringe benefits, as a result of improper determinations and calculations for various force account labor and equipment expenditures. 2 C.F.R. pt. 225, 44 C.F.R. § 13.20, 44 C.F.R. pt. 206, OIG-13-09 at 8-11.

3) Subgrantee officials did not adhere to FEMA's authorized scope of work and Federal criteria when they claimed cost related to the addition of new culverts and the replacement and upgrading of non-disaster-damaged culverts. Federal regulations and FEMA guidelines stipulate that claimed costs must be required as a result of the disaster. 44 C.F.R. § 206.223. Improvements can be performed while still restoring the predisaster function of a damaged facility by obtaining the grantee's approval. The Federal funding for such improved projects shall be limited to the Federal share of the approved estimate of eligible costs (44 C.F.R. § 206.203(d)(1)) and; Mitigation measures must be related to eligible disaster-related damages

[504] OIG Interpretive Guidance: The OIG cautions FEMA officials from routinely relying upon *reasonableness* in determining the eligibility of costs incurred through the use of improper procurement practices, particularly when the procurement is not used to mitigate safety and security risks to lives and property. Federal criteria stipulate that in determining cost reasonableness, consideration should be given to requirements imposed, such as laws and regulations that are conditions of the Federal award. As the OIG has previously reported, contracting practices that do not comply with Federal procurement regulations result in high-risk contracts that potentially cost taxpayers millions of dollars in excessive costs and often do not provide full and open competition. Fundamentally, full and open competition increases the opportunity for obtaining reasonable pricing from the most qualified contractors and allows the opportunity for minority firms, women's business enterprises, and labor surplus area firms to participate in federally funded work. Further, full and open competition helps discourage and prevent favoritism, collusion, fraud, waste, and abuse.

(FEMA Hazard Mitigation Policy 9526.1, Section 7.a). OIG-13-09 at 11-12.

DHS OIG Audit Report: DD-13-08
Procurements Under Grants Synopsis

Date: April 16, 2013

Subject: *FEMA Should Disallow $4.1 Million of the $48.5 Million Public Assistance Grant Awarded to ARK Valley Electric Cooperative, Kansas*

erms: private nonprofit, A/E, verbal agreement, socioeconomic contracting, required contract provisions

Background: The Cooperative (subgrantee) received a Public Assistance subgrant award for costs resulting from a severe winter storm. Subgrantee did not use written contracts for work awarded to 3 A/E firms.

Procurement Related Findings:

1) Subgrantee awarded the contracts without free and open competition.[505] OIG DD-13-08 at 3, 2 C.F.R. § 215.43.

2) Subgrantee did not have written procurement procedures. OIG DD-13-08 at 2, 2 C.F.R § 215.44(a).

3) Subgrantee did not take positive efforts to utilize small businesses, minority-owned firms, and women's business enterprises whenever possible. OIG DD-13-08 at 2, 2 C.F.R. § 215.44(b).

4) Subgrantee did not identify the type of procuring instruments used (e.g., fixed price contracts, cost reimbursable contracts, purchase orders, incentive contracts). OIG DD-13-08 at 3, 2 C.F.R. § 215.44(c).

5) Subgrantee could not, on request, make pre-award review and procurement documents available for the Federal awarding agency. OIG DD-13-08 at 3, 2 C.F.R. § 215.44(e).

6) Subgrantee did not document some form of cost or price analysis in the procurement files in connection with the procurement actions. OIG DD-13-08 at 3, 2 C.F.R. § 215.45.

7) Subgrantee did not include the required provisions in its contracts and subcontracts. OIG DD-13-08 at 3, 2 C.F.R. § 215.48, Appendix A pt. 215.

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[505] OIG Interpretive Guidance: "Because the [subgrantee] did not competitively bid the services provided by these three contractors and did not perform a price analysis to determine the reasonableness of the contractor's rates, open and free competition did not occur and FEMA has no assurance that the costs were reasonable. A cost or price analysis decreases the likelihood of unreasonably high or low prices, contractor misinterpretations, and errors in pricing relative to the scope of work."

DHS OIG Audit Report: DS-13-05
Procurements Under Grants Synopsis

Date: March 27, 2013

Subject: *The California Department of Parks and Recreation Did Not Account for or Expend $1.8 Million in FEMA Public Assistance Grant Funds According to Federal Regulations and FEMA Guidelines*

Terms: State, State procurement requirements, ineligible costs

Background: The Department (subgrantee) received a Public Assistance subgrant for costs resulting from severe storms, flooding, landslides, and mudslides.

Procurement Related Findings:

1) Subgrantee officials did not comply with four California State procurement requirements in the solicitation and award of its contracts. As a result, FEMA and the grantee had no assurance that the subgrantee paid a reasonable price. The subgrantee is a State entity and officials must therefore comply with the same policies and procedures used for procurements for its non-Federal funds (44 C.F.R. § 13.36(a)). This exempted subgrantee officials from compliance with particular Federal criteria, however, State contracting rules also stipulate that when contracting with another public agency, the awarding agency must complete a contract cost justification and address the appropriateness or reasonableness of the contract when not competitively bidding a contract (CSCM 5.70.D). Despite our requests, subgrantee officials could not provide OIG with the justification. OIG-13-05 at 4-6.

2) Subgrantee officials improperly charged various costs that they could not support with sufficient documentation. Federal regulations and FEMA guidelines predicates eligibility on sufficient documentary support. OIG-13-05 at 6-7.

3) Subgrantee officials improperly charged costs to replace utility components (e.g., sewer, electrical, water) of a facility that was not in *active use* at the time of the disaster. Federal regulations at 44 C.F.R. § 206.226(k)(2) stipulate that facilities that were not in active use at the time of the disaster are eligible for Federal disaster assistance only in certain circumstances. OIG-13-05 at 8-9.

4) Subgrantee officials charged ineligible project costs, emergency work charged to permanent repair projects that were not part of the FEMA-approved scope of work. 44 C.F.R. 13.20, 2 C.F.R. pt. 225, FEMA Public Assistance Guide, FEMA 322, October 1999, pp. 23, 33, and 71–73, FEMA Public Assistance Applicant Handbook, FEMA 323, September 1999, pp. 17, 21–22, 32, and 52, FEMA's Applicant Handbook, FEMA 323, September 1999, p. 16, OIG-13-05 at 10-11.

DHS OIG Audit Report: DA-13-13
Procurements Under Grants Synopsis

Date: March 15, 2013

Subject: *FEMA Should Recover $3.2 Million of Public Assistance Grant Funds Awarded to the Moss Point School District Hurricane Katrina*

Terms: local government, socioeconomic contracting, full and open competition, cost and price analysis, T&M contracts, exigent circumstances, qualifications-based contracting, unsupported costs, *FEMA Policy Digest* (2001)

Background: The District (subgrantee) received a Public Assistance subgrant award for damages resulting from Hurricane Katrina, which occurred in August 2005.

Procurement Related Findings:

1) Subgrantee did not take steps to assure use of small businesses, minority owned, women owned, and labor surplus area firms. DA-13-13 at 4, 44 C.F.R. § 13.36(e)(1). Subgrantee said it coordinated with Mississippi Development Authority prior but could not provide evidence.

2) Subgrantee did not compete bids for permanent work. DA-13-13 at 4, 44 C.F.R. § 13.36(c). Subgrantee believed Federal competition requirements did not apply because the Governor had declared a state of emergency. Although 44 C.F.R. § 13.36(d)(4)(i)(B) allows noncompetitive procurement when exigency/emergency will not permit a delay resulting from competition, the work in question was for permanent work and not emergency work.

3) Subgrantee did not perform cost/price analysis. DA-13-13 at 6, 44 C.F.R. § 13.36(f)(1) For one project, subgrantee argued that a cost analysis was not required due to competition, however, Federal regulations require cost/price analyses for all procurements. Subgrantee stated it compared costs that FEMA had approved under a similar project for and determined that the cost was reasonable. According to 44 C.F.R. § 13.36(f)(1), independent cost estimates must be made before receiving bids and there no documentation to proving a cost/price analysis was performed before award. For a second project, although exigency justified a noncompetitive contract, Federal regulations still require a cost/price analysis.

4) Subgrantee used a qualifications-based contracting method to select an A/E firm for project management services.[506] DD-13-13 at 5, 44 C.F.R. § 13.36(d)(3)(v).

[506] OIG Interpretive Guidance: This contracting method can only be used to procure professional A/E services. Federal regulations do not allow the purchase of other types of services from A/E firms, such as project management services using qualifications-based contracting, 44 C.F.R. § 13.36(d)(3)(v).

5) Subgrantee did not have adequate documentation to support contractor T&M charges.[507] DD-13-13 at 7.

[507] OIG Interpretive Guidance: As stated in FEMA's *Policy Digest* (FEMA 321, October 2001, p. 20), applicants must carefully document contractor expenses when using time-and-material contracts.

DHS OIG Audit Report: DA-13-11
Procurements Under Grants Synopsis

Date: March 12, 2013

Subject: *FEMA Should Recover $131,064 from a $3.0 Million Public Assistance Grant Awarded to the City of Norfolk, Virginia, for Tropical Storm Ida and a Nor'easter*

Terms: local government, cost-plus-percentage-of-cost contract, *FEMA Public Assistance Guide* (2007)

Background: The City (subgrantee) received a Public Assistance subgrant award totaling for damage resulting from Tropical Storm Ida and a Nor'easter, which occurred in November 2009.

Procurement Related Findings

Subgrantee utilized a prohibited cost-plus-percentage-of-cost contract.[508] DA-13-11 at 2, 44 C.F.R. § 13.36(f)(4). While the subgrantee utilized a contract it had competed in 2006 and renewed yearly under an option to renew clause, the contract included a cost-plus provision whereby the contractor charged materials at cost plus a markup of 34 percent.

[508] OIG Interpretive Guidance: Federal regulations at 44 C.F.R. § 13.36(f)(4) states that the cost plus a percentage of cost and percentage of construction cost methods of contracting shall not be used. In addition, FEMA's *Public Assistance Guide* (FEMA 322, June 2007, pp. 51–53) specifies that "cost plus a percentage of costs contracts are not eligible. However, FEMA may separately evaluate and reimburse costs it finds fair and reasonable." FEMA may grant exceptions to Federal procurement requirements to subgrantees on a case-by-case basis, 44 C.F.R. § 13.6(c).

DHS OIG Audit Report: DD-13-07
Procurements Under Grants Synopsis

Date: February 27, 2013

Subject: *FEMA Should Recover $881,956 of Ineligible Public Assistance Funds and $862,983 of Unused Funds Awarded to St. Charles Parish School Board, Luling, Louisiana*

Terms: local government, full and open competition, socioeconomic contracting, contract provisions, grant management, time and material, cost/price analysis

Background: The Parish (subgrantee) received a Public Assistance subgrant award for costs resulting from Hurricane Katrina, Gustav, and Ike.

Procurement Related Findings:

1) Subgrantee enacted its Emergency Purchase Policy to dispense with competitive bidding to immediately stabilize the local school system and community. However, it continued to use noncompetitive time-and-material contracts for various debris removal services after the period of exigency.[509] OIG DD 13-07 at 4, 44 C.F.R. § 13.36(c).

2) Subgrantee did not:

- Maintain a contract administration system to ensure that contractors perform according to terms, conditions, and specifications of their contracts or purchase orders. OIG DD 13-07 at 4, 44 C.F.R. § 13.36(b)(2).
- Negotiate profit as a separate element of the price for each contract in which there is no price competition. OIG DD 13-07 at 4, 44 C.F.R. § 13.36(f)(2).
- Avoid use of time-and-material contracts unless a determination is made that no other contract is suitable and that the contract include a ceiling price that the contractor exceeds at its own risk. OIG DD 13-07 at 4, 44 C.F.R. § 13.36(b)(10)(i)-(ii).
- Include required contract provisions such as those for records retention, legal remedies, and termination for cause. OIG DD 13-07 at 4, 44 C.F.R. § 13.36(i).

[509] OIG Interpretive Guidance: "Generally, we do not question costs based on noncompliance with Federal procurement regulations when lives and property are at risk. However, once the danger passes, subgrantees should fully comply with Federal contracting regulations." Subgrantee said that it continued to use noncompetitive time-and-material contracts after the schools opened because they were not fully aware of Federal procurement regulations.

3) Grant Management: Several findings occurred in part because the grantee did not provide proper guidance to the subgrantee, and did not adequately manage and monitor the day-to-day operations of the subgrantee to ensure compliance with Federal regulations. Federal regulation 44 C.F.R. § 13.40(a) requires the grantee to manage the day to- day operations of subgrant activity and monitor subgrant activity to assure compliance with applicable Federal requirements. OIG DD 13-07 at 7.

DHS OIG Audit Report: DD-13-06
Procurements Under Grants Synopsis

Date: February 27, 2013

Subject: *FEMA Should Recover $6.7 Million of Ineligible or Unused Public Assistance Funds Awarded to Cameron Parish, Louisiana, for Hurricane Rita*

Terms: local government, duplicate costs, full and open competition, socioeconomic contracting, contract provisions, grant management, cost-plus-percentage

Background: The Parish (subgrantee) received a Public Assistance subgrant award for costs resulting from Hurricane Rita.

Procurement Related Findings:

1) Subgrantee did not provide full and open competition[510] for an A/E contract totaling $1.8 million.[511] OIG DD 13-06 at 8, 44 C.F.R. § 13.36(c).

2) Subgrantee did not maintain sufficient records to detail the significant history of procurements. OIG DD 13-06 at 9, 44 C.F.R. § 13.36(b)(9).

3) Subgrantee did not include a reasonable cost ceiling in a T&M contract.[512] OIG DD 13-06 at 9, 44 C.F.R. § 13.36(b)(10)(ii).

4) Subgrantee did not include the required Federal provisions in all contracts.[513] OIG DD 13-06 at 9, 44 C.F.R. § 13.36(i).

5) Subgrantee did not take necessary affirmative steps to assure use of small businesses, minority firms, women's business enterprises, and labor surplus area firms when possible for contract

[510] The subgrantee awarded a noncompetitive architectural and engineering contract to a contractor that it had used before Hurricane Rita. This pre-existing contract was more than 2 decades old.

[511] OIG Interpretive Guidance: "FEMA's practice has been to allow contract costs it considers reasonable, regardless of whether the contract complies with Federal procurement regulations. However, Federal procurement policies do not authorize this practice unless lives and property are at stake, because the goals of proper contracting relate to more than just reasonable cost. Full and open competition usually increases the number of bids received and thereby increases the opportunity for obtaining reasonable pricing from the most qualified contractors. Full and open competition also helps to discourage and prevent favoritism, collusion, fraud, waste, and abuse."

[512] OIG Interpretive Guidance: The contract had a ceiling of $50 Million, but the OIG determined that this was unreasonably high and therefore meaningless as a cost control measure for a contract award.

[513] OIG Interpretive Guidance: These contract provisions document the rights and responsibilities of the parties and minimize the risk of contract misinterpretations and disputes.

work.[514] OIG DD 13-06 at 9-10, 44 C.F.R. § 13.36(e).

6) Grant Management: Several findings occurred in part because the grantee did not provide proper guidance to the subgrantee and did not adequately manage and monitor the subgrantee to ensure compliance with Federal regulations. Federal regulation 44 C.F.R. § 13.40(a) requires the grantee to manage the day-to-day operations of subgrant activity and monitor subgrant activity to assure compliance with applicable Federal requirements. OIG DD 13-06 at 12-13.

[514] Although the subgrantee did not have steps in place to solicit awards from small businesses, minority-owned firms, women's business enterprises, and labor surplus area firms, it did award 18 of its 40 contracts to such businesses. As such, the OIG did not question the other disaster-related contract costs because the subgrantee otherwise competitively bid its contracts, which included awards to small and disadvantaged businesses.

DHS OIG Audit Report: DA-13-10
Procurements Under Grants Synopsis

Date: February 22, 2013

Subject: *FEMA Should Recover* $8.5 *Million of Public Assistance for Grant Funds Awarded to the City of Gulfport Mississippi, for Debris Removal and Emergency Protective Measures--Hurricane Katrina*

Terms: local government, cost and price analysis, exigent circumstances, unreasonable costs, *FEMA Public Assistance Guide* (1999)

Background: The City (subgrantee) received a Public Assistance subgrant award for damages resulting from Hurricane Katrina, which occurred in August 2005.

Procurement Related Findings:

1) Subgrantee awarded noncompetitive contract for debris removal and did not conduct a cost or price analysis for the contract. The subgrantee awarded a noncompetitive contract for removal of the biohazard debris, which was justified because of the threat to public health and safety posed by the debris. To perform the contract work, the subgrantee issued change orders to an existing contract with its primary debris removal contractor. However, the subgrantee did not conduct a cost or price analysis to determine the reasonableness of the contractor's price or negotiate profit as a separate element of the price. A cost or price analysis decreases the likelihood of unreasonably high or low prices, contractor misinterpretations, and errors in pricing relative to the scope of work. DA-13-10 at 5, 44 C.F.R. § 13.36(f)(1).

2) Subgrantee claimed $989,148 in unreasonable costs because it did not conduct a cost or price analysis.[515] DA-13-10 at 6, FEMA *Public Assistance Guide* (FEMA 322, October 1999).

[515] OIG Interpretive Guidance: The subgrantee did not follow Federal procurement procedures and perform a cost or price analysis when costs data were available from another subgrantee project, under which identical work was performed for a significantly lower cost. The FEMA *Public Assistance Guide* (FEMA 322, October 1999, pp. 33-34) states that a cost must be reasonable and necessary to accomplish the work. It further states that a cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost. In other words, a reasonable cost is a cost that is both fair and equitable for the type of work performed. The guide states that the use of historical documentation for similar work, and average costs for similar work in the area, are among the methods through which reasonable costs can be established.

DHS OIG Audit Report: DA-13-09
Procurements Under Grants Synopsis

Date: February 15, 2013

Subject: *FEMA Should Recover $1.9 Million of Public Assistance Grant Funds Awarded to the Hancock County Utility Authority Hurricane Katrina*

Terms: local government, cost and price analysis, exigent circumstances, sole source, socioeconomic contracting, *FEMA Public Assistance Guide* (1999)

Background: The Authority (subgrantee) received a Public Assistance subgrant award for damages resulting from Hurricane Katrina, which occurred in August, 2005.

Procurement Related Findings:

1) Subgrantee did not take all necessary affirmative steps to assure that small businesses, minority firms, women's business enterprises, and labor surplus area firms were used when possible. DS-13-09 at 3, 44 C.F.R. § 13.36(e). Authority officials said that they believed that when they advertised projects in the newspaper, everyone had an equal chance to bid on the work. However, in addition to normal Federal contracting competitive procedures, 44 C.F.R. § 13.36 (e)(2) lists additional steps that must be taken to provide opportunities to minority firms, women's business enterprises, and labor surplus area firms.

2) Subgrantee did not perform a cost or price analysis for the contract for emergency work.[516] DA-13-09 at 4, 44 C.F.R. § 13.36(f)(1).

[516] OIG Interpretive Guidance: Federal regulations require a cost or price analysis in connection with every procurement action, including those awarded under exigent circumstances, and including contract modifications.

DHS OIG Audit Report: DD-13-02
Procurements Under Grants Synopsis

Date: January 3, 2013

Subject: *FEMA Public Assistance Grant Funds Awarded to St. John the Baptist Parish, Louisiana*

Terms: local government, socioeconomic contracting, full and open competition, cost and price analysis, required provisions

Background: The Parish (subgrantee) received a Public Assistance subgrant award for damages resulting from Hurricane Ike, declared on September 13, 2008.

Procurement Related Findings:

1) Subgrantee did not always take sufficient steps to assure the use of small businesses, minority owned firms, women's business enterprises, and labor surplus area firms. DD-13-02 at 5, 44 C.F.R. § 13.36(e)(1).

2) Subgrantee did not always perform a cost or price analysis in connection with procurement actions. DD-13-02 at 5, 44 C.F.R. § 13.36(f)(1).

3) Subgrantee did not always include certain required contract provisions such as those for records retention and termination for cause.[517] DD-13-02 at 5, 44 C.F.R § 13.36(i).

[517] In spite of these findings the OIG did not question any costs related to contracting because the subgrantee otherwise properly procured its disaster-related contracts and because it awarded $4.9 million of the $5.1 million in contract work to a minority-owned firm.

DHS OIG Audit Report: DA-13-08
Procurements Under Grants Synopsis

Date: December 4, 2012

Subject: *FEMA Should Recover $470,244 of Public Assistance Grant Funds Awarded to the City of Lake Worth, Florida-Hurricanes Frances and Jeanne*

Terms: local government, full and open competition, cost and price analysis, T&M contracts, exigent circumstances, sole source, *FEMA Public Assistance Guide* (1999)

Background: The City (subgrantee) received Public Assistance subgrant awards totaling for damages resulting from hurricanes Frances and Jeanne, which occurred in September 2004.

Procurement Related Findings:

1) Subgrantee did not award contracts using full and open competition for permanent work, instead continuing to use noncompetitive contracts that it had awarded to perform emergency work necessary to restore power.[518] DA-13-08 at 4, 44 C.F.R. § 13.36(c)(1).

2) Subgrantee did not conduct a cost and price analysis for the sole source contracts. DA-13-08 at 4, 44 C.F.R. § 13.36(f)(1).

3) Subgrantee used T&M contracts without establishing cost ceilings. DA-13-08 at 4, 44 C.F.R. § 13.36(b)(10).

[518] OIG Interpretive Guidance: Noncompetitive proposals should be used only when the award of a contract is not feasible under small purchase procedures, sealed bids, or competitive proposals, and one of the following circumstances applies: (1) the item is available only from a single source, (2) there is an emergency requirement that will not permit a delay for competition, (3) FEMA authorizes noncompetitive proposals, or (4) solicitation from a number of sources has been attempted and competition is determined to be inadequate. In this case, exigent circumstances warranted sole-sourcing the contract until September 29, 2004, when electricity was restored and lives and property were no longer at risk. However, the subgrantee should have competed the permanent repair work after that date.

DHS OIG Audit Report: DA-13-07
Procurements Under Grants Synopsis

Date: November 20, 2012

Subject: *FEMA Should Recover $701,028 of Public Assistance Grant Funds Awarded to Memphis Light, Gas and Water Division – Severe Weather February 2008*

Terms: local government, exigent circumstances, cost or price analysis, time and material contracts, reasonable costs, grants management

Background: The Water Division (subgrantee) received a Public Assistance subgrant award for damages resulting from severe storms, tornadoes, straight-line winds, and flooding, which occurred in February 2008.

Procurement Related Findings:

1) Subgrantee awarded two noncompetitive time-and-material contracts for the restoration of electrical power lost during the disaster. Subgrantee selected the contractors from a list of potential sources it had compiled before the disaster. The subcontractor did not establish ceiling prices that the contractors exceeded at their own risk.[519] DA-13-07 at 3, 44 C.F.R. § 13.36(b)(10).

2) Subgrantee did not complete a cost or price analysis to determine the reasonableness of the proposed price.[520] DA-13-07 at 3, 44 C.F.R. § 13.36(f)(1). Subgrantee officials said that they receive rates from contractors annually and compile a list of potential sources (by location, availability, and expertise) in the event of an emergency.

3) Grantee did not adequately manage the subgrantee's day-to-day operations, DA-13-07 at 3, 44 C.F.R. § 13.40(a).[521]

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[519] OIG Interpretive Guidance: The contract work began on February 6, 2008, and continued until February 10, 2008, when all power was restored. OIG concluded that the need for electrical power constituted exigent circumstances that warranted the use of noncompetitive contracts.

[520] OIG Interpretive Guidance: There no evidence in the subgrantee's files that the lists of prices were negotiated or reviewed for reasonableness. OIG noted that the overtime rates for similar positions varied considerably between the contractors. For example, one contractor's overtime rate for a general foreman was $85 per hour, while the other contractor's overtime rate for a general foreman was $133 per hour, or 56.4 percent more. Because the subgrantee did not conduct a cost or price analysis, FEMA has no assurance that the work was obtained at a fair and reasonable price.

[521] OIG Interpretive Guidance: The grantee accepted the costs in question but the documentation did not indicate that the costs were reviewed to ensure compliance with Federal procurement requirements and FEMA guidelines.

DHS OIG Audit Report: DA-13-06
Procurements Under Grants Synopsis

Date: November 20, 2012

Subject: *FEMA Should Recover $894,764 of Public Assistance Grant Funds Awarded to the Town of Dauphin Island, Alabama - Hurricane Katrina*

Terms: local government, cost or price analysis, reasonable costs

Background: The Town (subgrantee) received a Public Assistance subgrant award for damages resulting from Hurricane Katrina, which occurred in August 2005.

Procurement Related Findings:

1) Subgrantee did not perform a cost or price analysis to determine the reasonableness of the contractor's proposed price (note that subgrantee received only one bid in response to solicitation).[522] DA-13-06 at 2; 44 C.F.R. § 13.36(f)(1).

[522] OIG Interpretive Guidance: OIG questioned the costs claimed because the subgrantee did not comply with Federal procurement requirements and, as a result, FEMA has no assurance that the price paid for the contract work was reasonable.

DHS OIG Audit Report: DA-13-05
Procurements Under Grants Synopsis

Date: November 20, 2012

Subject: *FEMA Should Recover $2.2 Million of Public Assistance Grant Funds Awarded to Memphis Light, Gas and Water Division - Severe Weather, June 2009*

Terms: local government, noncompetitive, time and material, exigent circumstances, cost or price analysis, reasonable costs, grants management

Background: The Water Division (subgrantee) received a Public Assistance subgrant award for damages resulting from severe storms, tornadoes, straight-line winds, and flooding that occurred in June 2009.

Procurement Related Findings:

1) Subgrantee awarded T&M contracts without establishing ceiling prices that the contractors exceeded at their own risk.[523] DA-13-05 at 3, 44 C.F.R. § 13.36(b)(10).

2) Subgrantee did not complete a cost or price analysis to determine the reasonableness of the proposed prices for the T&M contracts.[524] DA-13-05 at 3, 44 C.F.R. § 13.36(f)(1). The subgrantee provided that it received rates from contractors annually and compile a list of potential sources (by location, availability, and expertise) in the event of an emergency.

3) Grantee did not adequately manage the subgrantee's day-to-day operations.[525] DA-13-05 at 3, 44 C.F.R. § 13.40(a).

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[523] Note that subgrantee awarded these contracts, for power restoration services, using noncompetitive procedures. The subgrantee selected the contractors from a list of potential sources it had compiled prior to the disaster. The contract work began on June 13, 2009, and continued until June 19, 2009, when all power was restored. The OIG concluded that the lack of power constituted exigent circumstances that warranted the use of noncompetitive contracts during this period.

[524] OIG Interpretive Guidance: There no evidence in the subgrantee's files that the lists of prices were negotiated or reviewed for reasonableness. OIG noted that the overtime rates for similar positions varied considerably between the contractors. For example, one contractor's overtime rate for a general foreman was $98 per hour, while the other contractor's overtime rate for a general foreman was $133 per hour, or 35.7 percent higher. Because the subgrantee did not conduct a cost or price analysis, FEMA has no assurance that the work was obtained at a fair and reasonable price.

[525] OIG Interpretive Guidance: The grantee accepted the costs in question but the documentation did not indicate that the costs were reviewed to ensure compliance with Federal procurement requirements and FEMA guidelines.

DHS OIG Audit Report: DA-13-04
Procurements Under Grants Synopsis

Date: November 20, 2012

Subject: *FEMA Should Recover $7.7 Million of Public Assistance Grant Funds Awarded to the City of Lake Worth, Florida Hurricane Wilma*

Terms: local government, exigent circumstances, cost and price analysis, noncompetitive contracts, reasonable costs

Background: The City (subgrantee) received a Public Assistance subgrant award for damages resulting from Hurricane Wilma, which occurred in October 2005.

Procurement Related Findings:

1) Subgrantee awarded time and material contracts without establishing ceiling prices that the contractors exceeded at their own risk. DA-13-04 at 3, 44 C.F.R. § 13.36(b)(10).

2) Subgrantee did not complete a cost or price analysis to determine the reasonableness of the proposed prices for the time and equipment contracts. DA-13-04 at 3, 44 C.F.R. § 13.36(f)(1).

3) Subgrantee did not solicit bids for permanent work once electrical power was restored and the exigent circumstances were over.[526] DA-13-04 at 3, 44 C.F.R. § 13.36 (d)(4)(i).

[526] OIG Interpretive Guidance: OIG concluded that the immediate need for electrical power constituted exigent circumstances that warranted the use of noncompetitive contracts through November 7, 2005, because lives and property were at risk. The subgrantee should have openly competed the permanent repair work after this date, because exigent circumstances no longer existed to justify the use of noncompetitive contracts. Instead, the subgrantee used the contractors hired under the noncompetitive contracts for permanent work that was completed by March 6, 2006.

DHS OIG Audit Report: DA-13-03
Procurements Under Grants Synopsis

Date: November 6, 2012

Subject: *FEMA Should Recover $5.3 Million of Public Assistance Grant Funds Awarded to University of Southern Mississippi-Hurricane Katrina*

Terms: institution of higher education, duplicate benefits, insurance proceeds, T&M contract, A/E contract, full and open competition, unsupported costs, alternate project funding

Background: The University (subgrantee) received a Public Assistance subgrant award for damages resulting from Hurricane Katrina.

Procurement Related Findings:

1) Subgrantee did not adequately justify the use of a T&M contract for permanent repair work.[527] DA-13-03 at 5, 2 C.F.R. § 215.44(c).

2) Subgrantee did not allow for full and open competition when procuring A/E services. Instead of soliciting competitive proposals, the subgrantee used an A/E firm with which it had a contract prior to Hurricane Katrina.[528] DA-13-03 at 6, 2 C.F.R. § 215.43.

3) Subgrantee also did not perform a cost or price analysis before awarding the T&M and A/E services contracts. DA-13-03 at 6, 2 C.F.R. § 215.45.

4) Subgrantee did not maintain adequate source documentation to support $979,803 of T&M contract costs claimed. According to 2 C.F.R. § 215.21(b)(7), recipients' financial management systems shall provide accounting records that are supported by source documentation. DA-13-03 at 7.

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[527] OIG Interpretive Guidance: Project documentation showed that a clear scope of work had been developed at the time the contract was awarded. A memo from the project architect stated, "We brought in reputable contractors . . . and reviewed the scope of work." The memo also noted drawings that outlined the proposed work. Because this contract was completed 11 months after the disaster and FEMA's *Public Assistance Guide* states that time-and-materials contracts should be avoided but may be used for a limited period (generally not more than 70 hours) for work that is necessary immediately after the disaster has occurred when a clear scope of work cannot be developed... . The [Subgrantee] should have used a more appropriate type of contracting method to accomplish the work.

[528] OIG Interpretive Guidance: Full and open competition increases the probability of reasonable pricing from the most qualified contractors and helps discourage and prevent favoritism, collusion, fraud, waste, and abuse.

DHS OIG Audit Report: DD-12-20
Procurements Under Grants Synopsis

Date: September 12, 2012

Subject: *FEMA Public Assistance Grant Funds Awarded to St. Charles Parish, Louisiana*

Terms: local government, cost and price analysis, sole source, socioeconomic contracting

Background: The Parish (subgrantee) received a Public Assistance subgrant award for damages resulting from Hurricanes Gustav and Ike, occurring September 2008.

Procurement Related Findings:

1) Subgrantee did not include required provisions in its contracts. These provisions document the rights and responsibilities and minimize risk of contract misinterpretations and disputes. DD-12-20 at 6, 44 C.F.R. § 13.36(i).

2) Subgrantee did not perform a cost or price analysis on any of the six contracts we reviewed. Federal regulations require subgrantees to perform a cost or price analysis for every procurement. Performing a cost or price analysis decreases the likelihood of unreasonably high or low prices, contractor misinterpretations, and errors in pricing relative to the scope of work.[529] DD-12-20 at 6, 44 C.F.R. § 13.36(f)(1).

3) Subgrantee did not take all necessary affirmative steps to assure that small businesses, minority firms, women's business enterprises, and labor surplus area firms were used when possible.[530] DD-12-20 at 6, 44 C.F.R. § 13.36(e).

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[529] Grantee stated that properly bid contract serves as a cost or price analysis. Grantee also stated that requiring applicants to complete a cost or price analysis on every contract is onerous. OIG disagreed as (1) FEMA is not a party these contracts and, therefore, is not involved in the decision as to the necessity of a cost or price analysis; (2) Federal regulations require cost or price analyses even when contracts are properly bid, in part to lessen the likelihood of underbidding, which can lead to nonperformance and contract disputes, and overbidding, which may occur when bidders have colluded on their bids; and (3) completing a simple cost or price analysis is not onerous; for example, the Parish could have determined what it has paid for similar services, or asked FEMA, GOHSEP, or neighboring parishes what they considered a fair price for similar services.

[530] OIG Interpretive Guidance: Affirmative steps should include using the services of the Small Business Administration and the Minority Business Development Agency of the Department of Commerce, and requiring the prime contractor to take the affirmative steps listed in Federal regulations 44 C.F.R. § 13.36(e)(2)(i) through (v). During the audit, the subgrantee revised its standard contract template. The revision states that the subgrantee "shall, to the extent consistent with quality, price, risk and other lawful and relevant considerations, use its good faith efforts to achieve participation by minority, women and disadvantaged businesses." However, simply stating that the subgrantee's policy is to consider awarding contracts to minority, women-owned, and disadvantaged businesses is not sufficient. Rather, the subgrantee must document the affirmative steps taken to encourage such firms to bid on its contracts.

DHS OIG Audit Report: DS-12-12
Procurements Under Grants Synopsis

Date: July 18, 2012

Subject: *FEMA Public Assistance Grant Funds Awarded to the Alaska Department of Transportation and Public Facilities, Central Region, Anchorage, Alaska*

Terms: State, full and open competition, cost and price analysis, scope of work, T&M, exigent circumstances, Public Assistance Guide (2007)

Background: The Alaska Department of Transportation and Public Facilities, Central Region was awarded a Public Assistance grant award related to roadway washout damages resulting from severe storms, flooding, mudslides, and rockslides during the period from October 6 through 11, 2009.

Procurement Related Findings:

1) Subgrantee awarded the contracts without full and open competition. Subgrantee improperly invited specific contractors to submit quotes using small procurement procedures. DS-12-12 at 2, 44 C.F.R. § 13.36 (c)(1).

2) Small procurement procedures that have a $100,000 limit were used for two contracts with charges in excess of the simplified acquisition threshold. DS-12-12 at 3, Alaskan Statute (AS) 36.30.32

2) The contracts did not include a cost estimate by site or project, and the scope of work for the contracts was broadly worded. As a result, the scopes of work couldn't be reconciled with the project worksheets. DS-12-12 at 3.

3) Subgrantee did not perform a cost or price analysis for the preaward or change order proposals. DS-12-12 at 4, 44 C.F.R. § 13.36(f)(1).

4) Subgrantee did not document a waiver of competitive requirements for emergency conditions, as required by State procurement rules. DS-12-12 at 5, AS 36.30.310.

5) Subgrantee awarded two T&M contracts with cost ceilings. The subgrantee paid contractor's billings that exceeded the cost ceilings.[531] DS-12-12 at 4, FEMA Public Assistance Guide.

[531] OIG Interpretive Guidance: Applicants should avoid using time-and-material contracting. FEMA may provide assistance for work completed under such contracts for a limited period (generally not more than 70 hours) that is necessary immediately after the disaster has occurred when a clear scope of work cannot be developed. In all cases, a cost ceiling, or "not-to-exceed" provision, must be included in the contract, and a competitive process should be used for all of the labor and equipment rates (*FEMA Public Assistance Guide*, FEMA 322, June 2007).

(2007).

DHS OIG Audit Report: DD-12-04
Procurements Under Grants Synopsis

Date: July 18, 2012

Subject: *FEMA Public Assistance Grant Funds Awarded to Cameron Parish School Board, Cameron, Louisiana*

Terms: local government, required provisions, socioeconomic contracting

Background: Cameron (subgrantee) received a Public Assistance subgrant award for damages resulting from Hurricane Rita, which occurred on September 24, 2005.

Procurement Related Findings:

1) Subgrantee did not include in its contracts the provisions required by 44 C.F.R. § 13.36(i). These provisions document the rights and responsibilities of the parties and minimize the risk of misinterpretations and disputes. DD-12-04 at 3.

2) Subgrantee did not take sufficient steps to assure the use of small businesses, minority owned firms, women's business enterprises, and labor surplus area firms.[532] DD-12-04 at 3, 44 C.F.R. § 13.36(e).

[532] OIG Interpretive Guidance: Although the subgrantee did not take the specific affirmative steps listed in the regulations, it did award half of its contracts to small or disadvantaged businesses (17 contracts totaling $14.3 million out of 31 contracts totaling $49.6 million). Therefore, OIG did not question any costs related to contracting because the subgrantee otherwise properly procured its disaster-related contracts. However, for future federally funded disaster contracts, the subgrantee should ensure that it complies with all Federal procurement standards.

DHS OIG Audit Report: DA-12-22
Procurements Under Grants Synopsis

Date: July 18, 2012

Subject: *FEMA Public Assistance Grant Funds Awarded* to *the Long Beach Port Commission, Long Beach, Mississippi*

Terms: local government, full and open competition, cost and price analysis, socioeconomic contracting, exigent circumstances, Public Assistance Guide (1999)

Background: The Port (subgrantee) received a Public Assistance subgrant award for damages resulting from Hurricane Katrina, which occurred in August 2005.

Procurement Related Findings:

1) Subgrantee did not take affirmative steps to include minority firms, women's business enterprises, and labor surplus area firms in its bid process for certain contract work.[533] DA-12-22 at 3, 44 C.F.R. § 13.36(e)(1). Subgrantee stated that it advertised all contracts in local and surrounding newspapers. Subgrantee also stated it believed the advertisements had been coordinated through the Mississippi Development Authority, a State agency, which has a process to assure the use of minority firms, women's business enterprises, and labor surplus area firms. Mississippi Development Authority could not confirm that coordination had taken place and the subgrantee could not otherwise document required affirmative requirements.

2) Subgrantee awarded a contract to an A/E firm without full and open competition and did not perform a cost or price analysis of the contractor's proposed prices.[534] DA-12-22 at 4, 44 C.F.R. § 13.36(c)(1), 44 C.F.R. § 13.36.36(f)(1).

[533] OIG Interpretive Guidance: Federal procurement standards require that procurement transactions be conducted in a manner providing full and open competition. The regulations also require that additional steps be taken, beyond competition, to ensure the use of minority firms, women's business enterprises, and labor surplus area firms.

[534] OIG Interpretive Guidance: The Port solicited bids from A/E firms and selected one firm using a qualifications-based selection process. However, this method of contracting, where price is not used as a selection factor, may be used only in procurement of A/E professional services (44 C.F.R. § 13.36(d)(3)(v)). It may not be used to purchase other types of services, such as project management services, from A/E firms.

DHS OIG Audit Report: DA-12-20
Procurements Under Grants Synopsis

Date: July 15, 2012

Subject: *FEMA Public Assistance Grant Funds Awarded* to *City of Miramar; Florida-Hurricane Wilma*

Terms: local government, full and open competition, cost and price analysis, socioeconomic contracting, exigent circumstances, Public Assistance Guide (1999), FEMA Policy 9580.4 Fact Sheet: Debris Operations—Clarification: Emergency Contracting vs. Emergency Work (2001)

Background: The City (subgrantee) received a Public Assistance subgrant award for damages resulting from Hurricane Wilma, which occurred in October 2005.

Procurement Related Findings:

1) Subgrantee awarded contracts without full and open competition.[535] DA-12-20 at 3, 44 C.F.R. § 13.36(c)(1). Subgrantee stated that it awarded the contracts without competition due to exigent circumstances. However, the contracts in question were awarded for debris removal from the City's rights-of-way. FEMA has determined that such activity is not a public exigency or emergency that relieves the applicant of competitive bidding (FEMA Policy 9580.4, Fact Sheet: *Debris Operations – Clarification: Emergency Contracting vs. Emergency Work*, January 2001).[536]

2) Subgrantee did not perform a cost or price analysis of the contractor's proposed prices.[537] DA-12-20 at 3, 44 C.F.R. § 13.36(f)(1).

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[535] OIG Interpretive Guidance: Full and open competition increases the probability of reasonable pricing from the most qualified contractors and allows the opportunity for minority firms, women's business enterprises, and labor surplus area firms to participate in federally funded work. Full and open competition also helps discourage and prevent favoritism, collusion, fraud, waste, and abuse.

[536] FEMA Policy 9580.4 provides in part that "non-competitive contracting is acceptable ONLY in rare circumstances where there can be no delay in meeting a requirement. In general, contracting for debris work requires competitive bidding. The definition of "emergency" in contracting procedures is not the same as FEMA's definition of 'emergency work.'" "[N]ormally, non-competitive bid awards should not be made several days (or weeks) after the disaster or for long-term debris removal."

[537] OIG Interpretive Guidance: A cost or price analysis decreases the likelihood of unreasonably high or low prices, contractor misinterpretations, and errors in pricing relative to the scope of work.

DHS OIG Audit Report: DS-12-11
Procurements Under Grants Synopsis

Date: July 3, 2012

Subject: *FEMA Public Assistance Grant Funds Awarded* to *County, El Dorado, California*

Terms: local government, full and open competition, cost and price analysis, maintain documents

Background: The County (subgrantee) received a Public Assistance subgrant award for debris removal, emergency protective measures, and permanent repairs to facilities damaged as a result of flooding that occurred from December 17, 2005, through January 3, 2006.

Procurement Related Findings:

1) Subgrantee awarded the contracts without full and open competition and without adequate justification. Subgrantee awarded a construction contract without competition to the same contractor hired to perform debris removal in the general vicinity. Subgrantee stated it would have taken too long to compete the contract for the road repairs. OIG found that the subgrantee expeditiously competed other contracts, and that several contractors also visited the construction site before the subgrantee decided to forego competition. The OIG also found that subgrantee did not take immediate steps to award these contracts and instead waited two months after deciding to not compete the contracts. DS-12-11 at 3, 44 C.F.R. §§ 13.36 (c)(1).

2) Subgrantee did not perform a cost or price analysis on each procurement action.[538] Subgrantee stated it determined the project costs were fair and reasonable by using both FEMA-provided cost estimates and historical costs that subgrantee incurred for similar projects. Subgrantee later shared copies of three worksheets that it claimed were recently located and used to perform a cost or price analysis. Because the three worksheets were not included in subgrantee's contract files and were undated, OIG could not determine their reliability or whether they were used for a cost or price analysis prior to awarding the contract, as the County asserts. DS-12-11 at 5, 44 C.F.R. § 13.36(f)(1).

3) Subgrantee did not maintain records, including documentation as to why the procurement was not competed. The grantee did not monitor the County's procurement activities to ensure adequate documentation was maintained to support procurement actions. DS-12-11 at 5, 44 C.F.R. § 13.36 (b)(9).

[538] OIG Interpretive Guidance: A cost analysis is necessary when adequate price competition is lacking, and for sole-source procurements, including contract modifications or change orders, unless price reasonableness can be established on other bases mentioned in 44 C.F.R. § 13.36(f)(1). A price analysis will be used in all other instances to determine the reasonableness of the proposed contract price.

DHS OIG Audit Report: DD-12-15
Procurements Under Grants Synopsis

Date: June 20, 2012

Subject: *FEMA Public Assistance Grant Funds Awarded to Ochsner Clinic Foundation, New Orleans, Louisiana*

Terms: private nonprofit, exigent circumstances, full and open competition, required provisions, cost and price analysis, socioeconomic contracting, small purchase threshold, maintain documents

Background: Ochsner (subgrantee) received a Public Assistance subgrant award for damages resulting from Hurricane Katrina, which occurred on August 29, 2005.

Procurement Related Findings:

1) Subgrantee did not conduct procurements in a manner to provide, to the maximum extent practical, open and free competition.[539]

2) Subgrantee did not comply with Federal contracting requirements after the exigent period.[540] DD-12-15 at 6, 2 C.F.R. § 215.43.

3) Subgrantee did not perform a cost or price analysis on the majority of contracts. DD-12-15 at 5, 2 C.F.R. § 215.45.

4) Subgrantee did not include required provisions in all contracts and subcontracts. DD-12-15 at 5, 2 C.F.R. § 215.48.

4) Subgrantee did not take steps to assure use of small, minority, women-owned and labor surplus area firms. DD-12-15 at 5, 2 C.F.R. § 215.44.

5) Procurement documents are to be made available for awards exceeding the small purchase

[539] OIG Interpretive Guidance: "FEMA's general practice has been to allow contract costs it considers reasonable regardless of compliance with Federal procurement regulations. We do not agree with this practice because the goal of proper contracting involves more than just cost. Without open and free competition, FEMA has little assurance that contract costs are reasonable. Open and free competition not only provides an environment for obtaining reasonable pricing from the most qualified contractors, it also discourages favoritism, collusion, fraud, waste, and abuse."

[540] OIG Interpretive Guidance: "The exigent period is the time when immediate actions are required to protect life and property. We generally do not question costs based on noncompliance with contracting regulations when lives and property are at risk. However, once the danger passes, applicants should fully comply with Federal contracting regulations."

threshold.[541] DD-12-15 at 5, 2 C.F.R. § 215.44.

[541] OIG Interpretive Guidance: Ochsner's claim included $2,426,451 of unsupported contract costs. The invoices for these costs did not include supporting documentation, such as timesheets and work logs for labor, contract agreements or rate schedules, and evidence of vendor payments. Cost principles at 2 C.F.R. 230, Appendix A, § A.2.g, state that a cost must be adequately documented to be allowable under Federal awards. Therefore, OIG questioned costs totaling $2,426,451 as unsupported.

DHS OIG Audit Report: DA-12-18
Procurements Under Grants Synopsis

Date: May 11, 2012

Subject: FEMA Public Assistance Grant Funds Awarded to Henderson Point Water and Sewer District, Pass Christian Mississippi

Terms: private nonprofit, full and open competition, cost and price analysis, socioeconomic contracting, unsupported costs

Background: The District (subgrantee) received a Public Assistance subgrant award for damage resulting from Hurricane Katrina, which occurred in August 2005.

Procurement Related Findings:

1) Subgrantee awarded contracts without full and open competition. DA-12-18 at 3, 2 C.F.R. § 215.43. The District used a contractor with which it had an existing business relationship to complete the work authorized under the FEMA projects. Subgrantee said that it made that decision because it was operating under a state of emergency at the time the replacement and repair work began on the sewer system. However, both projects were for permanent repair work and should have been openly competed.

2) Subgrantee accepted the contractor's proposed prices without performing an independent analysis of the prices to ensure reasonableness. DA-12-18 at 3, 2 C.F.R. § 215.45.

3) Subgrantee did not take positive steps to identify and use small businesses, minority-owned firms, women's business enterprises, and labor surplus area firms. DA-12-18 at 3, 2 C.F.R. § 215.44(b).

4) Subgrantee did not have adequate source documentation to support $443,440 of contract charges.[542] DA-12-18 at 4, 2 C.F.R. § 230, Appendix A, § (A)(2)(g).

[542] OIG Interpretive Guidance: Source documentation, such as material invoices and subcontractor invoices, did not support costs billed to the District by the prime contractor. This occurred because the invoices were based upon estimated costs instead of actual costs incurred. 2 C.F.R. § 230, Appendix A, § (A)(2)(g) states that, to be allowable under an award, costs must be adequately documented.

DHS OIG Audit Report: DA-12-15
Procurements Under Grants Synopsis

Date: April 1, 2012

Subject: *FEMA Public Assistance Grant Funds Awarded to City of Coral Springs, Florida - Hurricane Wilma*

Terms: local government, maintain documents, reasonable costs, T&M contract, FEMA Publication 325, *Debris Management Guide*, April 1999

Background: The City (subgrantee) received a Public Assistance subgrant award for damage resulting from Hurricane Wilma, which occurred in October 2005.

Procurement Related Findings:

1) Subgrantee did not have adequate documentation to support project activity costs. DA-12-15 at 4, Cost principles at 2 C.F.R. § 225, Cost Principles for State, Local, and Indian Tribal Governments, Appendix A, § C.1.j.

2) Subgrantee used a T&M contract for debris removal, including claimed costs for work performed outside FEMA's 70 hour permissible time limit.[543] DA-12-15 at 4, 44 C.F.R. § 13.36(b)(10), FEMA Publication 325, *Debris Management Guide*, April 1999. Subgrantee claimed that it used a T&M contract because it was inefficient for the contractor to pick up the bags with machinery. OIG disagreed as the contractor often used mechanically loaded trailers and self-loaders to pick up the bags.

3) Subgrantee submitted claims for unreasonable costs.[544] DA-12-15 at 4.

4) Subgrantee claimed T&M charges for a debris removal contract after the permissible 70 hour time limit for emergency debris clearance set by FEMA guidelines. DA-12-15 at 5, FEMA Publication 325, *Debris Management Guide*, April 1999.

[543] OIG Interpretive Guidance: Federal regulations and FEMA guidelines place restrictions on the use of time-and-materials contracting because it does not encourage effective cost controls.

[544] OIG Interpretive Guidance: Contract terms stipulated that certain types of debris would be charged at a rate of $3 to $8 per cubic yard. The subgrantee submitted claims for costs in excess of what should have been incurred applying the highest cubic yard rate. The excess costs are unreasonable.

DHS OIG Audit Report: DA-12-13
Procurements Under Grants Synopsis

Date: March 20, 2012

Subject: *FEMA Public Assistance Grant Funds Awarded to Harrison County Library System, Gulfport, Mississippi*

Terms: local government, socioeconomic contracting

Background: The Library (subgrantee) received a Public Assistance subgrant award for damage resulting from Hurricane Katrina in August 2005.

Procurement Related Findings:

Subgrantee did not take the necessary affirmative steps to assure that minority firms, women's business enterprises, and labor surplus area firms were considered contracts. DA-12-13 at 5, 44 C.F.R. § 13.36(e)(1). Subgrantee officials said that they were unaware of the requirement to take affirmative steps to assure that minority firms, women's business enterprises, and labor surplus area firms are used when using Federal funds to procure goods and services. However, subgrantee officials were notified of post-award procurement requirements. Subgrantee officials executed a signed agreement with the State prior to the grant award, which included a stipulation that the subgrantee must comply with all applicable provisions of Federal and State laws and regulations relating to procurement of goods and services.

DHS OIG Audit Report: DD-12-06
Procurements Under Grants Synopsis

Date: February 22, 2012

Subject: *FEMA Public Assistance Grant Funds Awarded to St. Charles Parish, Louisiana*

Terms: local government, required provisions, cost and price analysis, socioeconomic contracting

Background: The Parish (subgrantee) received a Public Assistance subgrant award for damage resulting from Hurricane Katrina, which occurred on August 29, 2005.

Procurement Related Findings:

1) Subgrantee did not include in its contracts the provisions required by 44 C.F.R. § 13.36(i). These provisions document the rights and responsibilities of the parties and minimize the risk of misinterpretations and disputes. DD-12-06 at 5.

2) Subgrantee did not perform a cost or price analysis on the majority of contracts. DD-12-06 at 6, 44 C.F.R. § 13.36(f)(1).

3) Subgrantee did not take sufficient steps to assure the use of small businesses, minority owned firms, women's business enterprises, and labor surplus area firms.[545] DD-12-06 at 6, 44 C.F.R. § 13.36(e).

[545] OIG Interpretive Guidance: Although the subgrantee did not take the specific affirmative steps listed in the regulations, it did award five of its contracts to small or disadvantaged businesses (5 contracts totaling $1.3 million out of 11 contracts totaling $6.7 million reviewed). Therefore, OIG did not question any costs related to contracting because the subgrantee otherwise properly procured its disaster related contracts and because the subgrantee did award a portion of its contracts to small or disadvantaged businesses. However, for future federally funded disaster contracts, the subgrantee should take steps to ensure that it complies with all Federal procurement standards.

DHS OIG Audit Report: DS-12-03
Procurements Under Grants Synopsis

Date: February 9, 2012

Subject: *FEMA Public Assistance Grant Funds Awarded to Paso Robles Joint Unified School District, California*

Terms: local government, full and open competition, cost and price analysis, maintain documents, socioeconomic contracting, *Public Assistance Guide* (1999)

Background: The Town (subgrantee) received a Public Assistance subgrant award for debris removal, emergency protective measures, and permanent repairs to facilities damaged as a result of flooding that occurred from December 17, 2005, through January 3, 2006.

Procurement Related Findings:

1) Subgrantee awarded the contracts without full and open competition, and without justification, in nonexigent circumstances.[546] DS-12-03 at 5, 44 C.F.R. §§ 13.36 (c)(1) and (d)(4)(i)(B). Subgrantee agreed it did not compete the contracts associated with this project, although one contractor was "prequalified" by the subgrantee—5 years prior to the disaster—to perform work for the subgrantee. This does not, and cannot, excuse the subgrantee from the requirement to comply with Federal procurement rules and regulations applicable to federally awarded funds.

2) Subgrantee did not perform a cost or price analysis on each procurement action, DS-12-03 at 6, 44 C.F.R. § 13.36(f)(1).

3) Subgrantee did not take all necessary affirmative steps to assure that small businesses, minority firms, women's business enterprises, and labor surplus area firms were used when possible. DS-12-03 at 6, 44 C.F.R. § 13.36(e).

4) Subgrantee did not maintain records, including documentation as to why the procurement was not competed. DS-12-03 at. 6, 44 C.F.R. § 13.36 (b)(9).

5) Subgrantee did not include required provisions within its contracts. DS-12-03 at 6, 44 C.F.R. § 13.36 (i).

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[546] OIG Interpretive Guidance: The subgrantee awarded contracts for permanent work, in nonexigent circumstances and without justification, to a contractor that the subgrantee used before the disaster and to other contractors with which the subgrantee was familiar. Full and open competition increases the opportunity for obtaining reasonable pricing from the most qualified contractors and allows minority firms, women's business enterprises, and labor surplus area firms to participate in federally funded work. In addition, full and open competition helps discourage and prevent favoritism, collusion, fraud, waste, and abuse.

DHS OIG Audit Report: DS-12-01
Procurements Under Grants Synopsis

Date: December 16, 2011

Subject: *FEMA Public Assistance Grant Funds Awarded to Town of Fairfax, California*

Terms: local government, full and open competition, cost and price analysis, maintain documents, socioeconomic contracting, *Public Assistance Guide* (1999)

Background: The Town (subgrantee) received a Public Assistance subgrant award for debris removal, emergency protective measures, and permanent repairs to facilities damaged as a result of flooding that occurred from December 17, 2005, through January 3, 2006.

Procurement Related Findings:

1) Subgrantee awarded the contracts without full and open competition, and without justification, in nonexigent circumstances.[547] DS-12-01 at 3, 44 C.F.R. §§ 13.36 (c)(1) and (d)(4)(i)(B).

2) Subgrantee did not perform a cost or price analysis on each procurement action. DS-12-01 at 3, 44 C.F.R. § 13.36(f)(1).

3) Subgrantee did not take all necessary affirmative steps to assure that small businesses, minority firms, women's business enterprises, and labor surplus area firms were used when possible. DS-12-01 at 3, 44 C.F.R. § 13.36(e).

4) Subgrantee did not maintain records, including documentation as to why the procurement was not competed. DS-12-01 at 3, 44 C.F.R. § 13.36(b)(9).

[547] OIG Interpretive Guidance: The subgrantee awarded contracts for permanent work, in nonexigent circumstances and without justification, to the contractor that the subgrantee used before the disaster. Full and open competition increases the opportunity for obtaining reasonable pricing from the most qualified contractors and allows minority firms, women's business enterprises, and labor surplus area firms to participate in federally funded work. In addition, full and open competition helps discourage and prevent favoritism, collusion, fraud, waste, and abuse.

DHS OIG Audit Report: DA-12-02
Procurements Under Grants Synopsis

Date: December 1, 2011

Subject: *FEMA Public Assistance Grant Funds Awarded to Long Beach School District, Long Beach, Mississippi*

Terms: local government, cost-plus-percentage-of-cost, maintain documents, full and open competition, cost and price analysis, monitor contracts

Background: The School District (subgrantee) received a Public Assistance subgrant award for damage resulting from Hurricane Katrina in 2005.

Procuremeut Related Findings:

1) Subgrantee awarded a cost-plus-percentage-of-cost contract. DA-12-02 at 2, 44 C.F.R. § 13.36(f)(4). Subgrantee stated the costs should be allowed because the contract was awarded prior to their State-applicant agreement and that other school districts were using similar types of contracts. Although the contract was entered into prior to the State-applicant agreement and the costs were accepted by the State and FEMA during the reimbursement process, cost-plus-percentage-of-cost contracts are prohibited under Federal regulations.

2) Subgrantee did not have adequate documentation to support $575,369 of contract charges.[548] DA-12-02 at 3, 2 C.F.R. § 225, *Cost Principles for State, Local, and Indian Tribal Governments*, Appendix A, § C.1.j.

3) Subgrantee awarded a noncompetitive contract without conducting a cost and price analysis.[549] DA-12-02 at 3, 44 C.F.R. § 13.36(f)(1).

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[548] DHS OIG Interpretive Analysis: The District and contractor provided a summary of costs to support the charges, but did not have detailed invoices. Without such invoices, we were unable to verify the accuracy and validity of the contractor's charges. Cost principles at 2 C.F.R. § 225, *Cost Principles for State, Local, and Indian Tribal Governments*, Appendix A, § C.1.j state that a cost must be adequately documented to be allowable under Federal awards.

[549] DHS OIG Interpretive Analysis: The noncompetitive contract was justified because of the urgent need to reopen the schools following the disaster. However, the subgrantee failed to perform a price analysis to determine if the contractor's proposed price was fair and reasonable. Note that the exigent circumstance described here falls outside the scope of the "protection of life and property" standard often employed by DHS OIG in defining emergency/exigent circumstances.

DHS OIG Audit Report: DD-11-22
Procurements Under Grants Synopsis

Date: September 27, 2011

Subject: *FEMA Public Assistance Grant Awarded to Henderson County, Illinois*

Terms: local government, full and open competition, public exigency, T&M, cost or price analysis, price competition, project splitting, lump sum, unit price, or cost-plus-fixed-fee contract and scope of work.

Background: The County (subgrantee) received a Public Assistance subgrant award for damage caused by severe storms and flooding that began on June 1 and continued through July 22, 2008.

Procurement Related Findings:

1) Subgrantee awarded a noncompetitive, T&M contract. DD-11-22 at 3; 44 C.F.R. § 13.36(c)(1), 44 C.F.R. § 13.36(b)(10)(ii).

2) Subgrantee awarded a T&M contract without a ceiling price or other required contract provisions. DD-11-22 at 3, 44 C.F.R. § 13.36(b)(10)(ii), 44 C.F.R. § 13.36(i).

3) Subgrantee did not perform a cost or price analysis. DD-11-22 at 3, 44 C.F.R. § 13.36(f)(1).

4) Subgrantee did not negotiate profit as a separate cost element. DD-11-22 at 3, 44 C.F.R. § 13.36(f)(2).

5) Subgrantee did not maintain records of its procurement actions. DD-11-22 at 3, 44 C.F.R. § 13.36(b)(9).

6) Subgrantee did not obtain required performance and payment bonds.[550] DD-11-22 at 3-4, 44 C.F.R. § 13.36(h).

[550] OIG Interpretive Guidance: "The Federal Acquisition Regulation prohibits breaking down a proposed large purchase into multiple small purchases merely to permit use of simplified acquisition procedures. Further, although 44 CFR 13.36 does not include a specific prohibition against such circumvention, we believe that any action specifically designed to circumvent a Federal regulation is not allowable [emphasis added]."

DHS OIG Audit Report: DD-11-21
Procurements Under Grants Synopsis

Date: September 26, 2011

Subject: *FEMA Public Assistance Grant Awarded to Jesuit High School, New Orleans, Louisiana*

Terms: private nonprofit, noncompetitive, cost-plus-percentage of costs, exigent circumstances, open and free competition, reasonable costs, cost or price analysis, ineligible costs

Background: Jesuit (subgrantee) received a Public Assistance subgrant award for damage resulting from Hurricane Katrina, which occurred August 29, 2005.

Procurement Related Findings:

1) Subgrantee awarded contracts without free and open competition as it did not advertise the solicitation and instead invited preselected contractors to bid.[551] Subgrantee stated that "word of mouth" was the best way to provide open and free competition considering the state of affairs after the disaster, however, a public notification system was available (newspapers) and thus the subgrantee should have publicly solicited. Subgrantee stated that they did not limit the number of potential contractors and accepted bids from any interested party; however, they could not have known the number of potential offerors without open and free competition.[552] DD-11-21 at 3-4, 2 C.F.R. § 215.43.

2) Subgrantee awarded cost-plus-percentage-of-costs contracts. Subgrantee argued the contract was not a cost-plus-percentage-of-cost contract because it contained a not-to-exceed limit. OIG provided that such a clause limits the amount of total costs incurred, but it does not provide an incentive for the contractor to control costs before reaching the guaranteed maximum price. DD-

[551] OIG Interpretive Guidance: Generally, open and free competition means that all responsible sources are allowed to compete for contracts.

[552] OIG Interpretive Guidance: FEMA attempted to determine cost reasonableness by comparing to another school's contract with the same contractor, however, the two contracts had different scopes of work and the other school also did not compete its contract. FEMA's comparison with different work scopes, especially to a contract that was not competed, did not provide an appropriate basis for determining the reasonableness of cost. Even if FEMA's cost analysis had accurately determined that the contract costs were reasonable, Federal procurement regulations require open and free competition to the extent practicable, not only to achieve a reasonable cost, but also to allow all qualified, responsible parties an equal chance to compete for the work. FEMA's practice has been to allow contract costs it considers reasonable, regardless of whether the contract complies with Federal procurement regulations. OIG does not agree with this practice unless lives and property are at stake as the goals of proper contracting relate to more than just cost. Open and free competition usually increases the number of bids received and thereby increases the opportunity for obtaining reasonable pricing from the most qualified contractors. Open and free competition also helps to discourage and prevent favoritism, collusion, fraud, waste, and abuse.

11-21 at 4, 2 C.F.R. § 215.44(c).

3) Subgrantee did not perform cost or price analyses. DD-11-21 at 5, 2 C.F.R. § 215.45.

4) Subgrantee did not include the required provisions in its contracts.[553] DD-11-21 at 5, 2 C.F.R. § 215.48, Appendix A pt. 215.

[553] OIG Interpretive Guidance: Required provisions document the rights and responsibilities of the parties and minimize the risk of misinterpretations and disputes.

DHS OIG Audit Report: DA-11-24
Procurements Under Grants Synopsis

Date: September 15, 2011

Subject: *FEMA Public Assistance Grant Awarded to Wayne County, Mississippi, Board of Supervisors*

Terms: local government, reasonable cost, monitoring, duplication of benefits, procurement, cost or price

Background: The County (subgrantee) had received a Public Assistance subgrant award for damage resulting from Hurricane Katrina in August 2005.

Procurement Related Findings:

1) Subgrantee awarded two contracts for debris removal activities without performing a cost or price analysis. DA-11-24 at 3; 44 C.F.R. § 13.36 (f)(1). Subgrantee provided that they met the requirements for a price analysis because of the sealed bid process they used to award the contract. However, Federal regulations require an independent estimate of contract cost or price *before* the receipt of bids or proposals. OIG review of prices paid by neighboring counties for similar services under the disaster established that the contract costs were reasonable, therefore, the OIG did not question any contract costs because of noncompliance with Federal procurement regulations.[554]

2) Subgrantee's failure to have adequate debris monitoring procedures constituted a failure to have an adequate contract administration system. The performance of the debris monitoring contractor suffered from multiple failures: the contractor has no experience and was provide no training in debris monitoring, load tickets were deficient, and there was no means to verify truck capacities. DA-11-24 at 6, 44 C.F.R. § 13.36(b)(2).

[554] The subgrantee disagreed with the finding, saying that the procurements conformed to State of Mississippi law. However, 44 C.F.R. § 13.36(b) states that subgrantees will use their own procurement procedures, which reflect applicable state and local laws and regulations, provided that the procurements conform to applicable Federal law and standards.

DHS OIG Audit Report: DS-11-12
Procurements Under Grants Synopsis

Date: September 13, 2011

Subject: *FEMA Public Assistance Grant Awarded to City of Paso Robles, California*

Terms: local government, full and open competition, reasonable prices, favoritism, collusion, fraud, waste and abuse, minority firms, women's business enterprises, labor surplus

Background: The City (subgrantee) received a Public Assistance subgrant award for debris removal, emergency protective measures, and permanent repairs to facilities damaged as a result of the San Simeon earthquake of December 22, 2003.

Procurement Related Findings:

1) Subgrantee did not solicit competitive bids in awarding contracts, and was unable to reasonably justify why full and open competition did not occur as no records were maintained documenting such justification.[555] DS-11-12 at 3, 44 C.F.R. § 13.36(c), 44 C.F.R. § 13.36(b)(9).

2) Subgrantee did not take necessary affirmative steps to assure that minority firms, women's business enterprises, and labor surplus area firms were used. DS-11-12 at 3, 44 C.F.R. § 13.36(e).

3) Subgrantee did not prepare a cost or price analysis for each procurement action. DS-11-12 at 3, 44 C.F.R. § 13.36(f)(1).

4) Subgrantee did not include the required provisions within their contracts. DS-11-12 at3, 44 C.F.R. § 13.36(i).

5) Subgrantee charged excessive costs for construction management, A/E, and design services. The City charged as much as 63% for A/E services. DS-11-12 at 4, 2 C.F.R. § 225, *Cost Principles for State, Local, and Indian Tribal Governments*, Appendix A, § C.2.

6) The OIG determined that the subgrantee included costs that were beyond FEMA's approved scope of work and should be disallowed. DS-11-12 at 5, 44 C.F.R. § 206.223(a)(1).

7) Subgrantee charged unsupported costs that the OIG recommended to be disallowed. DS-11-12 at 5, The OIG found the subgrantee did not have fiscal controls and accounting procedures

[555] OIG Interpretive Guidance: Full and open competition increases the opportunity for obtaining reasonable pricing from the most qualified contractors and allows the opportunity for minority firms, women's business enterprises, and labor surplus area firms to participate in federally funded work. In addition, full and open competition helps discourage and prevent favoritism, collusion, fraud, waste, and abuse.

that permit the tracing of funds to a level of expenditure adequate to establish that such funds are not used in violation of applicable statutes. DS-11-12 at 5, 44 C.F.R. § 13.20(a)(2).

DHS OIG Audit Report: DD-11-20
Procurements Under Grants Synopsis

Date: September 2, 2011

Subject: *FEMA Public Assistance Grant Awarded to Calcasieu Parish School Board, Lake Charles (CPSB), Louisiana*

Terms: local government, noncompetitive, cost-plus-percentage of costs, exigent circumstances, full and open, reasonable costs, fraud, waste and abuse, cost or price analysis, unreasonably high prices, ineligible costs.

Background: CPSB (subgrantee) received a Public Assistance subgrant award for damages resulting from Hurricane Rita, which occurred on September 24, 2005.

Procurement Related Findings:

1) Subgrantee awarded four noncompetitive cost plus percentage of costs contracts. Subgrantee contended the improper contract type is mitigated by cost reasonableness.[556] DD-11-20 at 4, 44 C.F.R. § 13.36(c), 44 C.F.R. § 13.36(f)(4).

2) Subgrantee did not include required Federal contract provisions in any of its contracts. DD-11-20 at 4, 44 C.F.R. § 13.36(i).

3) Subgrantee awarded six small purchases without obtaining quotes from qualified sources. Small purchase procedures require that price or rate quotations be obtained from an adequate number of qualified sources (generally three or more). As the contracts were awarded under exigent circumstances, the OIG did not question the costs. DD-11-20 at 4, 44 C.F.R. § 13.36(d)(1), 44 C.F.R. § 13.36(d)(4)(i)(B).

4) Subgrantee did not perform a cost or price analysis for most contracts.[557] DD-11-20 at 4, 44 C.F.R. § 13.36(f)(1).

5) Subgrantee did not include required Federal contract provisions in any of its contracts.[558]

[556] OIG Interpretive Guidance: "FEMA's general practice is to allow contract costs it considers reasonable regardless of compliance with Federal procurement regulations. We do not agree with this practice because the goals of proper contracting involve more than just cost. Without full and open competition, FEMA has little assurance that contract costs are reasonable. Full and open competition provides an environment for obtaining reasonable pricing from the most qualified contractors and helps discourage favoritism, collusion, fraud, waste, and abuse."

[557] OIG Interpretive Guidance: "Not performing a cost or price analysis increases the likelihood of unreasonably high or low prices, contractor misinterpretations, and errors in pricing relative to the scope of work."

[558] OIG Interpretive Guidance: "These provisions document the rights and responsibilities of the parties and minimize the risk of misinterpretations and disputes."

DD-11-20 at 4, 44 C.F.R. § 13.36(i).

6) Subgrantee did not negotiate profit as a separate element of cost for any of the contracts awarded. DD-11-20 at 4, 44 C.F.R. § 13.36(f)(2).

DHS OIG Audit Report: DA-11-23
Procurements Under Grants Synopsis

Date: August 26, 2011

Subject: *FEMA Public Assistance Grant Funds Awarded to Gulf Coast Community Action Agency, Gulfport, Mississippi*

Terms: private nonprofit, compete, reasonable cost, open and free competition, qualified, responsible parties

Background: The Gulf Coast Community Action Agency (subgrantee) received a Public Assistance subgrant award for damages as a result of Hurricane Katrina.

Procurement Related Findings:

1) Despite OIG's finding the costs to be reasonable, the OIG concluded there was no free and open competition. The subgrantee sole sourced the contract on the basis that the firm selected was the only source capable of performing the work but had no documentation supporting this determination. DA-11-23 at 3; 2 C.F.R. § 215.43. Cost were found to be reasonable based on *P.A. Guide*, Oct 1999, p.78; DA-11-23 at 3. OIG recommend complying with Federal regulations when acquiring goods and services.

2) Subgrantee did not separately account for expenditures and receipts for each building or Project Worksheet. Instead, the subgrantee created one general ledger account to record all disaster-related expenditures and receipts. DA-11-23 at 2; 2 C.F.R. § 215.21(b)(2); 44 C.F.R. § 206.205(b)(1)

DHS OIG Audit Report: DD-11-15
Procurements Under Grants Synopsis

Date: August 5, 2011

Subject: *FEMA Public Assistance Grant Awarded to Saint Mary's Academy (SMA), New Orleans, Louisiana*

Terms: private nonprofit, open and free competition, statement of work, brand name or equal, solicitation, cost-plus-percentage of cost, non-competitive awards, reasonable costs, fraud and waste, prohibited costs

Background: SMA (subgrantee) received a Public Assistance subgrant award for damages resulting from Hurricane Katrina, which occurred on August 29, 2005.

Procurement Related Findings:

1) Subgrantee did not meet free and open competition due to failure to publicly advertise solicitations.[559] DD-11-15 at 3, 2 C.F.R. § 215.43.

2) Subgrantee gave unfair competitive advantage to a subcontractor by allowing it to prepare drawings and specifications for the scope of work. DD-11-15 at 3, 2 C.F.R. § 215.43.

3) Subgrantee also gave subcontract "Southwest" an unfair advantage by soliciting "Southwest or equal" in its request for bid documents but did not describe the specific technical requirements that would equal Southwest's product. DD-11-15 at 3-4, 2 C.F.R. § 215.44(a)(3)(iii)-(iv).

4) Subgrantee awarded a prohibited cost-plus-percentage-of-cost basis contract. Subgrantee stated that FEMA and grantee approved the contract terms; however, no documentation was provided to support this statement. DD-11-15 at 4, 2 C.F.R. § 215.44(c).

5) None of the subgrantee's contracts and subcontracts contained all the contract provisions and required clauses.[560] DD-11-15 at 4, 2 C.F.R. § 215.48, Appendix A pt. 215.

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[559] OIG Interpretive Guidance: Federal regulations require that all procurement transactions be conducted in a manner to provide, to the maximum extent practical, open and free competition, which means that all responsible sources are allowed to compete for contracts.

[560] OIG Interpretive Guidance: FEMA's practice has been to allow contract costs it considers reasonable, regardless of whether the contract complies with Federal procurement regulations. The OIG does not agree with this practice unless lives and property are at stake, because the goals of proper contracting relate to more than just cost. Without open and free competition, FEMA has little assurance that costs are reasonable. Open and free competition usually increases the number of bids and thereby increases the opportunity for reasonable pricing from the most qualified contractors. Open and free competition also discourages and prevents favoritism, collusion, fraud, waste, and abuse.

6) Subgrantee accepted vendor costs and rates higher than stipulated in a contract.[561] DD-11-15 at 5.

[561] OIG Interpretive Guidance: Accepting contract prices at rates higher than stipulated in a contract is a waste of Federal funds, encourages abuse of the contract process, and invites acts of fraud.

APPENDIX B

SYPNOSES OF PUBLIC ASSISTANCE SECOND APPEALS INVOLVING PROCUREMENT UNDER PUBLIC ASSISTANCE GRANTS

A Department of Homeland Security Attorney prepared this document for INTERNAL GOVERNMENT USE ONLY. This document is pre-decisional in nature and qualifies as an interagency/intra-agency document containing deliberative process material. This document contains confidential attorney-client communications relating to a legal matter for which the client has sought professional advice. Under exemption 5 of section (b) of 5 U.S.C. § 552 (Freedom of Information Act), this material is EXEMPT FROM RELEASE TO THE PUBLIC.

LIST OF SECOND APPEALS

MAJOR DISASTER	SECOND APPEAL TITLE	DATE	PAGE
FEMA-1607-DR-LA	Town of Vinton, Procurement, FEMA-1607-DR-LA; PA ID# 019-78820-00; PW ID# 564	Aug. 20, 2014	B-4
FEMA-4029-DR-TX	Bluebonnet Electric Cooperative, Restoration of Power, FEMA-4029-DR-TX; PA ID# 000-UJ7K3-00; PW ID# 500, 602, 603, 748, and 789	May 20, 2014	B-5
FEMA-1603-DR-LA	Orleans Parish Sheriff's Office, PA ID 071-UPP9W-00, OIG Audit Report DD-10-08, FEMA-1603-DR-LA, Project Worksheets (PWs) 1320 and 15882	Feb. 26, 2014	B-6
FEMA-4019-DR-NC	County of Hyde, Debris Removal Costs, FEMA-4019-DR-NC, Project Worksheet (PW) 1296	Jan. 7, 2014	B-7
FEMA-1763-DR-IA	City of Cedar Rapids, Regulated Asbestos Containing Material (RACM) Demolition and Debris Removal, FEMA-1763-DR-IA, Project Worksheets (PWs) 10433, 10523, 10524, 10525, and 10445	Dec. 19, 2013	B-8
FEMA-1577-DR-CA	Santa Barbara County, Road Work, FEMA-1577-DR-CA, Multiple Project Worksheets	Nov. 4, 2013	B-10
FEMA-1771-DR-IL	Henderson County, FEMA-1771-DR-IL, Procurement Standards	Sep. 20, 2013	B-12
FEMA-1633-DR-IL	City of Springfield, Office of Inspector General, Audit Report DD-10-04, FEMA-1633-DR-IL	Dec. 28, 2012	B-13
FEMA-1915-DR-SD	Brule County, Embankment Erosion, FEMA-1915-DR-SD, Project Worksheet (PW) 847	July 25, 2012	B-14
FEMA-1646-DR-CA	Spanish Flat Water District, Sewer Treatment Plant Effluent Pond, FEMA-1646-DR-CA, Project Worksheet (PW) 173	May 22, 2012	B-15
FEMA-1379-DR-TX	City of Houston, Audit Report Number DD-07-04, Project Worksheets (PWs) 19, 55, 759, 761 and 960	Mar. 29, 2010	B-16

MAJOR DISASTER	SECOND APPEAL TITLE	DATE	PAGE
FEMA-1607-DR-LA	City of Lake Charles (Applicant), Debris Removal from Catch Basins, FEMA-1607-DR-LA, Project Worksheet (PW) 2635	July 1, 2009	B-17
FEMA-1603-DR-LA	St. Bernard Parish, Debris Removal, FEMA-1603-DR-LA, PWs 2050, 3078, 3112, and 3657	Oct. 21, 2008	B-18
FEMA-1603-DR-LA	City of New Orleans, FEMA-1603-DR-LA	Feb. 5, 2008	B-19
FEMA 1366-DR-KS	City of Hoisington, Audit Resolution, FEMA 1366-DR-KS	May 29, 2007	B-20
FEMA-1425-DR-TX	Guadalupe Blanco River Authority, FEMA-1425-DR-TX, PW 850, Contract Services and Force Account Labor costs	Mar. 27, 2007	B-21
FEMA-1491-DR-VA	City of Norfolk, Debris Removal, FEMA-1491-DR-VA	Aug. 2, 2006	B-22

Public Assistance Second Appeals: FEMA 1607-DR-LA
Procurements Under Grants Synopsis

Date: August 20, 2014

Re: FEMA 1607-DR-LA; PA ID# 019-78820-00; Town of Vinton; PW ID# 564; Procurement

Terms: local government, procurement by noncompetitive proposals, emergency

Background:

High winds due to Hurricane Rita resulted in downed tree limbs which severely interrupted electrical service throughout the Town of Vinton's service area. The Town of Vinton (Applicant) contracted to removal tree limbs from electric utility power lines. The Applicant did not have a written contract with the contractor that included language accepting higher rates for disaster conditions. In its second appeal, the Applicant cited 44 C.F.R. § 13.36(d)(4), Procurement by noncompetitive proposals, as supporting its claim regarding the reasonableness of the contractor's hourly rate.

Procurement Related Finding(s):

Noncompetitive procurement methods may be used in limited circumstances, such as in an emergency that will not permit a delay for competition. 44 C.F.R. § 13.36(d)(4).

- The immediate necessity to restore the Applicant's electrical system constitutes an emergency.

Public Assistance Second Appeals: FEMA 4029-DR-TX
Procurements Under Grants Synopsis

Date: May 20, 2014

Re: FEMA 4029-DR-TX; PA ID# 000-UJ7K3-00; Bluebonnet Electric Cooperative
PW ID# 500, 602, 603, 748, and 789; Restoration of Power

Terms: local government, full and open competition, actual cost

Background:

The significant portion of the Bluebonnet Electric Cooperative's electrical distribution system was burned, damaged, or destroyed by wildfires during the August 2011 to December 2011. Contrary to procurement requirements, Bluebonnet Electric Cooperative (Applicant) utilized an existing time and equipment contract without cost ceilings.

Procurement Related Finding(s):

Time and material type contracts may be used only after a determination that no other contract is suitable and the contract includes a ceiling price that the contractor exceeds at its own risk. 44 C.F.R. §13.36(b)(10).

- The Applicant violated federal procurement regulations by using its existing time and equipment contracts that contained no cost ceilings or not-to-exceed clauses for the restoration work.

Public Assistance Second Appeals: 1603-DR-LA
Procurements Under Grants Synopsis

Date: February 26, 2014

Re: Orleans Parish Sheriff's Office, PA ID 071-UPP9W-00, OIG Audit Report DD-10-08, FEMA-1603-DR-LA, Project Worksheets (PWs) 1320 and 15882

Terms: local government reasonable cost, price analysis, full and open competition

Background:

High winds and flooding associated with Hurricane Katrina damaged all 10 correctional facilities owned and operated by the Orleans Parish Sheriff's Office ("Applicant"), and as a result, the kitchen facilities where meals were prepared and provided to employees and inmates, were rendered inoperable. While the Applicant constructed an emergency and temporary kitchen, meals for employees and inmates were obtained from a caterer from September 2005 until August 2006 when the temporary kitchen became functional.

Procurement Related Findings:

The Applicant paid an excessive amount for employees' meals because the Applicant did not solicit proposals though full and open competition or conduct a price analysis. 1603-DR-LA , 44 C.F.R. § 13.36 (d)(2) and (3), 44 C.F.R. § 13.36(f)(1) and (2).

1) Initially, employees' and inmates' meal costs were priced at $46.00 per individual per day. In November 2005, the Applicant renegotiated, but did not re-bid, the employees' meals to a cost of $40.00 per day. At approximately the same time, inmate meals were re-bid to a cost of $27.50 per day. The lack of competitive contracting resulted in unreasonable costs.

2) To determine a reasonable cost for the employee meals, FEMA reviewed the scope and unit costs of similar meal rates using the Market Analysis. Based on the daily meal rates for entities with similar contract requirements, a rate of $29.75 per employee per day was deemed a reasonable cost in lieu of competitive procurement of the services. There was no justification for higher employee meal costs after the disaster since employee meal costs ($2.69 per person, per day) and inmate meal costs ($3.82 per person, per day) were similar before the disaster. OIG therefore recommended disallowing the difference between employee and inmate meal rates after November 2, 2005.

Public Assistance Second Appeals: 4019-DR-NC
Procurements Under Grants Synopsis

Date: January 7, 2014

Re: FEMA-4019-DR-NC, County of Hyde, Debris Removal Costs, Project Worksheet (PW) 1296

Terms: local government, debris removal, reasonable cost

Background:

In August 2011, strong winds from Hurricane Irene downed tree limbs and generated vegetative debris throughout Hyde County, North Carolina. FEMA prepared Project Worksheet (PW) 1296 for $1,833,070 to fund Hyde County's ("Applicant") debris removal activities countywide. The Applicant employed a contractor through a "pre-event contract" it entered into in 2010 for debris removal services, but the contractor the Applicant selected was the highest bidder. During the review of the PW, FEMA reduced the eligible amount by $407,442, based on the contract rates proposed by the lowest bidder that had responded to the Applicant's request for proposals ("RFP") for the pre-event contract. The de-obligation was upheld.

Procurement Related Fiudings:

1) The Applicant must provide documentation that it evaluated all four proposals based on the areas of consideration listed in its RFP during the "pre-event contract" selection process when the lowest bidder is not chosen; statements in support of its decision to award the contract to the highest bidder alone is not sufficient.[562] 4019-DR-NC , 44 C.F.R. § 13.36(b)(8).

2) Pre-event contracts, under which the applicant may choose to solicit bids and award contracts before a disaster strikes, are listed as an allowable method for expediting the procurement process. FEMA Debris Management Guide (FEMA 325, July 2007), FEMA RP9580.201, Fact Sheet: Debris Removal –Applicant's Contracting Checklist,[563] 44 C.F.R. § 13.36(d)(4)(i)(B).

[562] The decision cites to 44 C.F.R. § 13.36(b)(8) which specifies that grantees and subgrantees "will make awards only to responsible contractors possessing the ability to perform successfully under the terms and conditions of the proposed procurement." It is not clear why this provision is cited in this context. The failure to document the basis for a source selection decision *could* have been cited as failure to comply with 44 C.F.R. § 13.36(b)(9) (failure to document significant part of procurement history), 44 C.F.R. § 13.36(c)(1)(vii) (arbitrary action in the competitive process), 44 C.F.R. § 13.36(d)(3)(iv) (failure to make award to the firm whose proposal is most advantageous to the program, with price and other factors considered).

[563] The decision cites to FEMA RP95880.201—however, the Fact Sheet only describes pre-qualify debris removal contractors. The Debris Management Guide at Ch. 10, does provide that pre-event contracts are acceptable.

Public Assistance Second Appeals: 1763-DR-IA
Procurements Under Grants Synopsis

Date: December 19, 2013

Re: FEMA-1763-DR-IA, City of Cedar Rapids, Regulated Asbestos Containing Material (RACM) Demolition and Debris Removal, Project Worksheets (PWs) 10433, 10523, 10524, 10525, and 10445

Terms: local government, sealed bids, geographic preference, bonding

Background:

In June 2008, severe storms and flooding caused extensive damage to the Sinclair Warehouse Complex which was purchased by City of Cedar Rapids ("Applicant") in 2007. Local building officials determined that the damaged facilities at the Sinclair Warehouse were unsafe and issued a notice and order to demolish the structures. The Applicant prepared a Request for Bids ("RFB") on December 31, 2009 for demolition and disposal of the RACM debris from Sinclair. In the RFB, the Applicant specified that the debris was to be disposed of at the Cedar Rapids/Linn County Solid Waste Agency Landfill Site Number 1 (Site No. 1), located 1.5 miles from Sinclair.

The original RFB did not contain an estimate of the quantity of debris. In addendums to the RFB, the Applicant estimated the debris at 100,000 tons, and later at 65,000 tons. The Applicant also amended the RFB to reduce the requirement on performance and payment bonds from 100 percent to 75 percent of the contract price. On January 15, 2010, the Applicant received 11 sealed bids. Unit prices ranged from $65 per ton to $173 per ton for removal and disposal of debris. The Applicant considered the lowest bid non-responsive to its RFB because the contractor proposed taking the debris to an alternate landfill approximately 90 miles from Sinclair to Milan, Illinois. The Applicant rejected all bids and rebid the project on March 5, 2010, maintaining the requirement for disposal at Site No. 1.

Procurement Related Findings:

1) The Applicant's requirement for contractors to use Site No. 1 in its RFB is not a prohibited geographic preference. Applicants are generally prohibited from using geographic preferences for contractors, and it generally applies to location-based preference given to contractors in the bidding process, and not to a specification within the contract such as the landfill. 1763-DR-IA, 44 C.F.R. § 13.36(c)(2).

2) The Applicant's re-bid of the project at almost half the estimated debris quantity to allow contractors to avoid acquiring performance and payment bonds for the higher contract cost of the

higher quantity of debris constitutes an inaccurate representation of the scope of work.[564] 1763-DR-IA, 44 C.F.R. § 13.36(d)(2)(i)(A), 44 C.F.R. § 13.36(d)(2)(ii)(B).

[564] The decision provides that FEMA initially found that Applicant also violate the regulatory requirement for bonding at 44 C.F.R. §13.36(h)(2) but does not discuss in the analysis of the appeal, however, having intentionally circumvented the requirement it would appear that this regulation was violated .

Public Assistance Second Appeals: 1577-DR-CA
Procurements Under Grants Synopsis

Date: November 4, 2013

Re: FEMA-1577-DR-CA, Santa Barbara County, Road Work, Multiple Project Worksheets; OIG Audit Report DS-11-04

Terms: T&M contract, scope of work

Background:

Severe storms that occurred from December 27, 2004, through January 11, 2005, caused damage to the Santa Barbara County ("Applicant") public infrastructure. FEMA approved 150 PWs, totaling $14.6 million, to fund debris removal, emergency protective measures, and the permanent repair of facilities. The Office of Inspector General ("OIG") recommended that FEMA de-obligate a total of $1,916,663 from 17 PWs based on six findings.

Only one OIG finding is at issue in the second appeal. Finding A was related to debris removal and road repairs performed by two contractors. The Applicant hired the two contractors without formal written contracts, under an emergency resolution that the Applicant's Board of Supervisors passed, allowing them to waive a competitive bidding process in favor of T&M contracts for a pre-selected list of contractors. FEMA responded to the OIG's Audit Report with a determination that $1,243,850 from eleven PWs related to "Finding A" required de-obligation. In its second appeal, the Applicant requested re-obligation of $1,063,952 related to Finding A.

Procurement Related Finding(s):

1) The Applicant's use of the T&M contracts for 47 days violated FEMA's general restriction of T&M contracts and did not comply with Federal procurement regulations setting forth specific requirements for the use of T&M contracts. The Federal regulations require a contract cost ceiling, and FEMA's guideline which generally restricts the use of T&M contracts to "70 hours for work immediately after a disaster when a clear scope of work cannot be determined." 1577-DR-CA, 44 C.F.R. §13.36(b)(10), Public Assistance Guide (FEMA 322, page 53).

- The OIG determined that the Applicant did not perform any cost or price analysis, and did not negotiate any not-to-exceed contract provisions. The OIG stated that there was no documentation to identify the composition of the rates charged, such as profit or overhead. The OIG also stated that the T&M contracts exceeded the 70-hour time period allowed under FEMA policy.

2) Even relying on the public exigency exception for noncompetitive proposals, the Applicant has not demonstrated the existence of a public exigency that would prevent it from identifying a scope of work and competitively bidding the work for approximately 40 days beyond FEMA's

generally allowable timeframe for T&M contracts. 1577-DR-CA, 44 C.F.R. § 13.36(d)(4)(i)(B).

Public Assistance Second Appeals: 1771-DR-IL
Procurements Under Grants Synopsis

Date: September 20, 2013

Re: FEMA-1771-DR-IL, Henderson County, Procurement Standards

Terms: local government, T&M, reasonable costs

Background:

Severe storms resulting in widespread flooding of the Mississippi River between June 1, 2008, and July 22, 2008, caused a 2,000-foot breach in the Henderson County ("Applicant") levee flooding areas in Henderson County, the Village of Gulfport, and approximately 5 miles of U.S. Route 34.

The Applicant entered into a sole-source, T&M contract with the contractor for all necessary emergency services to dewater approximately 28,000 acres, and to restore county functions to normal. The contract did not have a clear, well-defined scope of work. The contractors subcontracted out the work required to construct a 3,000-foot, temporary levee and to de-water the area. The Applicant sought reimbursement for the costs it incurred under the contract from FEMA.

In light of the contracting deficiencies, the OIG recommended de-obligating costs associated with dewatering and levee construction. Concurring with the recommendation, the Region V Deputy Regional Administrator de-obligated $343,376 and $2,721,712, respectively. However, FEMA is authorized to reimburse allowable costs associated with eligible work under 44 C.F.R. § 13.22, even if the costs are incurred under contraets that an applicant improperly procures. FEMA reimbursed the Applicant $343,376 associated with dewatering, and $2,721,712 associated with levee construction because the Applicant was able to produce sufficient documentation supporting the amounts.

Procurement Related Finding(s):

The use of a T&M contract and the lack of a clear scope of work amount to contracting deficiencies warranted deobligation. 1771-DR-IL, 44 C.F.R. § 13.36(b)(10).

Public Assistance Second Appeals: 1633-DR-IL
Procurements Under Grants Synopsis

Date: December 28, 2012

Re: FEMA-1633-DR-IL, City of Springfield, Office of Inspector General, Audit Report DD-10-04

Terms: local government, cost-plus-percentage-of cost contract

Background:

In 2006, tornadoes and heavy rains caused extensive damage to the electrical distribution system in Springfield, Illinois. As no other entities were available to assist with the repair, the City of Springfield ("Applicant") supplemented its force account capability by executing a Mutual Aid Agreement ("MAA") with AMEREN, a private utility company, to restore the system. FEMA reimbursed the Applicant the Federal share of $11.4M in emergency and permanent work costs.

The OIG determined that some of the costs related to mutual aid labor and force account labor were ineligible and questioned $794,732 in funding. The Regional Administrator (RA) agreed with the OIG recommendations and requested that the Applicant return the funds.

Procurement Related Finding(s):

The mutual aid costs represented a form of cost-plus-percentage-of cost (CPPC) contract, which is prohibited for the procurement of services under a Federal grant. 1633-DR-IL, 44 C.F.R. § 13.36(f)(4).

- The ineligible line item mark-ups included $252,694 for a labor adder equal to 25 percent of the loaded labor rate (regular pay + premium pay + taxes + pension + leave allowance + medical insurance and other costs), $499,405 in Management Support Personnel costs equal to 82.52 percent of the actual labor costs (regular + premium pay), and $9,908 in Tools equal to 9.98 percent of regular pay.

Public Assistance Second Appeals: 1915-DR-SD Procurements Under Grants Synopsis

Date: July 25, 2012

Re: FEMA-1915-DR-SD, Brule County, Embankment Erosion, Project Worksheet (PW) 847

Terms: local government, full and open competition

Background:

From March 10, 2010 to June 20, 2010, extensive flooding damaged infrastructure in several South Dakota counties. In Brule County ("Applicant"), floodwater eroded the embankment of Boyer Bottom Road in three locations. On August 5, 2010, FEMA inspected the sites and prepared PW 847 in the amount $44,270 for repair of the embankment.

However, the Applicant had not competitively bid the project, nor solicited multiple quotes for the work, nor defined a scope of work for repairs, nor demonstrated that the invoiced costs were reasonable. The Applicant contends that the process of procuring contracted services for the repair of Boyer Bottom Road was consistent with local and State laws which, for this type of project, require competitive bids only when the projected costs exceed $50,000.

Procurement Related Finding(s):

While the actions of the Applicant in securing the non-competitive contract to perform emergency road repair may be legal under applicable local and State law, the procurement practice does not meet Federal procurement requirements for competition. 1915-DR-SD, 44 C.F.R. § 13.36(b), 44 C.F.R. § 13.36(d)(4).

Public Assistance Second Appeals: FEMA-1646-DR Procurements Under Grants Synopsis

Date: May 22, 2012

Re: FEMA-1646-DR-CA, Spanish Flat Water District, Sewer Treatment Plant Effluent Pond, Project Worksheet (PW) 173

Terms: local government, cost-plus-percentage-of-cost

Background:

In April 2006, heavy rain saturated the soil and caused rapid runoff from surrounding hillsides into the Spanish Flat Water District ("Applicant") sewer treatment plant effluent pond, damaging a portion of the pond's levee and causing wastewater to flow into Lake Berryessa. FEMA prepared PW 173 for $113,061 to repair the breach in the pond levee. Subsequently, the Applicant made significant changes to the scope of work for the levee repairs at a total project cost of $352,839. FEMA determined that the projcet was an Improved Project and capped the funding. In the first appeal, the Applicant appealed the Improved Project determination. FEMA Region IX concurred that the project was not an Improved Project because the scope of work had expanded due to geological site conditions necessitating deeper excavation than originally anticipated. However, the Region determined that the Applicant had used a cost plus percentage contract for the expanded scope of work, and limited funding to only the portion of work completed under the fixed price contract, $81,786, plus other eligible costs of $35,449, for a total of $117,234.

Procurement Related Finding(s):

The expanded scope of work was accomplished using a cost-plus-percentage-of cost (CPPC) contract which is prohibited for the procurement of services under a Federal grant. FEMA-1646-DR, 44 C.F.R. § 13.36(f)(4).

- The provision of the contract that was used is under the heading "Time and Expense Change Orders" in the March 1, 2007, contract which reads: "Payment to the Contractor for extra work performed on a time and expense basis shall consist of the actual necessary expense for doing the work, plus an allowance of 15 percent of labor, material and equipment rental for overhead, general superintendence and profits, plus one percent for bonds." The contract did not include a "ceiling" or "not to exceed" amount. Furthermore, upon review of the Daily Extra Work Reports (DEWR) FEMA found an allowance of 20 percent for overhead and 5 percent profit was added to labor, material, and equipment rental costs.

Public Assistance Second Appeals: FEMA-1379-DR Procurements Under Grants Synopsis

Date: March 29, 2010

Re: FEMA-1379-DR-TX, City of Houston, Audit Report Number DD-07-04, Project Worksheets (PWs) 19, 55, 759, 761 and 960

Terms: local government, cost-plus-percentage-of-cost

Background:

Between June 5 and 9, 2001, Tropical Storm Allison produced heavy rains and flooding in the Houston area. Following the flooding, the City of Houston's ("Applicant") Solid Waste Department performed debris removal operations, its Convention and Entertainment Facilities Department performed emergency protective measures within the City's Theater District Parking Garages, and its Fire Department performed search and rescue operations throughout the City. The OIG questioned $15,148 for subcontractor costs based on a determination that these costs were part of cost-plus-percentage-of-costs contracts. Since the enforcement mechanism is to limit reimbursement to reasonable costs, rather than to deny reimbursement altogether, FEMA concluded in PW 759 that the questioned costs were reasonable, and re-obligated the questioned costs

Procurement Related Finding(s):

Cost-plus-percentage-of-cost (CPPC) contracts are prohibited for the procurement of services under Federal grants even if they were pre-existing and properly awarded according to city guidelines and FEMA concluded that the costs were reasonable. FEMA-1646-DR, 44 C.F.R. § 13.36(f)(4).

- The Applicant argued that it had a pre-existing contract and performed the work pursuant to that contract that was, "properly awarded according to City guidelines and its validity was not disputed when the contract was discussed with FEMA....FEMA in its PWs concluded: 'A review of the contractor's costs has been performed and (those costs) are considered reasonable...."

Public Assistance Second Appeals: FEMA-1607-DR Procurements Under Grants Synopsis

Date: July 1, 2009

Re: FEMA-1607-DR-LA; City of Lake Charles (Applicant), Debris Removal from Catch Basins, Project Worksheet (PW) 2635

Terms: local government, cost analysis

Background:

On September 23, 2005, Hurricane Rita brought heavy winds and severe rainfall to the City of Lake Charles ("Applicant") resulting in the accumulation of debris in storm water catch basins throughout the City. The Applicant solicited bids from four contractors, only two of whom responded. The Applicant entered into a contract with Unified Recovery Group (URG) to remove debris from the City's catch basins at a unit price of $300 per catch basin. URG requested payment from the Applicant for cleaning 9,481 catch basins from October 25, 2005 through December 30, 2005. In February 2006, FEMA prepared Project Worksheet (PW) 2635 to fund the removal of debris from catch basins and power washing of street gutters. However, FEMA considered the unit price of $300 per catch basin unreasonably high and also disputed the number of catch basins eligible for cleaning. Because the regulations require that the costs be reasonable and the work be necessary, FEMA reduced the unit price to $148.75 per catch basin to reflect what it considered a more reasonable unit price. The Applicant appealed claiming that it performed cost analysis that validated the unit price of $300, and the second appeal granted $1,594,780 for the adjustment to the unit cost for catch basin cleaning and power washing of the gutters.

Procurement Related Finding(s):

The Applicant's City Engineer prepared a memorandum dated February 16, 2006, to Charles Eastland, FEMA Debris Specialist, with information on unit costs ranging from $200 to $500 for catch basin cleaning paid by several municipalities and/or Parishes in Louisiana and one city in Georgia prior to FEMA preparing PW 2635, which constitutes contract cost and price analysis required by the Federal procurement regulations. FEMA-1607-DR, 44 C.F.R. § 13.36(f)(1).

Public Assistance Second Appeals: FEMA-1603-DR Procurements Under Grants Synopsis

Date: October 21, 2008

Re: FEMA-1603-DR-LA, St. Bernard Parish, Debris Removal, PWs 2050, 3078, 3112, and 3657

Terms: local government, full and open competition, exigent circumstances

Background:

As a result of Hurricane Katrina on August 29, 2005, large quantities of disaster-related debris were deposited on public and private property in St. Bernard Parish ("Applicant"). The Applicant entered into two contracts: one on September 3, 2005, and another in late October 2005.

1st contract: On September 3, 2005, the Applicant entered into a non-competitive debris removal contract with the Unified Recovery Group (URG). URG consisted of four companies that had previously entered into separate unsolicited, non-competitive contracts with the Parish. The scope of work for this contract included the removal of vegetative, construction, and demolition debris, as well as white goods, silt, hazardous trees, hazardous limbs priced on a per-cut basis, cars, and boats. It also included management of temporary debris storage and reduction sites (TDSRS) and recovery of Freon.

2nd contract: In late October 2005, the Applicant solicited competitive proposals to perform the debris removal work in the parish. Twelve debris removal contractors responded to the solicitation, and on December 9, 2005, the Applicant awarded the contract to URG based on the evaluation criteria published with the request for proposals. Although URG was not the lowest bidder, the Applicant determined that URG provided the best value considering the evaluation criteria which included past accomplishments, technical capabilities, and reasonableness of cost. Reasonableness of cost was weighted 15 percent for the proposal evaluation. The contract went into effect in January 2006.

Procurement Related Finding(s):

1) The Applicant has demonstrated that exigent circumstances resulting from Hurricane Katrina justify the noncompetitive bid solicitation for the first contract. FEMA-1603-DR, 44 C.F.R. § 13.36(d)(4)(i)(B).

2) The Applicant also properly procured the second contract in compliance with the methods of procurement outlined in the Federal procurement regulations, specifically, the Request for Proposal was properly publicized and identified all evaluation criteria. FEMA-1603-DR, 44 C.F.R. § 13.36(d)(3).

Public Assistance Second Appeals: FEMA-1603-DR-LA Procurements Under Grants Synopsis

Date: February 5, 2008

Re: FEMA-1603-DR-LA; City of New Orleans

Terms: local government, reasonable cost, cost-plus-percentage-of-cost

Background:

The City of New Orleans ("Applicant") solicited contracts to remove disaster-related sediment from its storm sewer system. The Applicant amended an existing contract with Montgomery Watson Harza ("MWH") for $24,664,161 to perform the work over a 36-day period. It amended the contract again for $9,654,061 to clean storm sewers during an additional 30-day period. The Applicant requested reimbursement of $34,318,222 from FEMA. FEMA determined that the costs were unreasonable and the Applicant had not documented some of the claimed costs. FEMA evaluated the reasonableness of cost because there was only one responsible bidder for the work and the Applicant used a cost-plus-percentage-of-cost contract.

Procurement Related Finding(s):

1) The Applicant's contract with MWH stated that the Applicant would pay MWH thirteen (13) percent of cost incurred on the project as profit. This meets the definition of the cost plus contract. FEMA-1603-DR-LA, 44 C.F.R. § 13.36(f)(4).

2) In situations where there is inadequate competition before a contract is awarded, an applicant must perform a cost analysis. FEMA-1603-DR-LA, 44 C.F.R. § 13.36(d)(4)(ii).

- The Applicant argued that it performed a cost analysis, but it did not provide any information to substantiate its claim. Therefore, the City failed to comply with the mandates of the Federal procurement regulations.

Public Assistance Second Appeals: FEMA-1366-DR Procurements Under Grants Synopsis

Date: May 29, 2007

Re: FEMA 1366-DR-KS, City of Hoisington, Audit Resolution

Terms: local government, cost-plus-percentage-of-cost contract

Background:

Tornadoes that developed when severe storms struck Kansas devastated Hoisington, Kansas and outlying areas. The City of Hoisington ("Applicant") requested assistance from FEMA for approximately $2.26 million for debris removal, certain emergency response measures, and permanent restoration projects. In October 2003, the OIG issued Audit Report DD-02-04 questioning $293,364.18 of the total grant amount received by the Applicant. FEMA Region VII disagreed with the findings and recommended a de-obligation of only $8,060 in volunteer credit, non-disaster related work, contractor markups, duplicated benefits, and undocumented force account costs. The OIG Field Office rejected the Region's recommendation. In August 2004, the Regional Director requested that the Headquarters Program Office (Recovery Division) and the Assistant IG for Audit review make a determination regarding the audit. FEMA determined that the markup constituted a cost-plus-percentage-of-cost method of contracting, which is prohibited.

Procurement Related Finding(s):

The Applicant used a standing KDHE contract that reimburses the contractor the cost of its subcontractors plus a 10% administrative fee, which constitutes a cost-plus-percentage-of-cost type contract. FEMA-1366-DR, 44 C.F.R. § 13.36(f)(4).

Public Assistance Second Appeals: FEMA-1425-DR Procurements Under Grants Synopsis

Date: March 27, 2007

Re: FEMA-1425-DR-TX, Guadalupe Blanco River Authority, PW 850, Contract Services and Force Account Labor costs

Terms: local government, full and open competition, exigent circumstances, interlocal agreement

Background:

As a result of severe storms and flooding, the Guadalupe-Blanco River Authority ("Applicant") contracted for services for emergency repair of flood-damaged spillway gates. The Applicant called the Lower Colorado River Authority (LCRA) to help repair the roof weir gate. The LCRA, located about 50 miles away from the dam, had specialized experience with roof weir gates and a crew available to begin the repairs the day after the scope of work was determined (the Brazos River Authority has similar capabilities but was located over 300 miles away). No written agreement existed between the Applicant and the LCRA at the time of the disaster and prior to the onset of work. The LCRA charged only actual labor costs plus costs incurred to transport, house, and feed employees while on the job at this remote location. The LCRA did not collect a mobilization fee, accounting fee, overhead, or profit. On September 24, 2003, a competitively bid contract to complete the permanent repairs was let to Holloman Construction, and work began on September 29, 2003.

FEMA denied $24,985.29 for contract services payable to LCRA for emergency repair work to the spillway gates because the Applicant did not go through proper contract bidding procedure as required by law.

Procurement Related Finding(s):

1) The Applicant's interlocal cooperative agreement with the LCRA was authorized under Texas State law. FEMA-1425-DR, 44 C.F.R. § 13.36(b)(1).

2) While not explained in the decision, the decision appears to rest upon the conclusion that the interlocal cooperation contract was noncompetitive procurement. Upon that apparent determination, Applicant is allowed to use non-competitive proposals in the face of an emergency. FEMA-1425-DR, 44 C.F.R. § 13.36(d)(4)(i)(B).

- The work was completed under emergency conditions and had to be completed in less than two weeks due to the scheduled flood releases from the upstream USACE Canyon Reservoir.

Public Assistance Second Appeals: FEMA-1491-DR Procurements Under Grants Synopsis

Date: August 2, 2006

Re: FEMA-1491-DR-VA, City of Norfolk, Debris Removal

Terms: local government, cost analysis

Background:

As a result of Hurricane Isabel on September 8, 2003, the City of Norfolk ("Applicant") removed storm-related debris city-wide. Between October, 2003, and May, 2004, FEMA obligated 20 versions of PW 6 for a total of $10,774,419. The Applicant used two contractors to remove debris from public beaches. One contractor, procured competitively, charged $63.90 per cubic yard. The other contractor, procured on an emergency sole source basis, charged $108 per cubic yard for essentially the same work. On November 16, 2004, based on a final inspection, FEMA obligated an additional $1,024,624 (version 20) but denied funding for versions 21, 22, 23, 24, 26, 27, and 30 because many load tickets did not include loading and unloading times. FEMA also reduced funding for version 31 because it deemed the contractor's costs to be excessive.

Procurement Related Finding(s):

Federal procurement regulations require that applicants provide a cost analysis when using non-competitively procured contractors and no such study was included in the Applicant's second appeal. FEMA-1491-DR, 44 C.F.R. § 13.36(d)(4)(ii).

U.S. Department of Homeland Security
Washington, DC 20472

June 21, 2016

FEMA

PROCUREMENT GUIDANCE FOR RECIPIENTS AND SUBRECIPIENTS UNDER 2 C.F.R PART 200 (UNIFORM RULES)
SUPPLEMENT TO THE PUBLIC ASSISTANCE
PROCUREMENT DISASTER ASSISTANCE TEAM (PDAT) FIELD MANUAL

1. PURPOSE. This document provides guidance for Non-Federal Entity ("NFE") recipients and subrecipients of Federal financial assistance awarded by the Federal Emergency Management Agency ("FEMA") when using that assistance to finance procurements of property and services. The guidance provided by this document only applies to Federal financial assistance (e.g., grants and cooperative agreements) subject to the procurement standards of the government-wide *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards*, at 2 C.F.R. §§ 200.317 to 200.326, which were adopted by the Department of Homeland Security ("DHS"). *See* 2 C.F.R. Part 3002.

2. AUTHORITY. FEMA provides Federal assistance through various financial assistance programs under the authority of various Federal laws. NFEs that are recipients and subrecipients of Federal financial assistance provided by FEMA under these programs are generally required to comply with the *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards* ("Uniform Rules") at 2 C.F.R. Part 200, as adopted by DHS at 2 C.F.R. Part 3002. Chapter I, ¶ 3 of this document contains a detailed list of these programs and authorizing statutes.

3. WAIVER. FEMA may waive any provisions of this document to the extent permitted by Federal law or regulation.

4. DATES OF APPLICABILITY

    a. With one exception identified in Sec. 4.b., below, financial assistance associated with emergencies or major disasters declared under the Robert T. Stafford Disaster Relief and Emergency Assistance Act ("Stafford Act"), the procurement standards at 2 C.F.R. §§ 200.317 to 200.326 are the default standards that apply to those grants associated with emergencies or major disasters declared on or after December 26, 2014. See 79 Fed. Reg. 75871, 75872 (Dec. 19, 2014). For awards made by FEMA, or for emergency or major disasters declared, prior to December 26, 2014 (this includes awards associated with prior emergencies or disasters, but not started until after this date), Federal financial assistance awards are governed by the Uniform Administrative Requirements at either 44 C.F.R. Part 13 (for state, local, and Indian tribal governments) or 2 C.F.R. Part 215 (for institutions of higher education, hospitals, and other nonprofit organizations), depending upon the type of entity.

b. Grace Period. A Non-Federal Entity (also known as a "NFE"), however, may continue to comply with the former procurement standards applicable to FEMA awards at 44 C.F.R. Part 13 (for states, local, and Indian tribal governments) or 2 C.F.R. Part 215 (for institutions of higher education, hospitals, and other nonprofit organizations) until the completion of two additional fiscal years after December 26, 2014. This is an elective grace period. If a NFE elects to use the previous procurement standards, it must affirmatively document this decision in its internal procurement policies, including the date upon which its grace period (based upon the two additional fiscal years) will end and it will accordingly transition to the new procurement standards. 2 C.F.R. § 200.110(a). *See also*, Ch. 1, par. 2.e., below for additional amplifying guidance.

5. AMENDMENTS TO THIS DOCUMENT. FEMA may periodically update this document due to changes in other revised or new guidance or regulations.

6. SUPPLEMENT. This document is intended to supplement the *FEMA Field Manual, Public Assistance Grantee and Subgrantee Procurement Requirements Under 44 C.F.R. Pt. 13 and 2 C.F.R. pt. 215*, dated, December 2014 ("PDAT[1] Field Manual" or "Field Manual") by providing up-to-date identification, analysis and discussion of the current Federal procurement standards found at 2 C.F.R. pt. 215, which went into effect on December 26, 2014. The Field Manual can be found online at the following web link: https://www.fema.gov/media-library/assets/documents/96773, and provides in-depth discussion of the previous Federal procurement standards, to include analysis of Department of Homeland Security ("DHS") Office of Inspector General ("OIG") audits related to various procurement violations and real-world procurement scenarios. Together, both documents provide a comprehensive analysis of the Federal procurement standards that apply to procurements associated with disaster financial assistance provided both after and prior to December 26, 2014.

7. DISCLAIMER. This document and the guidance provided therein is not intended to, nor does it provide or constitute legal advice. This document is only intended to serve as a general guide as to the Federal procurement standards identified in the Uniform Rules. Adherence to, application of, or use of this document and the information herein to a procurement subject to Federal grant money, does NOT guarantee the legal sufficiency of any procurement, nor ensure that an award or subaward will NOT be audited or investigated, and subsequently determined to be non-compliant with the procurement standards. All legal questions concerning the sufficiency or insufficiency of a procurement in regards to the Federal procurement standards should be referred to servicing legal counsel.

[1] PDAT – Procurement Disaster Assistance Team, Procurement and Fiscal Law Division, Office of Chief Counsel, FEMA

PROCUREMENT GUIDANCE FOR RECIPIENTS AND SUBRECIPIENTS

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CHAPTER I

INTRODUCTION

1. THE FEDERAL EMERGENCY MANAGEMENT AGENCY

a. The Federal Emergency Management Agency ("FEMA") is a Federal agency within the Department of Homeland Security ("DHS"). FEMA is headed by an Administrator. FEMA's primary mission is to reduce the loss of life and property and protect the Nation from all hazards, including natural disasters, acts of terrorism, and other man-made disasters, by leading and supporting the Nation in a risk-based, comprehensive emergency management system of preparedness, protection, response, recovery, and mitigation. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, § 503 (2002) (codified as amended at 6 U.S.C. § 313).

b. FEMA administers its programs and carries out its activities through its headquarters offices in Washington, D.C.; ten Regional Offices; Area Offices for the Pacific, Caribbean, and Alaska; various Recovery Offices; and temporary Joint Field Offices.

c. FEMA provides Federal financial assistance through various assistance programs. Each program is not only governed by the enabling laws, implementing regulations, and FEMA policies for those programs, but also a wide range of cross-cutting laws, executive orders, and other regulations. As the Federal awarding agency for these programs, FEMA is responsible for the proper management and administration of these programs as otherwise required by law and enforcing the terms of the agreements it enters into with Non-Federal Entities (NFEs) that receive FEMA financial assistance, consistent with the requirements at 2 C.F.R. Part 200.

2. BACKGROUND

a. NFE recipients and subrecipients of FEMA financial assistance under the financial assistance programs may use contractors to assist them in carrying out the scope of work under their Federal financial assistance awards.

b. As a condition of receiving FEMA financial assistance for these contractor costs, a NFE must comply with applicable Federal laws, regulations, executive orders, and other requirements. Each NFE is responsible for managing and administering its Federal awards in compliance with the applicable requirements.

c. One such Federal requirement is the *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards* codified at 2 C.F.R. Part 200 ("Uniform Rules"), which DHS has adopted at 2 C.F.R. § 3002.10. 79 Fed. Reg. 75871 (Dec. 19, 2014). Of particular note, the regulations at 2 C.F.R. §§ 200.317 to 326 set forth various procurement standards that NFEs must follow when using FEMA financial assistance to finance procurements of property and

services.

d. The regulation at 2 C.F.R. § 200.110 provides that the procurement standards set forth at 2 C.F.R. §§ 200.317 to 200.326 apply to all FEMA awards issued on or after December 26, 2014. For grants and cooperative agreements under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, these procurement standards apply to those grants and cooperative agreements associated with emergencies or major disasters declared on or after December 26, 2014. *See* 79 Fed. Reg. 75871, 75872 (Dec. 19, 2014).

e. A NFE, however, may continue to comply with the former procurement standards applicable to FEMA awards at 44 C.F.R. Part 13 (for states, local, and Indian tribal governments) or 2 C.F.R. Part 215 (for institutions of higher education, hospitals, and other nonprofit organizations) under two scenarios:

   i. Until the completion of two additional fiscal years after December 26, 2014. "Two additional fiscal years" is interpreted to refer to the NFE's fiscal year. Accordingly, if the NFE's fiscal year is the equivalent of a calendar year (January 1 – December 31), the two additional fiscal year periods will begin on January 1, 2015 and end on December 31, 2016. If another NFE's fiscal year runs from 1 July – 30 June, its two additional fiscal year periods will begin on July 1, 2015 and end on June 30, 2017. During the period of the two additional fiscal years, the NFE may continue to follow the procurement standards found at 44 C.F.R. Part 13 or 2 C.F.R. Part 215 (depending upon the type of entity). Once the two additional fiscal years are complete, the NFE must transition to the new procurement standards found in 2 C.F.R. Part 200. As the grace period is voluntary, if a NFE elects to utilize the grace period, it must affirmatively document this decision in its internal procurement policies, including the date upon which it will transition to the new procurement standards. 2 C.F.R. § 200.110(a). There is no template or one way to do this.

   ii. The previous procurement standards must continue to be used in situations involving declarations that were issued prior to December 26, 2014, to include all projects associated with such a declaration, regardless of project start date. For example, if a disaster declaration was issued on November 1, 2014, the previous procurement standards would apply. If a project associated with this declaration did not begin until June 1, 2015, the previous procurement standards would remain applicable because the project is associated with a disaster declaration that was issued prior to the effective date of the procurement standards found in the Uniform Rules.[2]

[2] FEMA Office of Chief Counsel Procurement Disaster Assistance Team, Field Manual – Public Assistance Grantee and Subgrantee Procurement Requirements under 44 C.F.R. pt. 13 and 2 C.F.R. pt. 215, § V.C.2 (Dec. 2014), available at http://www.fema.gov/media-library-data/1419360792322-

f. The purpose of this document is to describe how a recipient or subrecipient of FEMA financial assistance can comply with the procurement standards of 2 C.F.R. §§ 200.317 to 200.326.

3. AUTHORIZING LEGISLATION AND GRANT AND COOPERATIVE AGREEMENT PROGRAMS

a. This circular applies to all of the grant and cooperative agreement programs listed in Appendix A.

b. Appendix A also identifies the programs' authorizing statutes and implementing regulations.

4. DEFINITIONS

a. Appendix B provides the definitions used in this document, which are consistent with the definitions set forth in 2 C.F.R. Part 200, subpart A, except where otherwise noted.

5. FEMA'S ROLE

a. General. As the Federal awarding agency, FEMA is responsible for monitoring financial assistance execution, and ensuring proper performance under the FEMA award, including compliance with the procurement standards. FEMA may, in exercising this responsibility, conduct both pre- and post-procurement reviews of a NFE's procurements consistent with the terms of 2 C.F.R. §§ 200.317-200.326.

b. Pre-Award Procurement Review.

i. Technical Specifications. A NFE must make available, upon request by FEMA or a pass-through entity, technical specifications of proposed procurements by the NFE where FEMA or the pass-through entity believes such review is needed to ensure that the item or service specified is the one being proposed for acquisition. This review will generally take place before the time the specification is incorporated into a solicitation document. However, if the NFE requests a procurement review after a solicitation has been developed, FEMA or a pass-through entity, may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase. 2 C.F.R. § 200.324(a).

ii. Procurement Documents. The NFE must make available upon request, for FEMA or a pass-through entity pre-procurement review, procurement documents, such as requests for proposals or invitations for bids, or independent cost estimates, when any of the following conditions are

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present. 2 C.F.R. § 200.324(b).

(1) The NFE's procurement procedures or operation fails to comply with the procurement standards in 2 C.F.R. Part 200;

(2) The procurement is expected to exceed the Simplified Acquisition Threshold and is to be awarded without competition or only one bid or offer is received in response to a solicitation;

(3) The procurement, which is expected to exceed the Simplified Acquisition Threshold, specifies a "brand name" product;

(4) The proposed contract is more than the Simplified Acquisition Threshold and is to be awarded to other than the apparent low bidder under a sealed bid procurement; or

(5) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the Simplified Acquisition Threshold. 2 C.F.R. § 200.324(b).

iii. Exemption. The NFE is exempt from pre-procurement review if FEMA or the pass-through entity determines that the NFE's procurement systems comply with the standards of 2 C.F.R. Part 200. There are two possible methods for a NFE to avail itself of this exemption.

(1) FEMA or Pass-Through Entity Review. The NFE may request that its procurement system be reviewed by FEMA or a pass-through entity to determine whether its system meets the standards under 2 C.F.R. Part 200 in order for its system to be certified. 2 C.F.R. § 200.324(c)(1). Generally, these reviews must occur where there is continuous high-dollar funding and third party contracts are awarded on a regular basis. In all cases where a recipient reviews a subrecipient's procurement system, it must provide the results of that review to FEMA.

(2) Self-Certification. The NFE may self-certify its procurement system. Such self-certification must not limit FEMA's right to survey the system. Under a self-certification procedure, FEMA may rely on written assurances from the NFE that it is complying with the procurement standards at 2 C.F.R. §§ 200.317 to 200.326. The NFE must cite specific policies, procedures, regulations, or standards as being in compliance with these requirements and have its system available for review. 2 C.F.R. § 200.324(c)(2). Even if a NFE self-certifies, this does not prevent the NFE from requesting review by FEMA or a pass-through entity.

c. Post-Award Procurement Review. FEMA may review a NFE's procurement documents subsequent to the NFE's contract award as part of FEMA's authority

and responsibility to monitor financial assistance execution, and ensure proper performance and compliance with the terms and conditions of the FEMA award. Such a review may occur during close-out of a FEMA award, close-out of an individual project under a FEMA award, or through a FEMA audit or monitoring visit. *See* 2 C.F.R. § 200.336.

d. Standard of Review. A "standard of review" is the criterion or level of deference by which FEMA will measure the propriety of a decision or action made by a NFE when conducting pre- and post-award review.

   i. Mandatory Provisions. The regulations at 2 C.F.R. §§ 200.317 to 326 will, in some cases, set forth a mandatory procurement standard. For example, 2 C.F.R. § 200.323 requires NFEs that are not states to perform a price or cost analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold, including contract modifications. FEMA affords no deference to a NFE when making the determination of whether it complied with the mandatory regulation.

   ii. Discretionary Provisions. The regulations at 2 C.F.R. §§ 200.317 to 326 will, in other cases, allow the NFE to take an action that involves the exercise of discretion or judgment. For example, the regulation at 2 C.F.R. § 200.318(j) provides that a NFE may use a time and materials contract only after, among other things, it makes a determination that no other contract is suitable. FEMA will review such discretionary procurement decisions by a NFE to determine whether: (1) the NFE's decision lacked a rational basis; and/or (2) the procurement procedure involved a violation of Federal law, regulation, or FEMA policy. In reviewing whether a decision lacked a rational basis, FEMA does not substitute its judgment for that of a NFE, but may impose any one of the remedies for non-compliance available to it, for example, by identifying and substituting reasonable costs for actually incurred costs (that are determined to be unreasonable). 2 C.F.R. § 200.338

e. Access to Records. The Federal awarding agency, Inspectors General, the Comptroller General of the United States, and the pass-through entity (e.g. the recipient), or any of their authorized representatives, must have the right of access to any documents, papers, or other records of the NFE which are pertinent to the Federal award, in order to make audits, examinations, excerpts, and transcripts. The right also includes timely and reasonable access to the NFE's personnel for the purpose of interview and discussion related to such documents. 2 C.F.R. § 200.336.

f. Audits. FEMA may perform or contract for audits of Federal awards or monitoring visits, which could include a review of a NFE's procurements. 2 C.F.R. §§ 200.336 and 200.503.

g. Training and Technical Assistance. FEMA provides procurement training and

technical assistance to NFEs at both the regional and national levels. For assistance, please contact your FEMA Regional Office.

CHAPTER II

APPLICABILITY

1. LEGAL EFFECT

   a. FEMA has developed this document to assist NFEs in complying with the Federal procurement standards at 2 C.F.R. Part 200 and considers this document, in its entirety, to be a guidance document and not a legislative regulation. Although this guidance document does not have the force and effect of law or regulation, it does contain information about the regulations at 2 C.F.R. Part 200 that are mandatory.

   b. This document describes how a NFE can comply with a particular procurement standard. Unless stated otherwise, such examples should not be treated as the exclusive manner in which a NFE can comply with a particular procurement standard. If a NFE identifies an alternate method to comply with a particular regulation, it may contact FEMA for comment before pursuing that alternate method.

2. APPLICABILITY

   a. General.

      i. The regulation at 2 C.F.R. § 200.110 provides that the procurement standards set forth at 2 C.F.R. §§ 200.317 to 326 apply to all FEMA awards issued on or after December, 26, 2014. For financial assistance under the Stafford Act, these procurement standards apply to those financial assistance awards associated with emergencies or major disasters declared on or after December 26, 2014. *See* 79 Fed. Reg. 75871, 75872 (Dec. 19, 2014).

      ii. A NFE, however, may continue to comply with the former procurement standards applicable to FEMA awards at 44 C.F.R. Part 13 (for states, local, and Indian tribal governments) or 2 C.F.R. Part 215 (for institutions of higher education, hospitals, and other nonprofit organizations) until the completion of two additional fiscal years after December 26, 2014. This is an elective grace period and, if a NFE affirmatively elects to use the previous procurement standards, it must document this decision in its internal procurement policies, including the date upon which it will transition to the new procurement standards. 2 C.F.R. § 200.110(a). *See* Ch. I, ¶ e.

      iii. This document only applies to those financial assistance awards that are awarded on or after the date of this circular's issuance or the end of the NFE's grace period, whichever is later. For financial assistance authorized under major disaster and emergency declarations pursuant to

the Stafford Act, this document only applies to financial assistance awarded under declarations occurring after December 26, 2014 or the end of the NFE's grace period (where affirmatively elected), whichever is later.

b. States. When procuring property and services under a grant or cooperative agreement, a state (to include state agencies and instrumentalities of the state[3]) must use the same policies and procedures that it uses for procurements from its non-Federal funds. 2 C.F.R. § 200.317. A state must comply with 2 C.F.R. § 200.322 (Procurement of Recovered Materials), must ensure that every purchase order or other contract included any clauses required by 2 C.F.R. § 200.326 (Contract Provisions), and must follow all applicable Federal laws, executive orders, implementing regulations, and policies. As such, Chapter I (*Introduction*), Chapter II, ¶ 1 (*Legal Effect*), Chapter II, ¶¶ 3 (*Federal Laws, Regulations, and Executive Orders*) and 4 (*State, Local, and Indian Tribal Laws and Regulations*), Chapter III (*Procurement by a State*), Chapter IV, ¶ 12 (Contract Provisions), and Chapter V, ¶ 7 (Procurement of Recovered Materials) of this Supplement apply to the procurement of services or property by a state.

c. Non-States. When procuring property and services under a grant or cooperative agreement, all other NFEs, must follow the regulations at 2 C.F.R. § 200.318 (General Procurement Standards) through 2 C.F.R. § 200.326 (Contract Provisions). 2 C.F.R. § 200.318. This includes local governments, institutions of higher education, hospitals, and other non-profit organizations, as well as Indian tribes (irrespective of whether they are serving as a recipient or subrecipient), institutions of higher education (that do not meet the definition of "state" instrumentality at 2 C.F.R. § 200.90), hospitals (that do not meet the definition of "state" instrumentality at 2 C.F.R. § 200.90), and other non-profit organizations. As such, Chapter I (*Introduction*), Chapter II, ¶ 1 (*Legal Effect of This Circular*), Chapter II, ¶¶ 3 (*Federal Laws, Regulations, and Executive Orders*) and 4 (*State, Local, and Indian Tribal Laws and Regulations*[4]), Chapter IV (*General Procurement Standards*), Chapter V (*Procedures and Guidance for Open Market Procurements*), and Chapter VI (*Other Procurement Methods and Additional Topics*) of this Supplement apply to the procurement of services or property by the NFEs that are not a state.

d. Recipients of Federal Financial Assistance from FEMA and other Federal Agencies. A NFE that uses funding provided by another Federal agency or agencies for a third party procurement also supported by FEMA financial assistance must comply with the procurement requirements of both FEMA and the other Federal agencies providing Federal financial assistance. These

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[3] 2 C.F.R. § 200.90. "State" is defined as "any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, U.S. Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any agency or instrumentality thereof exclusive of local governments.

[4] Id.

requirements may sometimes differ, with the result that FEMA expects the NFE to comply with both sets of requirements. If compliance with all applicable Federal requirements is impossible, the NFE should notify FEMA or its pass-through entity, as appropriate, for resolution by FEMA.

3. FEDERAL LAWS, REGULATIONS, EXECUTIVE ORDERS, AND OTHER FEMA REQUIREMENTS

a. Enabling Laws, Implementing Regulations, and FEMA Policies. The property or services acquired by a NFE must be eligible for support and otherwise comply with the relevant enabling laws, regulations, and FEMA policies for the specific financial assistance programs set forth in Chapter I, ¶ 3.

b. Scope of the Grant or Cooperative Agreement. The property or services acquired must be within the scope of work of the underlying grant or cooperative agreement.

c. Period of Performance. FEMA expects the NFE to use sound business judgment in establishing and extending a contract's period of performance, with such period generally not exceeding the time necessary to accomplish the purpose of the contract. Furthermore, FEMA will not reimburse a NFE for contract work performed outside of the period of performance of the financial assistance award. 2 C.F.R. § 200.309; Standard Form 424D, ¶ 6.

d. Contract Costs Incurred Prior to the FEMA Federal Assistance Award.

i. Pre-Award Costs. Pre-award costs are those costs incurred before the effective date of the FEMA award directly pursuant to negotiation and in anticipation of the FEMA award where such costs are necessary for efficient and timely performance of the scope of work. 2 C.F.R. § 200.458. Such costs are allowable only to the extent that they would have been allowable if incurred after the date of the FEMA award and only with the written approval of FEMA. For example, FEMA may fund pre-award planning or project costs directly related to the development of a Hazard Mitigation Grant Program project or planning proposal. *See* 44 C.F.R. § 206.439.

ii. Project Implementation Before Award.

(1) Contract costs associated with project implementation but incurred before FEMA has awarded a grant or cooperative agreement (or project under a grant or cooperative agreement) are generally unallowable for reimbursement. *See also* Appendix C, ¶ 6 (concerning environmental and historic preservation implications). For example, contract costs associated with the commencement of actual implementation of a project under the Hazard Mitigation Grant Program before FEMA has awarded that project are ineligible for reimbursement. *See* 44 C.F.R. § 206.439.

(2) There are limited exceptions to this prohibition, and recipients should engage the appropriate Regional or FEMA Headquarters staff with specific questions. Furthermore, even where contract costs are incurred before the effective date of award, if those costs are ultimately deemed otherwise allowable, the NFE must still comply with the procurement standards of 2 C.F.R. Part 200 when procuring property or services.

e. Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards.

i. General. The procurement standards set forth in the Uniform Rules at 2 C.F.R. §§ 200.317 to 200.326 apply to all awards as detailed in Chapter II, ¶ 2.a.

ii. Waivers. FEMA may, subject to certain limitations, approve exceptions to the procurement standards on a case-by-case basis for individual NFEs pursuant to 2 C.F.R. § 200.102(b). Recipients should contact their respective Regional Office for information about submitting waiver requests.

iii. More Restrictive Procurement Standards. FEMA may apply more restrictive procurement standards, to a class of FEMA awards or NFEs when approved by OMB or required by Federal statutes or regulations. 2 C.F.R. § 200.102(c). As of the date of this document, FEMA has not sought approval from OMB for any more restrictive requirements for any FEMA grant or cooperative agreement program or class of NFEs.

iv. Less Restrictive Procurement Standards. FEMA may also apply less restrictive procurement standards when making fixed amount awards, except for those requirements imposed by statute. 2 C.F.R. § 200.102(c).

v. Cost Principles. The costs under a FEMA grant or cooperative agreement must conform to the cost principles set forth under the Uniform Rules at 2 C.F.R. Part 200, subpart E. In general, costs must be necessary and reasonable; allocable to the FEMA award; conform to any limitations or exclusions set forth in the Cost Principles or in the FEMA award as to types or amount of cost items; be consistent with policies and procedures that apply uniformly to both Federally-financed and other activities of the NFE; be accorded consistent treatment; not be included as a cost or used to meet cost sharing or matching requirements of any other Federally-financed program in either the current or a prior period and authorized by Federal law or regulation; be adequately documented; and be determined in accordance with generally accepted accounting principles ("GAAP"), except, for state and local governments and Indian tribes only, as otherwise provided for in 2 C.F.R. Part 200, subpart E. 2 C.F.R. § 200.403.

f. Other Federal Laws, Regulations, and Executive Orders.

i. In addition to complying with the Uniform Rules and the enabling laws, implementing regulations, and FEMA policies for a financial assistance program, each NFE must also comply with all other applicable Federal laws, regulations, and executive orders.

ii. Many of these laws, regulations, and executive orders will need to be included in third party contracts to the lowest tier necessary, and others, although not expressly referenced in a contract, will have a direct and indirect effect on a NFE's third party contracts.

iii. DHS issues, on an annual basis, Standard Terms and Conditions that apply to recipients of Federal awards from all DHS Components, including FEMA. In addition, a recipient executes a Standard Form ("SF") 424B or 424D with its financial assistance application to FEMA that contains standard assurances. The DHS Standard Terms and Conditions and SF 424B and D contain references to many cross-cutting Federal laws and regulations that may apply to a FEMA award.

iv. Appendix C provides a non-exhaustive list and description of some of the cross-cutting laws, regulations, and executive orders that may affect a NFE's procurement.

g. Federal Acquisition Regulation. The Federal Acquisition Regulation ("FAR"), 48 C.F.R. Chapter 1, does not apply to FEMA-assisted procurements, absent Federal laws or regulations to the contrary. Nevertheless, in the case where the regulations at 2 C.F.R. §§ 200.317 to 200.326 need amplification as they relate to a particular procurement or a NFE's procurement laws, regulations, or policies do not provide guidance on a particular issue, then the FAR may prove helpful if the NFE's circumstances are suitable for application of the specific FAR provision under consideration.

4. STATE, LOCAL, AND TRIBAL LAWS AND REGULATIONS AND STANDARDS

a. General. The Uniform Rules provide that a state must, among other things, follow the same policies and procedures it uses for procurements from its non-Federal funds. 2 C.F.R. § 200.317. They also provide that all other NFEs must use their own documented procurement procedures which reflect applicable state, local, and tribal laws and regulations, provided that the procurement conform to applicable Federal law and the procurement standards set forth at 2 C.F.R. §§ 200.317 to 200.326. 2 C.F.R. § 200.318.

b. Waivers of Local, State, and/or Tribal Procurement Standards. Under certain circumstances, NFE authorities may, pursuant to their own legal requirements, waive local, state, or tribal procurement standards or regulations as a result of, or in anticipation of a disaster or emergency. However, even though the appropriate NFE may have waived local, state or tribal procurement standards or regulations,

the NFE cannot waive the applicable Federal procurement standards, which would continue to apply to the NFE, even where local, state, or tribal procurement standards or regulations have been waived.

c. Direct Conflicts Between the Federal Procurement Standards and the Procurement Standards Applicable to NFEs Other Than States. The Federal procurement standards are relatively brief. They only address certain, limited procurement concepts and do not address all possible procurement issues. Where the Federal procurement standards do not address a particular area of procurement, FEMA expects the NFE to apply local, state, and/or tribal procurement standards or regulations – whichever applies to the particular NFE. However, where a *direct conflict* exists between a Federal procurement standard and a local, state and/or tribal procurement standard or regulation, FEMA expects the NFE to apply the more restrictive procurement standard.

NFE procurement standards may, in some cases, be more restrictive than the Federal procurement standards at 2 C.F.R. §§ 200.318 to 200.326. For example, the regulation at 2 C.F.R. § 200.320(b) allows a NFE to use procurement by small purchase procedures when the services, property, or other property acquired do not cost more than the simplified acquisition threshold (which is currently $150,000). It may be the case that the applicable state, local, and/or Indian tribal procurement laws and regulations do not permit small purchase procedures for acquisitions over $50,000. In such a circumstance where there is a direct conflict between local, state (and/or tribal) procurement standards and these Federal procurement standards, the NFE is required to follow the more restrictive applicable state, local, or tribal laws and regulations. A more permissive procurement standard of the Uniform Rules would not, in other words, control over more restrictive state, local, or tribal standards. Note that this concept of direct conflicts and more or less restrictive standards *only applies to NFEs other than states*. States will always follow the procurement standards found at 2 C.F.R § 200.317, which directs them to utilize their own procurement standards, comply with 2 C.F.R. § 200.322 (procurement of recovered materials), and 2 C.F.R. § 200.326 (contract provisions).

CHAPTER III

PROCUREMENT BY A STATE

1. GENERAL STANDARD

   a. When procuring property and services under a grant or cooperative agreement, a state must follow the same policies and procedures that it uses for acquisitions from its non-Federal funds. 2 C.F.R. § 200.317. A state must comply with 2 C.F.R. § 200.322 (Procurement of Recovered Materials) and ensure that every purchase order or other contract includes any clauses required by 2 C.F.R. § 200.326 (Contract Provisions). As such, Chapter IV, ¶ 12 (Contract Provisions) and Chapter V, ¶ 7 (Procurement of Recovered Materials), which discuss the regulations at 2 C.F.R. §§ 200.322 and 326, apply to a state. A state must also follow all other applicable Federal law, executive orders, and implementing regulations.

   b. A "state" means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any agency or instrumentality thereof exclusive of local governments. As such, the procurement standard at 2 C.F.R. § 200.317 and described in Chapter III, ¶ 1.a apply to a state agency irrespective of whether that agency is acting as recipient or subrecipient under a FEMA award.

   c. Under the Stafford Act and other FEMA financial assistance programs, an Indian tribe may potentially serve as a recipient. An Indian tribe is not defined as a "state" at 2 C.F.R. § 200.90, however, meaning that the procurement standards applicable to an Indian tribe will always be 2 C.F.R. §§ 200.318 through 200.326 and not 2 C.F.R. § 200.317, unless the definition is subsequently revised by the Office of Management and Budget, which is responsible for the Uniform Rules.

2. COST ALLOWABILITY

   a. The Uniform Rules require financial costs to conform to the Cost Principles at 2 C.F.R. Part 200, subpart E, for allowable costs. In general, costs must be necessary and reasonable; allocable to the FEMA award; conform to any limitations or exclusions set forth in the Cost Principles or in the FEMA award as to types or amount of cost items; be consistent with policies and procedures that apply uniformly to both Federally-financed and other activities of the NFE; be accorded consistent treatment; not be included as a cost or used to meet cost sharing or matching requirements of any other Federally-financed program in either the current or a prior period and authorized by Federal law or regulation; be adequately documented; and be determined in accordance with generally accepted accounting principles ("GAAP"), except, for state and local governments and Indian tribes only, as otherwise provided for in 2 C.F.R. Part 200, subpart E. *See* 2 C.F.R. § 200.403.

b. Even if a state complies with its own policies and procedures when procuring services or property under a FEMA award, FEMA will not provide full reimbursement of a state's third party contract costs if FEMA determines the costs do not conform to the cost principles. For example, FEMA will not provide full reimbursement in the case of cost plus percentage of cost or cost plus percentage of construction cost contracts, as FEMA considers the percentage of cost portion of the contract to be unreasonable.

c. A state must use the cost principles at 2 C.F.R. Part 200, subpart E as a guide in the pricing of fixed-price contracts and subcontracts where costs are used in determining the appropriate price. 2 C.F.R. § 200.401.

3. LAW, REGULATIONS, AND EXECUTIVE ORDERS

a. A state must comply with all applicable Federal laws, regulations, and executive orders when procuring services or property under a FEMA award.

b. This document provides a list of some of the applicable Federal laws, executive orders, and regulations at Appendices A and C.

4. PROCUREMENTS BY NFEs OTHER THAN STATES

a. The remaining chapters of this circular discuss the procurement standards that apply to Institutions of Higher Education (both public and private), Hospitals, and other Private Non-Profit Organizations. Unlike the procurement standards for states, found in 2 C.F.R. § 200.317, the procurement standards for Institutions of Higher Education, Hospitals, and other Private Non-Profit Organizations are found at 2 C.F.R. §§ 200.318-326. With the exception of the requirements for Recovered Materials (2 C.F.R. § 200.322) and contract provisions (2 C.F.R. § 200.326), there is no other overlap of the procurement standards between States and NFEs other than States.

b. Accordingly, NFEs must be cognizant of the fact that the Federal procurement standards are differentiated by the type of entity receiving Federal disaster assistance from FEMA. In other words, the Federal procurement standards are divided into those that apply to States (as defined above and by the Uniform Rules) and those that apply to NFEs other than States – in other words, everyone else.

c. With the exception of the following discussion on the standards associated with 2 C.F.R. § 200.322 (Procurement of Recovered Materials) and 2 C.F.R. § 200.326 (contract provisions), the remaining sections and chapters of this document refer to the procurement standards applicable to NFEs other than States (local and tribal governments, institutions of higher education, hospitals, and other non-profit organizations). 2 C.F.R. § 200.318 – 200.326.

CHAPTER IV

GENERAL PROCUREMENT STANDARDS FOR NFEs OTHER THAN STATES

1. GENERAL

   a. A NFE that is NOT a state, must use its own documented procurement procedures which reflect applicable state, local, and tribal laws and regulations, provided the procurement conforms to applicable Federal law and the standards set forth in 2 C.F.R. Part 200.

   b. The regulations at 2 C.F.R. §§ 200.318, 319, and 326 set forth various general procurement standards for NFEs, some of which are mandatory and some of which are encouraged. These standards are discussed in this chapter.

   c. A NFE must comply with all other applicable Federal laws, regulations, and executive orders when procuring services or property under a FEMA award. The requirements identified in this supplement only address the Federal procurement standards and not the other requirements established and made applicable through the Uniform Rules. This supplement provides a (non-exclusive) list of some of the applicable Federal laws, executive orders, and regulations at Appendices A and C.

2. CONTRACTING CAPACITY AND OVERSIGHT

   a. NFEs must maintain oversight to ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders. 2 C.F.R. § 200.318(b).

   b. A NFE should maintain adequate technical capacity to comply with the procurement standards at 2 C.F.R. §§ 200.318 to 326. If a NFE lacks qualified personnel (force account labor) within its organization to undertake the various tasks (such as evaluating contractors, drafting specifications, overseeing contract performance), then FEMA expects the NFE to acquire the necessary services from sources outside the NFE's organization. If the NFE obtains such services, those services are eligible under a particular FEMA grant or cooperative agreement, and the NFE seeks to fund those services using FEMA award funding, then the procurement standards at 2 C.F.R. Part 200 and this circular will apply to those contracts and to those contractors selected to perform procurement functions on behalf of the NFE.

3. STANDARDS OF CONDUCT

   a. Written Standards. The NFE must maintain written standards of conduct covering conflicts of interest and governing the actions of its employees engaged in the selection, award, and administration of contracts. 2 C.F.R. § 200.318(c)(1).

b. Personal Conflicts of Interest. No employee, officer, or agent may participate in the selection, award, or administration of a contract supported by a FEMA award if he or she has a real or apparent conflict of interest. Such a conflict would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of these parties, has a financial or other interest in or a tangible personal benefit from a firm considered for award. 2 C.F.R. § 200.318(c)(1); *See also* Standard Form 424D, ¶ 7; Standard Form 424B, ¶ 3.

   i. FEMA considers a "financial interest" to be the potential for gain or loss to the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of these parties as a result of the particular procurement. The prohibited financial interest may arise from ownership of certain financial instruments or investments such as stock, bonds, or real estate, or from a salary, indebtedness, job offer, or similar interest that might be affected by the particular procurement.

   ii. FEMA considers an "apparent" conflict of interest to exist where an actual conflict does not exist, but where a reasonable person with knowledge of the relevant facts would question the impartiality of the employee, officer, or agent participating in the procurement.

c. Gifts. The officers, employees, and agents of the NFE must neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or parties to subcontracts. However, NFEs may set standards for situations in which the financial interest is *de minimus*, not substantial, or the gift is an unsolicited item of nominal value. 2 C.F.R. § 200.318(c)(1).

d. Violations. The NFE's written standards of conduct must provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the NFE. 2 C.F.R. § 200.318(c)(1). For example, the penalty for a NFE's employee may be dismissal, and the penalty for a contractor might be the termination of the contract.

e. Organizational Conflicts of Interest.

   i. Parent, Subsidiaries, and or Affiliates. If a NFE has a parent, affiliate, or subsidiary organization that is not a state, local government, or Indian tribe, the NFE must maintain written standards of conduct governing organizational conflicts of interest. Organizational conflicts of interest within this context means that because of relationships with a parent company, affiliate, or subsidiary organization, the NFE is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization. 2 C.F.R. § 200.318(c)(2).

   ii. Other Contractors. An organizational conflict of interest can also arise

within the context of contractors that are not related organizations. An organizational conflict of interest arises in these cases where a person, because of other activities or relationships with other persons, is unable or potentially unable to render impartial assistance of advice to the NFE, the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage. Chapter V, ¶ 1.b provides more information about such organizational conflicts of interest.

iii. In order to ensure objective contractor performance and eliminate unfair competitive advantage, 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 requirements. 2 C.F.R. § 200.319(a).

4. DETERMINING NFE NEEDS

a. Eligibility. The property and services to be acquired must be eligible under the Federal financial assistance award, including the Federal law authorizing the FEMA award and any implementing regulations and policies. Furthermore, if FEMA assistance will finance the cost of property or services, the property or services must be within the scope of work of the specific FEMA grant or cooperative agreement (or project within that grant or cooperative agreement). *See* Chapter II, ¶ 3.a.

b. Necessity. The Uniform Rules require the NFE to establish procedures to avoid the purchase of unnecessary or duplicative items. 2 C.F.R. § 200.318(d). In monitoring whether a NFE has complied with its procedures to avoid the purchase of unnecessary or duplicative items, FEMA bases its determination on what would have been the NFE's reasonable expectations at the time it entered into the contract.

i. General Prohibition. FEMA expects the NFE to limit an acquisition to its current and reasonably expected needs to carry out the scope of work under the FEMA award, and may not add quantities or options to the contract solely for needs unrelated to the scope of work under the FEMA award or for the purpose of assignment to another party at a later date. The prohibition does not apply, however, to joint procurements or state or local government purchasing schedules or contracts.

ii. Advance Contracts for Future Work. A NFE may award advance contracts before an incident occurs for the potential performance of work under a Stafford Act emergency or major disaster. These are also known as pre-positioned or pre-awarded contracts. These types of contracts are eligible for reimbursement when used to support response and recovery efforts pursuant to a financial assistance award; however, NFEs must ensure that these contracts are awarded in accordance with the Federal

procurement standards found at 2 C.F.R. §§ 200.318 – 200.326 and that the scope of work adequately encompasses the type and extent of work anticipated for its use in response to and recovery from the disaster.

c. Procurement Size. The NFE should consider whether to consolidate or break out the procurement to obtain a more economical purchase. 2 C.F.R. § 200.318(d).

   i. Joint Procurements. It may be economically advantageous for a NFE to enter into a joint procurement with others that have similar needs. A joint procurement will enable the two or more NFE's to obtain advantages unavailable for smaller procurements.

   ii. Smaller Procurements. The regulations require a NFE to take the affirmative step, when possible, to divide total requirements by breaking out procurements when economically feasible into smaller tasks or quantities to permit maximum participation of small and minority businesses and women's business enterprises. 2 C.F.R. § 200.321(b)(3). Absent efforts to permit maximum participation of small and minority businesses and women's business enterprises, a NFE should not break out a larger procurement merely to bring it under the micro-purchase or simplified acquisition thresholds. In other words, NFEs should not perform what is commonly referred to as "project splitting," by which a single requirement is broken up into smaller components simply to defeat an established dollar threshold in order to take advantage of streamlined procurement procedures under the micro-purchase and small purchase procedures, methods of contracting.

d. Options. The NFE's contracts may include options to ensure the future availability of property or services as long as the NFE justifies them as needed for the purpose of the FEMA grant or cooperative agreement.

e. Lease vs. Purchase. A NFE must, where appropriate, make an analysis of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach. 2 C.F.R. § 200.318(d). FEMA will review any costs used in the comparison for reasonableness, realistic current market conditions, and based on the expected useful service life of the asset. The following provide examples of where the lease vs. purchase analysis is required under FEMA financial assistance programs.

   i. Temporary Facilities under the Public Assistance Grant Program. Eligible Public Assistance applicants may request FEMA financial assistance for temporary facilities following a Stafford Act declaration to continue the essential community services[5] previously performed at a damaged facility.

[5] "Essential community services" are those services of a governmental nature that are necessary to save lives, protect property and the public, and preserve the proper function and health of the

Applicants may decide to lease, purchase, or construct eligible temporary facilities; whichever option is selected, it must be reasonable, cost-effective, and temporary in nature. FEMA does not mandate that the applicant pursue a specific option, but will fund only the most cost-effective option. Before FEMA will provide financial assistance for temporary facilities under the Public Assistance Grant Program, FEMA requires the applicant to perform a cost comparison of the options and provide that to FEMA. Id.

ii. Equipment to Perform Emergency Work under the Public Assistance Grant Program. FEMA may provide FEMA financial assistance to a NFE to acquire equipment to perform emergency work following an emergency or major disaster declaration under the Stafford Act. In those circumstances, the NFE must analyze its options to either lease or purchase equipment. FEMA, in most cases, does not mandate that the NFE either purchase or lease equipment but will fund only the most cost-effective option, and will review the applicant's analysis of comparative costs and other factors. *See* Public Assistance Program and Policy Guide, Ch. 2, Section V (C). The following provides several factors that FEMA will consider: estimated length of the period the equipment is to be used and the extent of use within that period; cumulative rental payments for the estimated period of use; net purchase price; transportation and installation costs; maintenance and other service costs; availability of purchase options; and trade-in or salvage value.

5. VALUE ENGINEERING

a. A NFE is encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lowest cost. 2 C.F.R. § 200.318(g).

b. Under value engineering clauses, contractors are incentivized to submit change proposals which reduce the cost of contract performance by promising the contractor a share of the savings.

c. Part 48 of the FAR is dedicated to the subject of value engineering and may provide a useful reference for a NFE.

6. CONTRACTOR QUALIFICATIONS

a. Responsibility.

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community at large. Stafford Act § 102(11)(B), 42 U.S.C. 5122. *See also*, Public Assistance Program and Policy Guide, Ch. 2, Section VI (B) (17).

i. Requirement. A NFE must award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed requirement. 2 C.F.R. § 200.318(h). The Uniform Rules require a NFE to give consideration to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources. The following provide amplifying information in regard to these mandatory criteria.

(1) Integrity. A contractor must have a satisfactory record of integrity and business ethics. Contractors that are debarred or suspended as described in Chapter III, ¶ 6.d must be rejected and cannot receive contract awards at any level. A NFE, for those contractors that are not debarred or suspended, may also analyze whether the contractor has:

a. Committed fraud or a criminal offense in connection with obtaining or attempting to obtain a contract;

b. Violated Federal or state antitrust statutes;

c. Committed embezzlement, theft, forgery, bribery, falsification or destruction of records, or tax evasion;

d. Made false statements;

e. Violated Federal criminal tax laws;

f. Received stolen property;

g. Committed any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of the contractor;

h. Been indicted for any of the offenses described in ¶ 6.a.(1)(a)-(g); or

i. Has delinquent Federal or state taxes

(2) Public Policy. A contractor must have complied with the public policies of the Federal Government and state, local government, or tribal government. This includes, among other things, past and current compliance with the:

a. Equal opportunity and nondiscrimination laws described in Appendix C, ¶ 5;

b. Five affirmative steps described at 2 C.F.R. § 200.321(b) for all subcontracting under contracts supported by FEMA financial assistance; and

c. Applicable prevailing wage laws, regulations, and executive orders

(3) Record of Past Performance. A contractor must be able to provide a satisfactory past performance record, which could include:

a. Sufficient Resources. The contractor has key personnel with adequate experience and subcontractors with adequate experience that will be performing work under the prospective contract.

b. Adequate Past Experience. A contractor has successful past experience in carrying out similar work, including a record of:

i. Having the necessary organization, accounting, and operational controls;

ii. Conforming to requirements and standards of good workmanship;

iii. Forecasting and controlling costs and showing appropriate budgetary controls;

iv. Adherence to schedules, including the administrative aspects of performance;

v. Reasonable and cooperative behavior and commitment to customer satisfaction;

vi. Business-like concern for the interest of the customer; and

vii. Meeting quality requirements

(4) Financial Resources. A contractor must have adequate financial resources to perform the contract or the ability to obtain such resources. A NFE could analyze the existing cash flow of the contractor, account receivables, and other financial data as well as existing business prospects in making this evaluation.

(5) Technical Resources. A contractor must have or be able to acquire the required construction, production, and/or technical facilities, equipment, employees, and other resources to perform the work under the contract.

ii. While the NFE is afforded great discretion in its Responsibility determination, FEMA requires a NFE exercising this discretion to make a documented determination that a prospective contractor qualifies as responsible and set forth the basis for that determination. 2 C.F.R. §

200.318(h).

b. Organizational Conflict of Interest. The Uniform Rules require a NFE to exclude contractors that developed or drafted specifications, requirements, statements of work, or invitations for bids or requests for proposals from competing for such procurements in order to ensure objective contractor performance and eliminate unfair competitive advantage. *See* ¶ 3.e; 2 C.F.R. § 200.319(a).

c. Lobbying Certification. The NFE must obtain a lobbying certification and, if applicable, a lobbying disclosure from a prospective contractor if the contract will exceed $100,000 before awarding the contract. *See* 2 C.F.R. § 200.450; Chapter IV, ¶ 12.ix and Appendix C, ¶ 4; 44 C.F.R. Part 18 (New Restrictions on Lobbying).

d. Debarment and Suspension. A NFE's contractor or subcontractor must not be debarred nor suspended from Federal programs. *See* 2 C.F.R. § 200.213.

i. OMB Guidelines. The rules of assistance exclusion are governed by the OMB guidelines to agencies on government-wide debarment and suspension set forth at 2 C.F.R. Part 180. These guidelines prohibit a NFE from entering into a "covered transaction" with a party listed on the System for Award Management ("SAM) Exclusions list. *See* 2 C.F.R. Part 200, Appendix II, ¶ I; Appendix C, ¶ 2.

ii. Department Guidelines. The Department has adopted debarment and suspension guidelines at 2 C.F.R. Part 3000, which adopt OMB's regulations at 2 C.F.R. Part 180 and provide supplemental policies and procedures.

iii. Covered Transactions. As detailed in 2 C.F.R. Part 180 and 2 C.F.R. Part 3000, the following comprise "covered transactions" of a NFE under a FEMA award:

(1) Contract awarded by a NFE in the amount of at least $25,000 or more;

(2) Contract awarded by NFE that requires approval of FEMA (irrespective of contract amount);

(3) Contract awarded by a NFE for a Federally required audit (irrespective of the contract amount);

(4) A subcontract awarded by a NFE's contractor or subcontractor that requires the approval of FEMA (irrespective of amount) or is in the amount of least $25,000. 2 C.F.R. § 3000.220; 2 C.F.R. § 180.220.

iv. State Debarment and Suspension Lists. A NFE may treat, consistent with applicable state, local, and/or Indian tribal laws and regulations, any

prospective contractor or subcontractor listed on a centralized government debarment and suspension list as non-responsible and ineligible for contract award, pursuant to applicable state, local or tribal law. This would not fall within the Federal Suspension and Debarment classification, but would instead fall within the NFE's requirement to determine and award contracts only to contractors determined to be responsible.

7. RECORD KEEPING

a. Procurement History. The Uniform Rules require a NFE to maintain records sufficient to detail the history of a procurement. These records include, but are not limited to, the following: rationale for method of procurement, selection of contract type, contractor selection or rejection, and the basis for contract price. 2 C.F.R. § 200.318(i).

i. Procurement Method. A NFE must document its rationale for the method of procurement used for each contract (micro-purchases, small purchase procedures, sealed bidding, competitive proposals, and noncompetitive proposals), including a justification for using the procurement by noncompetitive proposals method.

ii. Contract Type. A NFE must document its rationale for selecting the contract type it used (fixed price, cost reimbursement, or time and materials). In addition, time and materials contracts have additional requirements described at 2 C.F.R. § 200.318(j). *See* Chapter IV, ¶ 8.

iii. Contractor Selection. A NFE must document its rationale for contractor selection or rejection, including a written responsibility determination for the successful contractor.

iv. Price. A NFE must document the basis for the contract price, which will include the cost or price analysis for contracts exceeding the simplified acquisition threshold. *See* 2 C.F.R. § 200.323; Chapter V, ¶ 4.

v. Other Documentation. A procurement file should also include the following documentation as appropriate:

(1) Acquisition planning information and other pre-solicitation documents;

(2) List of sources solicited;

(3) Copies of published notices of proposed contract action;

(4) Independent cost estimate;

(5) Copy of the solicitation, all addenda, and all amendments;

(6) Determination of contractor's responsiveness;

(7) Notice of award;

(8) Notice to unsuccessful bidders or offerors and record of any debriefing;

(9) Record of protests, disputes, and claims;

(10) Bid, performance, payment, and other bond documents;

(11) Notice to proceed

b. Extent of Documentation. FEMA expects that the NFE will maintain reasonable documentation, such that documents included in a procurement history should be commensurate with the size and complexity of the procurement.

c. Access to Records.

i. The Uniform Rules provide that FEMA, DHS Office of Inspector General, the Comptroller General of the United States, and the pass-through entity, or any of their authorized representatives, must have the right of access to any documents, papers, or other records of the NFE which are pertinent to the FEMA award, in order to make audits, examinations, excerpts, and transcripts. 2 C.F.R. § 200.336; DHS Standard Terms and Conditions, v 3.0, ¶ XXVI (Dec. 4, 2013).

ii. A NFE must acknowledge and agree—and require any contractors, successors, transferees, and assignees acknowledge and agree—to comply with applicable provisions governing DHS access to records, accounts, documents, information, facilities, and staff. DHS Standard Terms and Conditions, v 3.0, ¶ XXVI (Dec. 4, 2013).

8. TIME AND MATERIALS CONTRACTS

a. Definition. A time and materials type contract means a contract whose cost to a NFE is the sum of the actual cost of materials and direct labor hours charged at fixed hourly rates that reflect wages, general and administrative expenses, and profit. 2 C.F.R. § 200.318(j)(1)(i) and (ii).

b. Conditions Precedent. A NFE may use a time and materials type contract only after a determination that (1) no other contract is suitable; and (2) if the contract includes a ceiling price that the contractor exceeds at its own risk. 2 C.F.R. § 200.318(j).

c. Oversight. Time and materials type contracts provide no positive profit incentive to the contractor for cost control or labor efficiency, which is why the Uniform Rule requires the inclusions of a contract ceiling price. The Uniform Rules also require the NFE to assert a high degree of oversight in order to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls. 2 C.F.R. § 200.318(j)(2).

d. Differentiating Time and Materials and Cost Plus Percentage of Cost Contracts.

i. As described above, a time and materials (T&M) contracts provides for the payment of labor costs on the basis of fixed hourly billing rates which are specified in the contract. These hourly billing rates would include wages, indirect costs, general and administrative expense, and profit. No fee or profit is allowed except as part of the fixed billing rate for direct labor hours, such that materials are billed at cost.

ii. To include for the payment of labor costs on the basis of fixed hourly billing rates and allow the contractor to bill for actual costs other than labor (such as materials or travel) plus a percentage rate of those actual costs would constitute a prohibited cost-plus-percentage-of-cost contract. A contractor, however, is allowed to recover overhead costs on its direct costs, such as materials or travel, if the contractor's accounting system clearly separates the overhead costs associated with those direct costs and those overhead costs are not included in the overhead pool that is applied to direct labor costs. In other words, there must be no duplicate billing for material handling overhead costs in the rates applied to labor hours.

e. FEMA Review.

i. FEMA will review a NFE's determination to use a time and materials contract under a reasonable basis standard.

ii. FEMA generally discourages a NFE from using time and materials type contracts; however, where their use is unavoidable, FEMA generally limits the use of these contracts to a reasonable time based on the circumstances during which the Applicant could not define a clear scope of work. FEMA also encourages a NFE to ensure that it has a unilateral right to terminate the contract for convenience that will enable the NFE to award a follow-on fixed price or cost reimbursement contract type.

9. SETTLEMENT OF ALL CONTRACTUAL AND ADMINISTRATIVE ISSUES

a. General. A NFE alone is responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to, source evaluation, protests, disputes, and claims. 2 C.F.R. § 200.318(k). While not specifically defined in the Uniform Rules, these terms generally have the following meaning:

i. A "protest" is a disagreement before or over the award of a contract. Such disagreements can arise from, among other things, content in a solicitation, an award or proposed award of a contract, or termination or cancellation of an award of the contract.

ii. A "dispute" is a disagreement between the NFE and its contractor

regarding the rights of the parties after a contract has been awarded that do not concern award of the contract itself.

iii. A "claim" is a written demand or assertion by the NFE or its contractor seeking payment of a specific sum of money, an adjustment or interpretation of contract terms, or other relief arising under or relating to the contract.

iv. A "source evaluation" generally refers to the evaluation by a NFE of a prospective contractor's proposal when using the procurement by competitive proposal method.

b. Contractual Responsibilities. Neither FEMA nor the Uniform Rules relieve the NFE of any contractual responsibilities under its contracts. 2 C.F.R. § 200.318(k).

c. Violations of Law. FEMA and NFEs must refer violations of law to the local, state, or Federal authority having proper jurisdiction. 2 C.F.R. § 200.318(k).

d. FEMA Review. FEMA will not substitute its judgment for that of the NFE in resolving contractual and administrative issues unless the matter is primarily a Federal concern. 2 C.F.R. § 200.318(k). An example of a matter that is "primarily a Federal concern" includes, but is not limited to, a violation of Federal law, violation of any of the procurement standards at 2 C.F.R. §§ 200.318 to 326, and violation of other Federal regulations or executive orders, impropriety, waste, fraud, or abuse.

e. Liquidated Damages. If a NFE's contract includes a liquidated damages provision, FEMA requires the NFE to credit any liquidated damages recovered to the FEMA award unless FEMA approves other uses for the liquidated damages.

10. WRITTEN PROCEDURES FOR PROCUREMENT TRANSACTIONS

a. General. The Uniform Rules require that a NFE must have written procedures for procurement transactions. 2 C.F.R. § 200.319(c). FEMA expects these written procedures to address the following items.

b. Solicitations. The NFE's written procedures must ensure that all solicitations meet the following requirements. 2 C.F.R. § 200.319(c).

i. Clear Description. The solicitation must incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. 2 C.F.R. § 200.319(c)(1).

ii. Nonrestrictive Specification. The description of the technical requirements must not contain features that unduly restrict competition. 2 C.F.R. § 200.319(c)(1).

iii. Qualitative Requirements. The description of the technical requirements may include a statement of the qualitative nature of the material, product, or service to be procured and, when necessary, must set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. 2 C.F.R. § 200.319(c)(1). The NFE should avoid detailed product specifications if at all possible.

(1) Brand Name or Equal. When it is impractical or uneconomical to write a clear and accurate description of the technical requirements of the property or services to be acquired, a NFE may use a "brand name or equal" description as a means to define the performance or other salient requirements of procurement. The specific features of the named brand which must be met by offerors must be clearly stated.

(2) Preference for Performance Specifications. FEMA interprets the Uniform Rules, in setting the requirements for solicitations, as expressing a preference for performance or functional specifications, although they do not prohibit the use of detailed technical specifications when appropriate. A performance specification describes an end result, an objective, or standard to be achieved, and leaves the determination of how to reach the result to the contractor. Using performance specifications, a NFE should describe what the product should be able to do or the services to accomplish without imposing unnecessarily detailed requirements on how to accomplish the tasks.

iv. Requirements. The solicitation must identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals. 2 C.F.R. § 200.319(c)(2). If using the procurement through competitive proposals method, the NFE should state if it is reserving its right to award the contract to other than the lowest priced offeror.

v. FEMA Funding. The solicitation must acknowledge the NFE's use of FEMA funding for the contract, in compliance with the terms of its financial assistance award from FEMA. Specifically, the document should indicate that FEMA is providing the funds, the Catalog of Federal Domestic Assistance Number, as applicable, and the amount provided. *See* Financial Services and General Government Appropriations Act, 2015, Pub. L. No. 113-83, Division E, § 724 (2015); DHS Standard Terms and Conditions, v 3.0, ¶ II (Dec. 4, 2013); Appendix C, ¶ 3.

vi. Contract Type. The solicitation should state the type of contract that will be awarded.

(1) Fixed Price. A fixed price contract provides for a firm price that remains irrespective of the contractor's actual cost of performing

the scope of work under the contract. The risk of performing the work, at the fixed price, is borne by the contractor. Fixed price contracts may include an economic price adjustment, incentives, or both.

(2) Cost Reimbursement. Cost-reimbursement type contracts provide for payment of certain incurred costs to the extent provided in the contract. They normally provide for the reimbursement of the contractor for its reasonable, allocable, actual, and allowable costs, with an agreed-upon fee. There is a limit to the costs that a contractor may incur at the time of contract award, and the contractor may not exceed those costs without the NFE's approval or does so at its own risk. In a cost-reimbursement contract, the NFE bears more risk than in a fixed price contract. There are many varieties of cost-reimbursement contracts, such as cost-plus-fixed-fee, cost-plus-incentive-fee, and cost-plus-award-fee.

(3) Time and Materials Contracts. A time and materials type contract is a contract whose cost to a NFE is the sum of the actual cost of materials and direct labor hours charged at fixed hourly rates that reflect wages, general and administrative expenses, and profit. 2 C.F.R. § 200.318(j)(1)(i) and (ii). The Uniform Rules prohibit the use of this type of contract unless certain conditions precedent are met. *See* ¶ 8.b.

(4) Cost Plus Percentage of Cost. The use of cost plus percentage of cost and cost plus a percentage of construction cost methods of contracting are prohibited. *See* Chapter V, ¶ 4.c; 2 C.F.R. § 200.323(d).

vii. Prohibitions. The Uniform Rules prohibit a NFE from using a solicitation that contains features that unduly restrict competition. 2 C.F.R. § 200.319(a). Some of the situations considered restrictive of competition include the following. *See also* Chapter V, ¶ 1.b.

(1) Excessive Qualifications. Placing unreasonable requirements on firms in order for them to qualify to do business. 2 C.F.R. § 200.319(a)(1).

(2) Unnecessary Experience. Requiring unnecessary experience. 2 C.F.R. § 200.319(a)(2).

(3) Unnecessary Bonding. Requiring excessive bonding. 2 C.F.R. § 200.319(a)(2).

(4) Improper Qualification. Using improper prequalification procedures that conflict with 2 C.F.R. § 200.319(d).

(5) Retainer Contract. Making a noncompetitive solicitation only to a

person or firm on retainer contract where that award is not for property or services specified for delivery under the scope of work of the retainer contract. 2 C.F.R. § 200.319(a)(4).

(6) In-State, Local, or Tribal Geographic Preferences. Imposing prohibited in-state, local, or tribal geographic preferences that conflict with 2 C.F.R. 200.319(b).

(7) Organizational Conflicts of Interest. Allowing entities to submit bids or proposals in response to the solicitation where there would be a prohibited organizational conflict of interest. 2 C.F.R. § 200.319(a)(5).

viii. Federal Laws, Regulations, Executive Orders, and FEMA Requirements Affecting the Procurement. The solicitation should inform prospective contractors that they will need to comply with all applicable Federal laws, regulations, executive orders, and FEMA requirements.

c. Necessity. The Uniform Rules require a NFE's written procedures to avoid acquisition of unnecessary or duplicative items. 2 C.F.R. § 200.318(d); Chapter IV, ¶ 4.b

d. Records. The procurement procedures must ensure the generation of records sufficient to detail the history of the procurement. 2 C.F.R. § 200.318(i); Chapter IV, ¶ 7.

e. Lease vs. Purchase. The procurement procedures must ensure that, where appropriate, the NFE makes an analysis of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach. 2 C.F.R. § 200.318(d); Chapter IV, ¶ 4.e.

f. Procurement Methods. The NFE's procurement procedures must address what procurement methods will be used, including a description of those methods and the circumstances when used. These methods should ensure that a procurement complies with at least the minimum standards at 2 C.F.R. § 200.320 (Methods of Procurement to Be Followed) when using FEMA financial assistance for that procurement. These methods should also include a description of how and when the NFE will use joint procurements, purchasing agents, and Federal and state supply schedules.

g. Additional Content. FEMA also recommends that a NFE's written procurement procedures address the following:

i. Legal Restrictions. The NFE's procurement procedures should include a description of any Federal, state, local, and tribal restrictions on the NFE's acquisitions.

ii. Third Party Contract Provisions. The NFE's procurement procedures

should address the required third party contract provisions required for third party contracts under Federal law, regulation, and executive order, including requirements for each third-party contractor to extend applicable requirements subcontractors. *See* 2 C.F.R. § 200.326; Chapter IV, ¶ 12.

iii. Resolution of Procurement Issues. The NFE's procurement procedures should provide procedures for settling contractual and administrative issues arising out of procurements, including source evaluation, protests, disputes, and claims, in order to meet the requirements of 2 C.F.R. § 200.318(k).

11. STATE AND LOCAL INTERGOVERNMENTAL AGREEMENTS

a. Use Encouraged. The Uniform Rules, to foster greater economy and efficiency, encourage a NFE to enter into state and local intergovernmental agreements or inter-entity agreements where appropriate for procurement or use of common or shared goods and services. 2 C.F.R. § 200.318(e).

b. Joint Procurements. FEMA interprets the regulation at 2 C.F.R. § 200.318(e) as encouraging NFEs to enter into intergovernmental agreements to conduct joint procurements. FEMA uses the term "joint procurement" to mean a method of contracting in which two or more NFEs agree to use a single solicitation document and enter into a single contract with a vendor for delivery of property or services in a fixed quantity, even if expressed as a total minimum or total maximum. *See* Chapter VI, ¶ 3.

c. Purchasing Schedules or Purchasing Contracts. FEMA has interpreted the regulation at 2 C.F.R. § 200.318(e) as encouraging NFEs to enter into intergovernmental agreements for procurements and use of property and services through government purchasing schedules and contracts. FEMA uses the term "government purchasing schedule and contract" to mean an arrangement that a state, local, or Indian tribal government has established with several or many vendors in which those vendors agree to provide the option to the state, local, or Indian tribal government, their subordinate government entities, and others it might include in their programs to acquire specific property or services in the future at established prices. In establishing this arrangement, the NFE may also seek the agreement of a vendor to provide the listed property and services to others with access to the schedules. *See* Chapter VI, ¶ 4.

12. CONTRACT PROVISIONS

a. Requirement under the Uniform Rules. A NFE's contracts must contain the applicable provisions described in Appendix II to the Uniform Rules (Contract Provisions for NFE Contracts Under Federal Awards), which are set forth below. 2 C.F.R. §.200.326. FEMA has provided model language for these required contract clauses at: https://www.fema.gov/media-library/assets/documents/96773.

i. Remedies.

(1) Standard. Contracts for more than the simplified acquisition threshold must address administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as appropriate. *See* 2 C.F.R. Part 200, Appendix II, ¶ A.

(2) Applicability. This requirement applies to all FEMA financial assistance programs in excess of $150,000, which is the current simplified acquisition threshold.

ii. Termination for Cause and Convenience.

(1) All contracts in excess of $10,000 must address termination for cause and for convenience by the NFE including the manner by which it will be effected and the basis for settlement. *See* 2 C.F.R. Part 200, Appendix II, ¶ B.

(2) Applicability. This requirement applies to all FEMA grant and cooperative agreement programs, in excess of $10,000.

iii. Equal Employment Opportunity.

(1) Standard. Except as otherwise provided under 41 C.F.R. Part 60, all contracts that meet the definition of "Federally assisted construction contract" in 41 C.F.R. § 60-1.3 must include the equal opportunity clause provided under 41 C.F.R. § 60-1.4(b), in accordance with Executive Order 11246, *Equal Employment Opportunity* (30 Fed. Reg. 12319, 12935, 3 C.F.R. Part, 1964-1965 Comp., p. 339), as amended by Executive Order 11375, *Amending Executive Order 11246 Relating to Equal Employment Opportunity*, and implementing regulations at 41 C.F.R. Part 60 (Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor). *See* 2 C.F.R. Part 200, Appendix II, ¶ C.

(2) Key Definitions.

a. Federally Assisted Construction Contract. The regulation at 41 C.F.R. § 60-I.3 defines a "Federally assisted construction contract" as any agreement or modification thereof between any applicant and a person for construction work which is paid for in whole or in part with funds obtained from the Government or borrowed on the credit of the Government pursuant to any Federal program involving a grant, contract, loan, insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, or any application or modification thereof approved by the

Government for a grant, contract, loan, insurance, or guarantee under which the applicant itself participates in the construction work.

b. Construction Work. The regulation at 41 C.F.R. § 60-1.3 defines "construction work" as the construction, rehabilitation, alteration, conversion, extension, demolition or repair of buildings, highways, or other changes or improvements to real property, including facilities providing utility services. The term also includes the supervision, inspection, and other onsite functions incidental to the actual construction.

(3) Applicability. This requirement applies to all FEMA financial assistance programs.

iv. Davis Bacon Act and Copeland Anti-Kickback Act.

(1) Applicability of Davis-Bacon Act and Copeland-Anti-Kickback Act. The Davis-Bacon and Copeland-Anti-Kickback Acts only apply 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. These Acts do not apply to other FEMA grant and cooperative agreement programs, such as FEMA's Public Assistance Grant Program. However, if the NFE's own procurement standards include equivalents to, or adopt the Davis-Bacon and Copeland-Anti-Kickback Acts, under those circumstances, they should be applied by the NFE.

(2) All prime construction contracts in excess of $2,000 awarded by NFEs must include a provision for compliance with the Davis-Bacon Act (40 U.S.C. §§ 3141-3144 and 3146-3148) as supplemented by Department of Labor regulations at 29 C.F.R. Part 5 (Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction)). *See* 2 C.F.R. Part 200, Appendix II, ¶ D.

(3) In accordance with the statute, contractors must be 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. In addition, contractors must be required to pay wages not less than once a week.

(4) The NFE must place a copy of the current prevailing wage determination issued by the Department of Labor in each solicitation. The decision to award a contract or subcontract must

be conditioned upon the acceptance of the wage determination. The NFE must report all suspected or reported violations to the Federal awarding agency.

(5) In contracts subject to the Davis-Bacon Act, the contracts must also include a provision for compliance with the Copeland "Anti-Kickback" Act (40 U.S.C. § 3145), as supplemented by Department of Labor regulations at 29 C.F.R. Part 3 (Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States). The Copeland Anti-Kickback Act provides that each contractor or subrecipient must be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he or she is otherwise entitled. The NFE must report all suspected or reported violations to FEMA.

v. Contract Work Hours and Safety Standards Act.

(1) Where applicable (*see* 40 U.S.C. § 3701), all contracts awarded by the NFE in excess of $100,000 that involve the employment of mechanics or laborers must include a provision for compliance with 40 U.S.C. §§ 3702 and 3704, as supplemented by Department of Labor regulations at 29 C.F.R. Part 5. *See* 2 C.F.R. Part 200, Appendix II, ¶ E.

(2) Under 40 U.S.C. § 3702, each contractor must be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than one and a half times the basic rate of pay for all hours worked in excess of 40 hours in the work week.

(3) The requirements of 40 U.S.C. § 3704 are applicable to construction work and provide that no laborer or mechanic must be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of property or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.

(4) Applicability. This requirement applies to all FEMA grant and cooperative agreement programs.

vi. Rights to Inventions Made Under a Contract or Agreement.

(1) If the FEMA award meets the definition of a "funding agreement" under 37 C.F.R. § 401.2(a) and the NFE wishes to enter into a

contract with a small business firm or nonprofit organization regarding the substitution of parties, assignment or performance of experimental, developmental, or research work under that "funding agreement," the NFE must 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. *See* 2 C.F.R. Part 200, Appendix II, ¶ F.

(2) The regulation at 37 C.F.R. § 401.2(a) currently defines "funding agreement" as any contract, grant, or cooperative agreement entered into between any Federal agency, other than the Tennessee Valley Authority, and any contractor for the *performance of experimental, developmental, or research work* funded in whole or in part by the Federal government. (emphasis added) This term also includes any assignment, substitution of parties, or subcontract of any type entered into for the performance of experimental, developmental, or research work under a funding agreement as defined in the first sentence of this paragraph.

(3) Applicability. This requirement does not apply to the Public Assistance, Hazard Mitigation Grant Program, Fire Management Assistance Grant Program, Crisis Counseling Assistance and Training Grant Program, Disaster Case Management Grant Program, and Federal Assistance to Individuals and Households – Other Needs Assistance Grant Program, as FEMA awards under these programs do not meet the definition of "funding agreement."

vii. Clean Air Act and the Federal Water Pollution Control Act.

(1) Contracts for amounts in excess of $150,000 must contain a provision that requires the contractor to agree to comply with all applicable standards, orders, or regulations issued pursuant to the Clean Air Act (42 U.S.C. §§ 7401-7671q) and the Federal Water Pollution Control Act as amended (33 U.S.C. §§ 1251-1387). Violations must be reported to FEMA and the Regional Office of the Environmental Protection Agency. *See* 2 C.F.R. Part 200, Appendix II, ¶ G.

(2) Applicability. This requirement applies to all FEMA financial assistance programs, in excess of $150,000.

viii. Debarment and Suspension.

(1) NFEs and contractors are subject to the debarment and suspension regulations implementing Executive Order 12549, *Debarment and Suspension* (1986) and Executive Order 12689, *Debarment and*

Suspension (1989) at 2 C.F.R. Part 180 and the Department of Homeland Security's regulations at 2 C.F.R. Part 3000 (Non-procurement Debarment and Suspension). These regulations restrict awards, subawards, and contracts with certain parties that are debarred, suspended, or otherwise excluded from or ineligible for participation in Federal assistance programs and activities. *See* 2 C.F.R. Part 200, Appendix II, ¶ I; and Chapter IV, ¶ 6.d and Appendix C, ¶ 2.

(2) A contract award must not be made to parties listed on the SAM Exclusions list. SAM Exclusions is the list maintained by the General Services Administration that contains the names of parties debarred, suspended, or otherwise excluded by agencies, as well as parties declared ineligible under statutory or regulatory authority other than Executive Order 12549. SAM exclusions can be accessed at www.sam.gov. *See* 2 C.F.R. § 180.530; Chapter IV, ¶ 6.d and Appendix C, ¶ 2.

(3) Applicability. This requirement applies to all FEMA financial assistance programs.

ix. Byrd Anti-Lobbying Amendment.

(1) Contractors that apply or bid for an award of $100,000 or more must file the required certification. *See* 2 C.F.R. Part 200, Appendix II, ¶ J; 44 C.F.R. Part 18; Chapter IV, ¶ 6.c; Appendix C, ¶ 4.

(2) 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 must 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 non-Federal award. *See* Chapter IV, ¶ 6.c and Appendix C, ¶ 4.

(3) Applicability. This requirement applies to all FEMA financial assistance programs where contractors apply or bid for an award of $100,000 or more.

x. Procurement of Recovered Materials.

(1) A NFE that is a state agency or agency of a political subdivision of a state and its contractors must comply with Section 6002 of the

Solid Waste Disposal Act, Pub. L. No. 89-272 (1965) (codified as amended by the Resource Conservation and Recovery Act at 42 U.S.C. § 6962). *See* 2 C.F.R. Part 200, Appendix II, ¶ K; 2 C.F.R. § 200.322; Chapter V, ¶ 7.

(2) The requirements of Section 6002 include procuring only items designated in guidelines of the EPA at 40 C.F.R. Part 247 that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds $10,000 or the value of the quantity acquired by the preceding fiscal year exceeded $10,000; procuring solid waste management services in a manner that maximizes energy and resource recovery; and establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines.

(3) Applicability. This requirement applies to all FEMA financial assistance programs, consistent with the guidance found in ¶ (2) above.

b. Additional FEMA Requirements. The Uniform Rules authorize FEMA to require additional provisions for NFE contracts. FEMA, pursuant to this authority, requires or recommends the following:

i. Changes. To be eligible for FEMA assistance under the NFE's FEMA grant or cooperative agreement, the cost of the change, modification, change order, or constructive change must be allowable, allocable, within the scope of its grant or cooperative agreement, and reasonable for the completion of project scope. *See* Chapter V, ¶ 8. FEMA recommends, therefore, that a NFE include a changes clause in its contract that describes how, if at all, changes can be made by either party to alter the method, price, or schedule of the work without breaching the contract. The language of the clause may differ depending on the nature of the contract and the end-item procured.

ii. Access to Records. All NFEs must place into their contracts a provision that all contractors and their successors, transferees, assignees, and subcontractors acknowledge and agree to comply with applicable provisions governing Department and FEMA access to records, accounts, documents, information, facilities, and staff. *See* DHS Standard Terms and Conditions, v 3.0, ¶ XXVI (Dec. 4, 2013).

iii. DHS Deal, Logo, and Flags. All NFEs must place in their contracts a provision that a contractor shall not use the DHS seal(s), logos, crests, or reproductions of flags or likenesses of DHS agency officials without specific FEMA pre-approval. *See* DHS Standard Terms and Conditions, v 3.0, ¶ XXVI (Dec. 4, 2013).

iv. Compliance with Federal Law, Regulations, and Executive Orders. All NFEs must place into their contracts an acknowledgement that FEMA financial assistance will be used to fund the contract along with the requirement that the contractor will comply with all applicable Federal law, regulations, executive orders, and FEMA policies, procedures, and directives. *See* Standard Form 424D, ¶ 19; Chapter IV, ¶ 10.b.v; Appendix C, ¶ 3.

v. No Obligation by Federal Government. The NFE should include a provision in its contract that states that the Federal Government is not a party to the contract and is not subject to any obligations or liabilities to the NFE, contractor, or any other party pertaining to any matter resulting from the contract.

vi. Program Fraud and False or Fraudulent Statements or Related Acts. The NFE must include a provision in its contract that the contractor acknowledges that 31 U.S.C. Chapter 38 (Administrative Remedies for False Claims and Statements) applies to its actions pertaining to the contract.

CHAPTER V

PROCEDURES AND GUIDANCE FOR OPEN MARKET PROCUREMENTS

1. COMPETITION

a. Competition Required. The Uniform Rules require a NFE to conduct all procurement transactions in a manner providing full and open competition consistent with the standards of 2 C.F.R. § 200.319. FEMA considers "full and open" competition to mean that a complete requirement is publicly solicited (except if specifically not required) and all responsible sources that are interested in doing so, are permitted to compete.

i. There are numerous benefits to full and open competition, such as increasing the probability of reasonable pricing from the most qualified contractors and helping discourage and prevent favoritism, collusion, fraud, waste, and abuse.

ii. FEMA will scrutinize procurements not providing for full and open competition, even if they result in the same or lower contract price than if conducted through full and open competition.

b. Prohibited Situations Restrictive of Competition. The Uniform Rules identify seven situations considered to be restrictive of competition. 2 C.F.R. § 200.319(a)(1)-(7). **This is an illustrative and non-exclusive list, such that FEMA may consider other situations as restrictive of competition, even though they are not specifically listed.**

i. Unreasonable Requirements. A NFE must not place unreasonable requirements on firms in order for them to qualify to do business. 2 C.F.R. § 200.319(a)(1). This means that the NFE should include only those requirements that are the least restrictive to establish the contractor's necessary qualifications.

ii. Unnecessary Experience and Excessive Bonding. A NFE must not require unnecessary experience and excessive bonding. 2 C.F.R. § 200.319(a)(2).

(1) Unnecessary experience could include unnecessary levels or years of experience for contractors as organizations, the contractors' workforce, or for the contractors' key personnel on a project.

(2) Excessive bonding increases the cost associated with the contract and restricts competition by reducing a prospective bidder's or offeror's capability to bid or offer a proposal on bonded work. FEMA does not require any additional bonding requirements other than construction or facility improvement contracts or subcontracts set forth at 2 C.F.R. § 200.325. Notwithstanding, a NFE might

find it desirable to exceed the bid, performance, or payment bond requirements at 2 C.F.R. § 200.325 for construction or facility improvements, or might find bonds desirable for work other than construction or facility improvements. In these cases, FEMA expects the NFE's bonding requirements to be reasonable, not unduly restrictive, and in accordance with any applicable local, state or tribal government standards.

iii. Noncompetitive Pricing Practices. A NFE should undertake reasonable efforts to ensure that prospective contractors have not engaged in noncompetitive pricing practices in responding to a solicitation. 2 C.F.R. § 200.319(a)(3). The most prominent form of noncompetitive pricing is referred to as "bid rigging," which is when conspiring competitors effectively raise prices under a process where a purchaser acquires goods or services by soliciting competing bids. Essentially, competitors agree in advance who will submit the winning bid on a contract being awarded through the competitive bidding process. Bid rigging takes many forms, but bid-rigging conspiracies usually fall into one or more of the following categories: bid suppression, complementary bidding, and bid rotation.

(1) In bid suppression schemes, one or more competitors, who otherwise would be expected to bid or who have previously bid, agree to refrain from bidding or withdraw a previously submitted bid so that the designated winning competitor's bid will be accepted.

(2) Complementary bidding (also known as "cover" or "courtesy" bidding) occurs when some competitors agree to submit bids that are either too high to be accepted or contain special terms that will not be acceptable to the buyer. Such bids are not intended to secure the buyer's acceptance, but are merely designed to give the appearance of genuine competitive bidding. Complementary bidding schemes are the most frequently occurring forms of bid rigging, and they defraud purchasers by creating the appearance of competition to conceal secretly inflated prices.

(3) In bid rotation schemes, all conspirators submit bids but take turns being the low bidder. The terms of the rotation may vary. For example, competitors may take turns on contracts according to the size of the contract, allocating equal amounts to each conspirator or allocating volumes that correspond to the size of each conspirator company.

iv. Noncompetitive Contracts to Consultants.

(1) A NFE must not make a noncompetitive award to a consultant on a retainer contract. 2 C.F.R. § 200.319(a)(4).

(2) Although the Uniform Rules do not define the term "retainer contract," FEMA considers a retainer contract to be a form of agreement for general, unspecified services entered into in advance of work to be done. Under such an agreement, the consultant remains available when the client needs services during a specific period or on a specified matter. As such, it would be restrictive of competition if a NFE simply made a noncompetitive contract award for work to be done under a FEMA award to a consultant that was already on retainer, specifically where the noncompetitive contract award was for property or services not specified for delivery under the retainer contract or where the retainer contract was not originally procured in a manner that met all of the requirements of 2 C.F.R. §§ 200.318 to 200.326.

v. Organizational Conflicts of Interest. A NFE must ensure that its procurements are free from organizational conflicts of interest. 2 C.F.R. § 200.319(a)(5).

(1) Meaning of Organizational Conflict of Interest. The Uniform Rules provide that an organizational conflict of interest can arise where, because of relationships with a parent company, affiliate, or subsidiary organization, a NFE is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization. 2 C.F.R. § 200.318(c)(2). In addition, an organizational conflict of interest may also occur in circumstances of impaired objectivity, unequal access to information, and biased ground rules, irrespective of whether the contractor is a related organization (parent, affiliate, or subsidiary) or not.

a. Impaired objectivity arises where a contractor is unable, or potentially unable, to provide impartial and objective assistance or advice to the NFE due to other relationships, contracts, or circumstances. This would comprise circumstances where a contractor's work under one contract could entail it evaluating itself through an assessment of performance under another contract or an evaluation of proposals.

b. Unequal access to information occurs when a contractor has access to nonpublic information as part of its performance under another contract with the NFE and where that information may provide the contractor with a competitive advantage in a later competition for a NFE contract.

c. Biased ground rules issues arise where a contractor, as part of its performance of work under a contract with the NFE, has in some sense set the ground rules for another NFE

contract. An example of such a situation would be where a NFE prepares a statement of work or specifications for a contract and later competes for that contract. Notably, the Uniform Rules require that, in order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, and invitations for bids or requests for proposals must be excluded from competing for such procurements. 2 C.F.R. § 200.319(a).

(2) Advance Acquisition Analysis. FEMA expects a NFE to analyze each planned acquisition in order to identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible and avoid or mitigate potential conflicts.

vi. Specifying Only a Brand Name. A NFE shall not specify only a "brand name" product instead of allowing "an equal" product to be offered and describing the performance or other relevant requirements of the procurement. When it is impractical or uneconomical to write a clear and accurate description of the technical requirements of the property or services to be acquired, a NFE may use a "brand name or equal" description as a means to define the performance or other salient requirements of procurement. Should a NFE determine that only a brand name product is acceptable to fulfill a requirement, that determination must be documented and justified in the same manner as a noncompetitive procurement. The specific features or salient characteristics of the named brand which must be met by offers must be clearly stated. 2 C.F.R. § 200.319(a)(6) and (c)(1).

vii. Any Arbitrary Action. A NFE must not engage in any other arbitrary action in the procurement process that would restrict competition. 2 C.F.R. § 200.319(a)(7). The term "arbitrary" generally refers to an action or decision founded on prejudice or preference rather than on reason or fact or something that is otherwise unreasonable or unsupported. Accordingly, FEMA considers an "arbitrary action" within the procurement context to include, among other things, a discretionary action that showed preference or prejudice to certain contractors in a manner not consistent with full and open competition.

c. Prohibited Geographical Preferences.

i. Prohibition. A NFE must conduct procurements in a manner that prohibits the use of statutorily or administratively imposed state, local, or tribal geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. 2 C.F.R. § 200.319(b). Prohibited geographic preferences may come in a variety of forms, such as the

following:

(1) Exclusion of Contractors from Outside a Geographic Area. A NFE could exclude from consideration for a procurement all contractors incorporated or primarily doing business outside the state, local, or tribal geographical area in which the NFE is located. In other words, the NFE simply sets aside the contract for an in-state or local contractor.

(2) Price Matching. Price matching is where a NFE will give an opportunity for a local vendor—within a certain percentage of the lowest bid to a solicitation—to match the lowest bid. If the local vendor does not match the bid, then the NFE awards the contract to the next lowest bidder.

(3) Reducing Bids. A NFE may reduce by a percentage a bid submitted by a local vendor during the evaluation of bids submitted during sealed bidding. For example, a preference may deem a bid submitted by a resident business to be five percent lower than the bid actually submitted.

(4) Adding Weight to Evaluation Factors. A NFE may add weight on evaluation factors to an in-state or local business as part of a procurement by competitive proposals.

ii. Exception – Architectural and Engineering Contracts. When contracting for architectural and engineering services, geographic location may be a selection criterion provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract. 2 C.F.R. § 200.319(b).

iii. Exception – State Licensing Laws. Nothing in the Uniform Rules or this document preempts state licensing laws. 2 C.F.R. § 200.319(b).

iv. Exception – Federal Law.

(1) General. A NFE may use a state, local, or tribal geographical preference in the evaluation of bids or proposals where applicable Federal statutes expressly mandate or encourage geographic preference.

(2) Federal Laws Establishing FEMA Grant and Cooperative Agreement Programs. None of the Federal laws establishing or governing FEMA grant and cooperative agreement programs mandate or encourage geographic preferences by NFEs. Of particular note, NFEs frequently have questions concerning Section 307 of the Stafford Act, which appears to direct local preferences in the award of response and recovery contracts;

however, Section 307 only applies to procurements conducted by FEMA or other Federal agencies, not NFEs.

(3) Tribal Self-Determination and Education Act. Tribal preferences may be permissible if certain requirements are met under the Indian Self - Determination and Education Assistance Act.[6] Pursuant to this Act, an Indian tribal government acting as either a recipient or subrecipient may give a preference in the award of contracts funded in whole or in part with Public Assistance funding to businesses falling within the meaning of "Indian organizations" or "Indian-owned economic enterprises," as further defined by section 3 of the Indian Financing Act of 1974.[7] This determination would generally be issued and documented by the tribal government claiming such an exception.

d. Prequalified Lists.

i. General. A NFE may use prequalified lists of persons, firms, and products among which to compete property and services under a FEMA award. 2 C.F.R. § 200.319(d). Prequalified lists, however, are not contracts. They are tools to aid in the procurement of future requirements by allowing NFEs to review the qualifications of prospective contractors prior to contract award of an anticipated future need. The Uniform Rules set forth two requirements that must be met in using such a list.

(1) Sources. A NFE must ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum full and open competition.

(2) Qualification Period. A NFE must not exclude potential bidders or offerors from qualifying during the solicitation period. When using FEMA award funding, a NFE must allow vendors an opportunity to qualify during the solicitation period for the service or property, although FEMA does not expect a NFE to delay a proposed award (extend the solicitation period) in order to afford a vendor the opportunity to demonstrate that its product or services meet the pre-qualification requirements (*e.g.*, technical capability, management capability, prior experience, and past performance).

ii. Other Requirements. As pre-qualified lists are not contracts, but merely tools to assist NFEs with the solicitation and award of a future requirement, even after such a list is created, a NFE must still comply with

[6] Indian Self Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2205 (1975) (codified as amended at 25 U.S.C. § 5150(a)(3))

[7] Indian Financing Act of 1974, Pub. L. No. 93-262, § 2(e), 88 Stat 77 (codified as amended at 25 U.S.C. § 1452(e) and (f).

all other applicable procurement standards identified in 2 C.F.R. §§ 200.318-326 in the award of a contract. While a NFE may submit a solicitation directly to those contractors identified on a pre-qualified list, NFEs must still publicly solicit the requirement pursuant to the applicable standards contained in the Uniform Rules, and allow any additional interested contractors to submit their qualifications and, if deemed qualified, submit their bids or proposals in response to the solicitation. The solicitation, evaluation, and subsequent award of a contract or contracts must also conform to the standards identified in this Supplement.

2. METHODS OF PROCUREMENT

a. General. The NFE must use one of the following five methods of procurement: procurement by micro-purchases; procurement by small purchase procedures; procurement by sealed bids; procurement by competitive proposals; and procurement by noncompetitive proposals.

b. Procurement by Micro-Purchases. The Uniform Rules authorize a NFE to use simplified acquisition procedures to purchase property and services where the aggregate dollar amount of the property or services does not exceed the micro-purchase threshold. While the Micro-Purchase threshold is adjusted from time to time, as of October 2015, the Micro-Purchase threshold was adjusted to $3,500. Micro-purchase procedures comprise a subset of a NFE's small purchase procedures, and a NFE uses such procedures in order to expedite the completion of its lowest-dollar small purchase transactions and minimize the associated administrative burden and cost. 2 C.F.R. §§ 200.67 and 320(a).

c. When Appropriate. A NFE may use the micro-purchases procurement method for the acquisition of property or services when the aggregate dollar amount of the services or property does not exceed the micro-purchase threshold.

d. Procedures. The following procedures apply to micro-purchases.

i. Competition. A NFE may award micro-purchases without soliciting competitive quotations if the NFE considers the price to be fair and reasonable. To the extent practicable, a NFE must distribute micro-purchases equitably among qualified suppliers. 2 C.F.R. § 200.320(a).

ii. Prohibited Divisions. A NFE must not split a larger procurement merely to lower the cost of a procurement to less than the micro-purchase threshold in order to take advantage of the streamlined procurement process associated with this method.

iii. Documentation. A NFE must document its determination that the price is fair and reasonable, and the basis for that determination, but does not need to document its rationale for the procurement method used or selection of contract type. It also does not need to document its reasons for contractor selection or rejection if it did not utilize competitive quotations. If the

NFE solicited competitive quotations and made an award to other than the lowest bidder, it must document its explanation for the award decision.

iv. Responsibility. A NFE must award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of the solicitation and contract. 2 C.F.R. § 200.318(h). This is a "go/no-go" determination. A NFE must give consideration to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources. The NFE must document its responsibility determination for the winning bidder, and must (if applicable) also document its determination that the otherwise lowest bidder is not responsible. *See* Chapter IV, ¶ 6.

e. Procurement by Small Purchase Procedures. A NFE may use relatively simple and informal small purchase procedures when securing services, property, or other property where the aggregate dollar amount of the services, property, or other property does not exceed the simplified acquisition threshold, which is currently $150,000. NFEs adopt small purchase procedures in order to expedite the purchase of items costing less than the simplified acquisition threshold. 2 C.F.R. §§ 200.88 and 320(b).

i. When Appropriate.

(1) Small purchase procedures may be used to acquire services and property where the aggregate dollar amount of the acquisition does not exceed the simplified acquisition threshold.

(2) The contracts should be fixed price or not to exceed cost-reimbursement contracts with assurances that the scope of work can be completed for less than the simplified acquisition threshold.

ii. Procedures. The following procedures apply to small purchases.

(1) Competition. The NFE must obtain price or rate quotations from an adequate number of qualified sources. What is an adequate number of sources will depend upon the facts and circumstances of the procurement, but in no case should this be less than three. 2 C.F.R § 320(b).

(2) Prohibited Divisions. A NFE must not split a larger procurement merely to bring the cost of a procurement under the simplified acquisition threshold. Similarly, a NFE may not intentionally limit the size of a procurement to only a portion of a known requirement in order to lower the cost of a procurement to under the simplified acquisition threshold and then, to fulfill the entire requirement, issue a follow-on change order that brings the procurement above the simplified acquisition threshold.

(3) Documentation. The NFE must document the procurement history as detailed in 2 C.F.R. § 200.318(i). *See* Chapter IV, ¶ 7. This should include an independent NFE estimate of the costs of the procurement that indicates the total estimated cost to fall below the simplified acquisition threshold.

(4) Responsibility. A NFE must award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of the solicitation and contract. 2 C.F.R. § 200.318(h). This a "go/no-go" determination. A NFE must give consideration to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources. The NFE must document its responsibility determination for the winning bidder, and must (if applicable) also document its determination that the otherwise lowest bidder is not responsible. *See* Chapter IV, ¶ 6.

iii. Future Changes that Cause the Contract to Exceed the Simplified Acquisition Threshold.

(1) It may be the case that a NFE properly used small purchase procedures to acquire services or property below the simplified acquisition threshold, but later needs to modify the contract to an amount above the threshold to cover unforeseen circumstances or an unexpected overrun in the quantity of work.

(2) Such a change may be permissible under certain facts and circumstances, particularly where such a change falls within the scope of the original contract. The NFE should document its justification. FEMA will utilize this justification along with the independent NFE's estimate completed before the procurement in reviewing whether or not the NFE's decision to use small purchase procedures was permissible.

f. Procurement by Sealed Bids. Sealed bidding is a permissible method of procurement, where bids are publicly solicited and a firm fixed price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming to all the material terms and conditions of the invitation for bids, is the lowest in price. 2 C.F.R. § 200.320(c).

i. When Appropriate. Sealed bidding is the preferred method for procuring construction if the following conditions apply. 2 C.F.R. § 200.320(c)(1).

(1) Specification. A complete, adequate, and realistic specification or purchase description is available.

(2) Adequate Price Competition. Two or more responsible bidders are willing and able to compete effectively for the business.

(3) Fixed Price Contract. The procurement lends itself to a firm fixed price contract.

(4) Price Determinative. The NFE selects the successful bidder principally on the basis of price, which includes the price-related factors included within the solicitation. *See* Chapter V, ¶ 2.d.ii.(5). Other than the responsibility determination, the NFE may not select a contractor on the basis of non-price related factors.

ii. Procedures. The following procedures apply to procurement by sealed bids. 2 C.F.R. § 200.320(c)(2).

(1) Public Advertisement. A local or tribal government must publicly advertise the invitation for bids. *Public advertisement is not a requirement for other NFEs.* 2 C.F.R. § 200.320(c)(2)(i).

(2) Solicitation from Adequate Sources. The NFE must solicit bids from an adequate number of known suppliers, providing them with sufficient response time before the date set for opening the bids. 2 C.F.R. § 200.320(c)(2)(ii). What is an adequate number of sources will depend upon the facts and circumstances of the procurement. Unlike small purchase procedures, FEMA has not defined an "adequate number" of qualified sources here, as obtaining at least three quotes.

(3) Invitation for Bids. The invitation for bids must define the items or services in order for the bidder to properly respond and must include any specifications and pertinent attachments. 2 C.F.R. § 200.320(c)(2)(ii).

(4) Bid Opening. The NFE must open the bids at the time and place prescribed in the invitation for bids. For local and Indian tribal governments, the bids must be publicly opened. Other NFEs are not required to open bids publicly. 2 C.F.R. § 200.320(c)(2)(iii).

(5) Firm Fixed Price Contract. The NFE will make a firm fixed price contract in writing to the lowest responsive and responsible bidder. 2 C.F.R. § 200.320(c)(2)(iv).

a. Price-Related Factors. Where specified in the bidding documents, the NFE may consider discounts, transportation costs, and life cycle costs in determining which bid is lowest. The NFE will only use payment discounts to determine the low bid when prior experience indicates such discounts are usually taken advantage of.

b. Incentives and Economic Adjustments. FEMA considers a fixed price incentive contract or inclusion of an economic price adjustment provision in a fixed price contract as

permissible if the NFE documents a rational basis for using those forms of fixed price contracts.

(6) Rejection of Bids. The NFE may reject any or all bids if it documents a sound reason for the rejection. 2 C.F.R. § 200.320(c)(2)(5).

(7) Documentation. The NFE must document the procurement history as detailed in 2 C.F.R. § 200.318(i). *See* Chapter IV, ¶ 7.

(8) Affirmative Steps. The NFE must take all necessary affirmative steps to assure that minority businesses, women's business enterprises, and labor area surplus firms are used when possible. The affirmative steps must include those set forth at 2 C.F.R. § 200.321(b). *See* Chapter V, ¶ 6.

(9) Responsibility. A NFE must award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of the solicitation and contract. 2 C.F.R. § 200.318(h). This is a "go/no-go" determination. A NFE to give consideration to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources. The NFE must document its responsibility determination for the winning bidder, and must (if applicable) also document its determination that the otherwise lowest bidder is not responsible. *See* Chapter IV, ¶ 6.

g. Procurement by Competitive Proposals. Procurement by the competitive proposal method is an acceptable form of procurement, which is where more than one vendor submits an offer and the NFE awards either a fixed price or cost-reimbursement type contract. 2 C.F.R. § 200.320(d).

i. When Appropriate. A NFE will generally use this method when conditions are not appropriate for the use of sealed bids. FEMA considers the following as some of the possible factors that a NFE could use to justify procurement by competitive proposals.

(1) Types of Specifications and Other than Price-Related Factors. The procurement by competitive proposals method is used when the NFE cannot base the contract award exclusively on price or price-related factors due to the nature of the service or property to be acquired. When the NFE's material requirements are clearly definable and the risk of unsuccessful contract performance is minimal, cost or price may play a dominant role in source selection and weighs against the need to use this procurement method. On the other hand, the less definitive the requirements, the more development work required, or the greater the performance risk, the more that technical capability, past performance, and prior

experience considerations may play a dominant role in source selection and weigh in favor of this procurement method.

ii. Procedures. The following procedures apply to procurement by competitive proposals. 2 C.F.R. § 200.319(d).

(1) Public Advertisement. The NFE must publicize the request for proposals. 2 C.F.R. § 200.319(d)(1).

(2) Solicitation from Adequate Sources. In addition to publicizing the request for proposals, the NFE must solicit proposals from an adequate number of qualified sources, providing them with sufficient response time before the date set for the receipt of proposals. 2 C.F.R. § 200.319(d). What is an adequate number of sources will depend upon the facts and circumstances of the procurement. Unlike small purchase procedures, FEMA has not defined an "adequate number" of qualified sources here, as meaning obtaining no less than three quotes. 2 C.F.R. § 200.320(c)(ii).

(3) Responsibility. A NFE must award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of the solicitation and contract. 2 C.F.R. § 200.318(h). A NFE must give consideration to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources. The NFE must document its responsibility determination for the winning contractor, and must (if applicable) also document its determination that the otherwise lowest bidder is not responsible. *See* Chapter IV, ¶ 6.

(4) Evaluation Factors. The request for proposals must identify all evaluation factors and their relative importance. 2 C.F.R. § 200.319(d). The following provides several considerations for NFEs when developing evaluation factors:

a. The evaluation factors for a specific procurement should reflect the subject matter and elements that are most important to the NFE.

b. The evaluation factors may include such things as technical design, technical approach, length of delivery schedules, past performance, and quality of proposed personnel.

c. A NFE may use any one or a combination of source selection approaches as permitted under state, local, and tribal laws, regulations, and procedures, and these approaches will often differ based on the relative

importance of price or cost for the procurement.

d. If permitted by the NFE's written procurement procedures and applicable non-Federal laws and regulations, a NFE may award a contract to the offeror whose proposal offers the "best value" to the NFE. The solicitation must, in addition to the items described above, inform potential offerors that the award will be made on a "best value" basis, which should include a statement that the NFE reserves the right to award the contract to other than the lowest priced offeror.

e. Two examples of source selection approaches are "tradeoff" and "lowest price technically acceptable" ("LPTA") methods. Under the "tradeoff" process, a NFE may consider award to other than the lowest-priced offeror or other than the highest technically rated offeror. The process allows trade-offs among cost or price and non-cost factors and allows the NFE to accept other than the lowest priced proposal (meaning that the benefits of the higher priced proposal merit the additional cost). The LPTA process is similar to sealed bidding with the award going to the lowest priced offer that is technically acceptable. A cost-technical tradeoff is not used under the LPTA process—the award goes to the lowest price which meets the minimum technical standards. The technical factors, in other words, are go/no-go and rated only for acceptability (and not ranked or scored).

f. The request for proposals must identify evaluation factors and their relative importance, but need not disclose numerical or percentage ratings or weights.

g. FEMA does not require any specific evaluation factors or analytic process. Notwithstanding, the evaluation factors must support the purposes of the grant or cooperative agreement.

(5) Consideration. The NFE must consider any response to publicized requests for proposals to the maximum extent practical. 2 C.F.R. § 200.319(d)(1).

(6) Affirmative Steps. The NFE must take all necessary affirmative steps to assure that minority businesses, women's business enterprises, and labor area surplus firms are used when possible. The affirmative steps must include those set forth at 2 C.F.R. § 200.321(b). *See* Chapter V, ¶ 6.

(7) Evaluation Method. The NFE must have a written method for conducting technical evaluations of the proposals received and for selecting offerors. 2 C.F.R. § 200.319(d)(4).

a. When evaluating proposals, FEMA expects the NFE to consider all evaluation factors specified in its solicitation documents and evaluate offers only on the evaluation factors included in the solicitation documents.

b. The NFE may not modify its evaluation factors after proposals have been submitted without re-opening the solicitation.

c. In awarding a contract that will include options, FEMA expects the NFE to evaluate proposals for any option quantities or periods contained in the solicitation if it intends to exercise those options after the contract is awarded.

(8) Award. The NFE must make the award to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered. Price must be a factor evaluated by the NFE, unless the procurement is for architectural/engineering professional services. 2 C.F.R. § 200.319(d)(4).

(9) Documentation. The NFE must document the procurement history as detailed in 2 C.F.R. § 200.318(i). *See* Chapter IV, ¶ 7.

iii. Architectural and Engineering Services. A NFE may use competitive proposal procedures for qualifications-based procurement of architectural/engineering professional services.

(1) Price Not Used as an Evaluation Factor. Under this qualifications-based procurement, a NFE evaluates competitors' qualifications and selects the most qualified competitor for award, subject to negotiation of fair and reasonable compensation. 2 C.F.R. § 200.319(d)(5). The following provides amplifying guidance in the case of failed negotiations for compensation:

a. If failing to agree on a fair and reasonable price, the NFE may conduct negotiations with the next most qualified offeror.

b. Then, if necessary, the NFE will conduct negotiations with successive offerors in descending order until contract award can be made to the offeror whose price the NFE believes is fair and reasonable.

(2) Limitation. This method, where price is not used as an evaluation

factor, may only be used in procurement of architectural/engineering professional services. It cannot be used to purchase other types of services though architectural/engineering firms are a potential source to perform the proposed effort.

(3) Meaning of Architectural/Engineering Professional Services. FEMA considers the following to fall within the scope of architectural/engineering professional services:

a. Professional services of an architectural or engineering nature, as defined by applicable state law, and which the state law requires to be performed or approved by a registered architect or engineer.

b. Professional services of an architectural or engineering nature associated with design or construction of real property.

c. Other professional services of an architectural or engineering nature or services incidental thereto (including studies, investigations, surveying and mapping, tests, evaluations, consultations, comprehensive planning, program management, conceptual designs, plans and specifications, value engineering, construction phase services, soils engineering, drawing reviews, preparation of operating and maintenance manuals and other related services) that logically or justifiably require performance by registered architects or engineers or their employees.

d. Professional surveying and mapping services of an architectural or engineering nature.

h. Procurement by Noncompetitive Proposals. Procurement by noncompetitive proposals is an acceptable method of procurement under certain circumstances, where solicitation of a proposal occurs from only one source or a limited number of sources. 2 C.F.R. § 200.320(f).

i. When Appropriate. A NFE may use procurement by noncompetitive proposals only when one or more of the following circumstances apply.

(1) One Source. The item is only available from one source. An item or service is available from only one source when no other property or services will satisfy the NFE's requirements. 2 C.F.R. § 200.320(f)(1).

a. Examples. The following provide examples of some circumstances under which a NFE could consider property or services as available from only one source.

i. Unique Capability. The offeror demonstrates a unique or innovative concept or capability not available from another source. A unique or innovative concept means a new, novel, or changed concept, approach, or method that is the product of original thinking, the details of which are kept confidential or are patented or copyrighted, and is available to the NFE from only one source and has not in the past been available to the NFE from another source.

ii. Duplication of Costs. In the case of a follow-on award to an existing contractor already performing work, where there would be a substantial duplication of costs that would not be expected to be recovered through competition. This situation would arise, for example, if a contractor was in the middle of constructing a facility when the facility was damaged by a major disaster under the Stafford Act, and the eligible scope of work under the Public Assistance project award was to repair the facility to restore it to its pre-disaster condition.

iii. Patents or Restricted Data Rights. There are patent or data rights restrictions precluding competition.

b. Change Orders. When a NFE makes a change to an existing contract that is beyond the scope of the original contract (a cardinal change), then the NFE has made a sole source award that must be justified in the same manner as making an original award through solicitation of a proposal from only one source. *See* Chapter V, ¶ 8.

(2) Public Exigency or Emergency. The NFE determines that the public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation. 2 C.F.R. § 200.320(f)(2).

a. Meaning of Exigency. FEMA defines an "exigency" as something that is necessary in a particular situation that requires or demands immediate aid or action. In these cases, the NFE would be seriously injured unless it performed the procurement in a noncompetitive manner.

b. Meaning of Emergency. FEMA defines an "emergency" as an unexpected and unusually dangerous situation that calls for immediate action or an urgent need for assistance or relief. One of the key distinctions between an "emergency"

and an "exigency" is that an emergency will typically involve a threat to life, public health or safety, improved property, and/or some other form of dangerous situation, whereas an exigency is not necessarily so limited.

c. Duration. Use of the public exigency or emergency exception **is only permissible during the actual exigent or emergency circumstances**. Once the exigent or emergency circumstances cease to exist, the NFE is expected to transition to a more appropriate method of contracting using full and open competition. Failure to properly transition to a more appropriate method of contracting at the cessation of the exigent or emergency circumstance has frequently been identified by the Department of Homeland Security ("DHS"), Office of Inspector General ("OIG") as problematic, resulting in frequent recommendations to de-obligate or disallow all or a portion of incurred costs.

d. Applicability to Categories of Work. The Federal procurement standards are not limited to the Public Assistance emergency work period under Category A or B. The Federal procurement standards apply to all categories of work.

(3) FEMA or Pass-Through Entity Approval. FEMA or the pass-through entity expressly authorizes noncompetitive proposals in response to a written request from the NFE. While identified as a potential exception to full and open competition under the noncompetitive procurement process, approval for this exception has been exceptionally rare at both the FEMA and pass-through entity levels. NFEs that are considering the use and application of this exception, should first consult with their servicing FEMA Public Assistance Coordinator to ascertain whether this option is available and what steps are necessary to undertake its use. 2 C.F.R. § 200.320(f)(3).

(4) Competition Inadequate. The NFE determines that, after solicitation of a number of sources, competition is inadequate. 2 C.F.R. § 200.320(f)(4).

a. FEMA considers competition "inadequate" when a NFE has complied with all of the procurement standards and receipt of a single offer or bid, single responsive offer or bid, or no responsive bids or proposals is caused by conditions outside of the NFE's control.

b. FEMA will not, on the other hand, consider competition

inadequate where a NFE did not sufficiently publicize the requirement, solicited only a few sources that chose not to submit a proposal, set unduly restrictive specifications, and/or took arbitrary actions or failed to take other actions that resulted in the inadequate competition. In those cases, adequate competition may be attainable; however, the NFE failed to take the proper steps and actions to ensure such competition.

c. It is important for a NFE to document its justification for why there is inadequate competition and why it moved forward with a noncompetitive award without revising or cancelling the solicitation and re-soliciting offers or bids.

i. In making this justification, it may be necessary for the NFE to evaluate whether or not it sufficiently publicized the invitation for bids or requests for proposals and/or solicited an adequate number of firms.

ii. It may also be necessary to speak to those firms solicited to find out why they did not submit offers or bids. If the reason is an overly restrictive specification or delivery requirement, then the NFE would need to evaluate whether it should cancel the solicitation, change that specification to allow for more bids or offers, and re-solicit bids or offers. If the NFE chooses to move forward with the award in light of the restrictive specification, then the NFE should document in the procurement file why the restrictive specification or delivery requirement was necessary and could not be modified so as to enable additional competition.

(5) When Inappropriate. Procurement by noncompetitive proposals is not justified based on the NFE's failure to adequately plan its procurement, concerns about the amount of FEMA financial assistance available to support a procurement, or ability to save money.

(6) Procedures. The following procedures apply to a procurement through noncompetitive proposal:

a. Justification and Documentation. The NFE must document the procurement history as detailed in 2 C.F.R. § 200.318(i). *See* Chapter IV, ¶ 8. Of particular note, the NFE must adequately document its justification for the sole source contract in light of the requirement for full and open

competition.

b. Negotiation of Profit. The NFE must negotiate profit as a separate element of the price. 2 C.F.R. § 200.323(b).

c. Preaward Review. The NFE must submit proposed procurement documents to either FEMA or the pass-through entity as directed. *See* 2 C.F.R. § 200.324(b); Chapter I, ¶ 5.

(7) Affirmative Steps. Where there is sufficient justification for the NFE to use procurement through noncompetitive proposals, FEMA will generally consider it not possible for the NFE to take affirmative steps to assure that minority businesses, women's business enterprises, and labor area surplus firms are used under those circumstances.

3. METHODS OF PROCUREMENT – ADDITIONAL TOPICS

a. Design-Bid-Build. Constitutes the traditional system of construction in the United States. Involves the selection of an architect who completes a fully detailed design, solicitation of construction bids based on the 100 percent complete design, and the selection of the lowest eligible and responsible bidder to complete construction. In this process, the three phases of planning, design, and construction run sequentially and the construction contractor has no involvement until the construction stage.

i. Use Permitted. FEMA allows a NFE to use design-bid-build procurement procedures under FEMA awards if permitted by state, local, and/or Indian tribal laws and regulations.

ii. Procurement Process. Involves two (2) separate and distinct solicitations and contract awards. The first solicitation and contract award is for the complete building designs, drawings, and/or specifications. This is followed by a second solicitation and contract award for construction associated with the complete building designs, drawings, and/or specifications. Both procurements must comply with all of the procurement standards of the Uniform Rules.

iii. Prohibition. 2 C.F.R. § 200.319 prohibits a contractor that is awarded a contract to develop designs, drawings, and/or specifications from competing for and receiving award for the associated construction portion of the work.

b. Two-Step Procurement Procedures. A two-step procurement procedure is a selection method used during either procurement by competitive proposals or sealed bidding in which the NFE selects a limited number of contractors during step 1 to submit detailed proposals or bids for step 2.

i. Use Permitted. FEMA allows a NFE to use two-step procurement procedures under FEMA awards if permitted by state, local, and/or Indian tribal laws and regulations.

ii. Procurement Process. The procurement must comply with all of the procurement standards of the Uniform Rules. In addition, FEMA expects that the NFE's procurement will, at a minimum, meet the following requirements.

(1) Review of Technical Qualifications and Approach. The first step consists of a review of the prospective contractors' technical approaches to the NFE's request and technical qualifications to carry out that approach. The NFE may then narrow the competitive range to prospective contractors that demonstrate a technically satisfactory approach and have satisfactory qualifications.

(2) Review of Bids and Proposals Submitted by Qualified Prospective Contractors. The second step consists of soliciting and reviewing complete proposals (including price) or bids submitted by each prospective contractor that the NFE has determined to be qualified during step 1. The NFE should attempt to obtain bids or quotations from as many qualified sources as possible, but should solicit bids or proposals from at least three qualified sources. In the case where the NFE conducts a qualifications based procurement during step 2, the NFE must evaluate contractors on price as well as any non-price evaluation factors.

c. Design-Build Contracts. The design-build procurement method consists of contracting for design and construction simultaneously with a contract award to a single contractor or contractor team that will be responsible for both the project's design and construction.

i. Use Permitted. FEMA allows the use of "design-build" contracts, if permitted by state, local, or tribal laws and regulations, under FEMA awards involving construction and design. The use of such a method must meet the following minimum requirements.

ii. Procurement Method Determined by Value. The NFE must separate the various contract activities to be undertaken and classify them as either design or construction, and then calculate the estimated total value of each. FEMA expects the NFE to use the procurement method appropriate for the services having the greatest cost.

(1) The construction costs normally comprise a greater estimated total value than design costs. If so, then FEMA expects the NFE to use procurement by competitive proposals or sealed bidding for the entire procurement rather than a qualifications-based procurement

by competitive proposals.

(2) If architectural and engineering services are predominant (which is usually not the case), then the NFE may use sealed bidding, procurement by competitive proposals, or a qualifications-based procurement by competitive proposals.

iii. Selection Processes. A NFE may use a one-step or two-step procurement process when conducting a design-build procurement.

d. Construction Manager at Risk (CMAR) Delivery Method. Under a CMAR delivery method, a project owner conducts a procurement of a construction manager firm early in or before the design process that will later serve as the project's general contractor. The construction manager, during the design and planning process, is the equivalent of an agent or consultant of the project owner and conducts early coordination with the architect, project cost, estimating, value engineering, construction scheduling, and constructability reviews. After the project owner selects a design, the construction manager and the NFE negotiate a Guaranteed Maximum Price (GMP).[8] If a GMP is agreed upon, the CM then acts as the equivalent of a general contractor during the construction phase to select, schedule, and sequence subcontractors to complete the required construction work. (However, jurisdictions differ as to the purpose and extent of performance required during the construction phase, which provides an added layer of complexity in defining a uniform rule pertaining to the CMAR delivery method.)[9]

i. Use Permitted. The Federal procurement standards do not expressly prohibit the potential use of the CMAR delivery process by a NFE. However, because there is no uniform CMAR standard across the different NFEs, particularly in regards to the construction phase and the evaluation thereof, FEMA will review the use of the CMAR delivery method on a case-by-case basis to ensure that the method utilized conforms to the requirements outlined by the Federal procurement standards for the solicitation and award of contracts using federal disaster assistance funds – even where use of the CMAR delivery method is otherwise permitted by state, local, and/or Indian tribal laws and regulations.

ii. Procurement Process. NFEs will generally issue a Request for

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[8] The GMP includes hard (estimated) costs of construction, associated fees, and contingencies applicable to the construction phase of the project. If agreed upon by the CM and the NFE, any cost overruns over the GMP (that are not due to change orders from the NFE) will be borne by the CM, hence, the CM "at risk." Conversely, any savings under the GMP will be attributed to the NFE and not to the CM, unlike traditional fixed price/lump sum contracts.

[9] In other words, some CMAR processes provide for the CM to directly perform the work once a GMP is agreed upon, while other CMAR processes prohibit the CM from performing such work itself, and require the CM to either subcontract out the work or conduct solicitations, evaluations and awards for construction work on the behalf of the NFE.

Qualifications (RFQ)/Request for Proposals (RFP) for construction management at risk preconstruction and construction management services and require prospective offerors to submit both a price and non-price related proposal – the extent and thoroughness of which differs between jurisdictions.

(1) Preconstruction Phase. This phase includes the performance of tasks such as developing professional construction cost estimates and schedules, developing value-added concepts and value engineering reviews, providing advice relative to the overall project budget and constructability reviews; collaborating with project architects on design, and preparing detailed estimates of the schematic design.

(2) Construction Phase. There is no uniformity between NFE jurisdictions concerning this phase of the CMAR delivery method. Some jurisdictions prohibit the Construction Manager (CM) from performing the construction work itself – instead requiring the CM to use its construction and management expertise to procure and manage subcontractors and trade subcontractors to construct the project more efficiently – while other jurisdictions have no such prohibition. Accordingly, in situations such as these, questions are appropriately raised as to the propriety of the solicitation, evaluation, and award of CMAR contracts, particularly when it comes to the construction phase of work.

4. CONTRACT COST OR PRICE

a. Cost or Price Analysis. A NFE must perform a cost or price analysis in connection with every procurement action in excess of the simplified acquisition threshold, including contract modifications. 2 C.F.R. § 200.323(a).

i. Method and Degree of Analysis and Independent Estimate. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, the NFE must make independent estimates before receiving bids or proposals. 2 C.F.R. § 200.323(a).

ii. Amplifying Guidance. FEMA provides the following guidance as to the meaning and use of cost and price analysis.

(1) Price Analysis. A price analysis is the examination and evaluation of a proposed price without evaluating its separate cost elements and proposed profit.

a. This is the form of analysis typically used when acquiring commercial items or when using the procurement through sealed bidding method.

b. The NFE is responsible for selecting and using whatever price analysis techniques will ensure a fair and reasonable price. Some of the ways in which a price analysis could be performed include comparing offers with one another; comparing prior proposed prices and contract prices with current proposed prices for the same or similar goods or services; comparing offers with competitive published price lists, published market prices, or similar indexes; comparing proposed prices with independently developed estimates of the NFE; and comparing proposed prices with prices of the same or similar items obtained through market research.

(2) Cost Analysis. A cost analysis is the review and evaluation of the separate cost elements (such as labor hours, overhead, materials, etc.) and proposed profit in a proposal in order to determine a fair and reasonable price for a contract and the application of judgment to determine how well the proposed costs represent what the cost of the contract should be, assuming reasonable economy and efficiency.

a. This is the form of analysis typically used to establish the basis for negotiating contract prices when using the procurement through competitive proposals method; using procurement through sealed bidding where price competition was not sufficient; making contract modifications; and any other case when a price analysis, by itself, does not ensure price reasonableness.

b. The NFE is responsible for selecting and using whatever cost analysis techniques will ensure a fair and reasonable price. Some of the ways in which a cost analysis could be performed include verification of the cost or pricing data and evaluation of cost elements and comparison of costs proposed for individual cost elements with previously incurred actual costs and independently developed estimates by the NFE.

b. Negotiation of Profit. A NFE must negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where a cost analysis is performed. To establish a fair and reasonable profit, consideration must be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work. 2 C.F.R. § 200.323(b).

c. Cost Plus Percentage of Cost. A NFE is prohibited from using the cost plus

percentage of cost and percentage of construction cost methods of contracting. 2 C.F.R. § 200.323(d).

i. FEMA considers a cost plus a percentage of cost or percentage of construction cost contract to be a contract containing some element that obligates the NFE to pay the contractor an amount (in the form of either profit or cost), undetermined at the time the contract was made and to be incurred in the future, based on a percentage of future costs. The inclusion of a ceiling price does not make these forms of contracts acceptable.

ii. FEMA will use the following four-part analysis to determine if a certain contract is a prohibited cost plus percentage of cost or percentage of construction cost contract:

(1) Payment is made on a pre-determined percentage rate;

(2) The pre-determined percentage rate is applied to actual performance costs;

(3) The contractor's entitlement is uncertain at the time of contracting; and

(4) The contractor's entitlement increases commensurately with increased performance costs.

iii. The prohibition against a cost plus percentage of cost and percentage of construction cost applies to subcontracts of the contractor in the case where the prime contract is a cost-reimbursement type contract or subject to price redetermination.

d. Estimated Costs. Costs or prices based on estimated costs for contracts under the FEMA award are allowable only to the extent that costs incurred or cost estimates included in the negotiated prices would be allowable for the NFE under the Federal cost principles at 2 C.F.R. Part 200, subpart E. The NFE may reference its own cost principles that comply with the Federal cost principles.

5. BONDING REQUIREMENTS

a. General. There are bonding requirements for ***construction or facility improvement contracts*** exceeding the simplified acquisition threshold. 2 C.F.R. § 200.325.

i. A bond is a written instrument executed by a contractor (the "principal"), and a second party ("the surety" or "sureties") to assure fulfillment of the principal's obligations to a third party (the "obligee"), identified in the bond. If the principal's obligations are not met, the bond assures payment, to the extent stipulated, of any loss sustained by the obligation.

ii. FEMA or the pass-through entity may accept the bonding policy and requirements of the NFE provided that FEMA or pass-through entity has made a determination that the Federal interest is adequately protected. This means that FEMA will approve the bonding policy and requirements of a recipient, and that the recipient will approve the bonding policy and requirements of its subrecipients.

iii. If FEMA or the pass-through entity has not made such a determination, then the NFE must meet the bid guarantee, performance bond, and payment bond requirements described in ¶ 5.b through 5.d.

b. Bid Guarantee. Each bidder must provide a bid guarantee equivalent to five percent of the bid price. The bid guarantee must consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of the bid by the NFE, execute such contractual documents as may be required within the time specified. 2 C.F.R. § 200.325(a).

c. Performance Bond. There must be a performance bond on the part of the contractor for 100% of the contract price. A "performance bond" is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract. 2 C.F.R. § 200.325(b).

d. Payment Bond. There must be a payment bond on the part of the contractor for 100 percent of the contract price. A payment bond is one executed in connection with a contract to assure payment as required by law for all persons supplying labor and material in the execution of work provided for in the contract. 2 C.F.R. § 200.325(c).

e. Not Construction or Facility Improvement. If the NFE is procuring neither construction nor facility improvement services, then there are no bonding requirements imposed by the Uniform Rules or this document.

6. CONTRACTING WITH SMALL AND MINORITY BUSINESSES, WOMEN'S BUSINESS ENTERPRISES, AND LABOR AREA SURPLUS FIRMS

a. Requirement. A NFE must take all necessary, affirmative steps to assure that small and minority businesses, women's business enterprises, and labor area surplus firms are used when possible. 2 C.F.R. § 200.321(a). *These steps are in addition to full and open competition* and must include, at a minimum, the following six affirmative steps.

i. Solicitation Lists. The NFE must place small and minority businesses and women's business enterprises on solicitation lists. 2 C.F.R. § 200.321(b)(1).

ii. Solicitations. The NFE must assure that it solicits small and minority businesses and women's business enterprises whenever they are potential sources. 2 C.F.R. § 200.321(b)(2).

iii. Dividing Requirements. The NFE must divide total requirements, *when economically feasible*, into smaller tasks or quantities to permit maximum participation by small and minority businesses and women's business enterprises. 2 C.F.R. § 200.321(b)(3).

iv. Delivery Schedules. The NFE must establish delivery schedules, *where the requirement permits*, which encourage participation by small and minority businesses and women's business enterprises. 2 C.F.R. § 200.321(b)(4).

v. Obtaining Assistance. The NFE must use the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Minority Business Development Agency of the Department of Commerce. 2 C.F.R. § 200.321(b)(5).

vi. Prime Contractor Requirements. The NFE must require the prime contractor, if subcontracts are anticipated or let, to take the five affirmative steps described in ¶ 6.a.i through 6.a.v above. 2 C.F.R. § 200.321(b)(6).

b. Additional Guidance.

i. Meaning of Terms. The Uniform Rules do not define the terms small business, minority business, women's business enterprises, and labor area surplus firms. FEMA will use the following meaning of the terms when evaluating compliance with the requirements of the Uniform Rules. If state, local, or tribal law and procedures provide different meanings of small business, women's business enterprise, and minority business, then FEMA may accept those meanings.

(1) Small Business. A business that is independently owned and operated, not dominant in the field of operation in which it is bidding on NFE contracts, and qualified as a small business under the Small Business Administration criteria and size standards at 13 C.F.R. Part 121.

(2) Women's Business Enterprise. A business enterprise that is: (a) at least 51 percent owned by one or more women or, in the case of a publicly owned business, at least 51 percent of the stock is owned by one or more women; and (b) whose management and daily

operations are controlled by one or more women.

(3) Minority Business. A business that is (a) at least 51 percent owned by one or more minority group members or, in the case of a publicly owned business, at least 51 percent of the stock is owned by one or more minority group members; and (b) whose management and daily operations are controlled by one or more minority group members.

(4) Labor Area Surplus Firm. A labor surplus area firm is one that, together with its first tier subcontractors, will perform substantially in labor surplus areas. The Department of Labor's Employment and Training Administration has defined labor surplus areas (LSA) as localities that have a "civilian average annual unemployment rate during the previous two calendar years of 20 percent or more above the average annual civil unemployment rate for all states" during that same period. 20 C.F.R. §§ 654.4-654.5. More information about LSAs is available at 20 C.F.R. pt. 654, subchapter A as well as on this website: https://www.doleta.gov/programs/laborsurplus02.cfm. The Department of Labor has also issued a list for FY 2016 of all the LSAs: https://www.doleta.gov/programs/lsa.cfm.

ii. Documentation of Compliance. A NFE must document its compliance with the six affirmative steps. As it relates to the prime contractor requirements, FEMA recommends the inclusion of the requirement in the solicitation and also in the contract.

iii. Set-Asides.

(1) A set-aside means a contracting practice restricting eligibility for the competitive award of a contract solely to small businesses, minority business, women's business enterprises, and/or labor area surplus firms. FEMA considers set-asides or percentages as impermissible (unless otherwise authorized by Federal law).

(2) Noticeably, the Federal procurement standards do NOT mandate a set aside of a solicitation or reservation of an award to any socioeconomic contractor, but merely that they are used, when possible, e.g. in other words, given the opportunity to compete for such awards.

(3) Indian tribes may use preferences pursuant to the requirements and conditions set forth in the Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2205 (1975) (codified as amended at 25 U.S.C. § 450 *et seq.*).

7. PROCUREMENT OF RECOVERED MATERIALS

a. Requirement. A NFE that is a state agency or agency of a political subdivision of a state and its contractors must comply with Section 6002 of the Solid Waste Disposal Act, Pub. L. No. 89-272 (1965) (codified as amended by the Resource Conservation and Recovery Act at 42 U.S.C. § 6962). The requirements of Section 6002 include procuring only items designated in guidelines of the EPA at 40 C.F.R. Part 247 that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds $10,000 or the value of the quantity acquired during the preceding fiscal year exceeded $10,000; procuring solid waste management services in a manner that maximizes energy and resource recovery; and establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines. 2 C.F.R. § 200.322.

b. Additional Background.

i. Inapplicability to Indian Tribes and Private Parties. The requirements of Section 6002 and its implementing regulations at 40 C.F.R. Part 247 do not apply to procurements by Indian tribes or private party NFEs (such as hospitals, institutions of higher education, and non-profit organizations).

ii. Product Designation and Associated Procurement Requirement. EPA is required to designate products that are or can be made with recycled materials, and to recommend best practices for buying these products. EPA has currently designated 61 products across eight categories, which are construction products, landscaping products, non-paper office products, paper products, park and recreation products, transportation products, vehicular products, and miscellaneous products. *See* 40 C.F.R. Part 247, subpart B.

(1) Once EPA designates a product, Section 6002(c)(1) of the Solid Waste Disposal Act (codified as amended at 42 U.S.C. § 6962(c)(1)) requires a NFE to procure that designated item composed of the highest recovered material content level practicable, consistent with maintaining a satisfactory level of competition, considering such guidelines. *See also* 40 C.F.R. § 247.2(d).

(2) A NFE may decide not to procure such items if they are not reasonably available in a reasonable period of time; fail to meet reasonable performance standards; or are only available at an unreasonable price. *See* Section 6002(c) of the Solid Waste Disposal Act (codified as amended at 42 U.S.C. § 6962(c)); 40 C.F.R. § 247.2(d).

iii. Affirmative Procurement Program. Section 6002(i) of the Solid Waste Disposal Act (codified as amended at 42 U.S.C. § 6962(i)) provides that each NFE that purchases items designated by EPA must establish an affirmative procurement program, containing four specific elements, for procuring such items containing recovered materials to the maximum extent practicable. *See also* 40 C.F.R. § 247.6. The four required elements of the affirmative procurement program are:

(1) Preference program for purchasing the designated items;

(2) Promotion program;

(3) Procedures for obtaining estimates and certifications of recovered materials content and for verifying the estimates and certifications; and

(4) Annual review and monitoring of the effectiveness of the program

iv. Solid Waste Disposal Services. Section 6002(f) of the Solid Waste Disposal Act (codified as amended at 42 U.S.C. § 6962(f)) requires a NFE, to the maximum extent practicable, manage or arrange for the procurement of solid waste management services in a manner which maximizes energy and resource recovery.

v. Certifications. Section 6002(c)(3) of the Solid Waste Disposal Act (codified as amended at 42 U.S.C. § 6962(c)(3)) and 40 C.F.R. § 247.4 provide that a NFE must require that its vendors:

(1) Certify that the percentage of recovered materials to be used in the performance of the contract will be at least the amount required by applicable specifications or other contractual requirements; and

(2) Estimate the percentage of the total material utilized for the performance of the contract which is recovered materials (for contracts greater than $100,000).

8. CHANGES

a. General. There are many reasons why a NFE may wish to make changes to an existing contract. For example, during performance, changes may be required in order to fix inaccurate or defective specifications, react to unforeseen circumstances, or otherwise modify the work to ensure the contract meets NFE requirements.

b. NFE Responsibilities. The NFE is responsible for issuing, evaluating, and making necessary decisions involved any change to its third party contracts and any change orders it may issue. The NFE is also responsible for evaluating and making the necessary decisions involving any claim of a constructive change.

c. Cardinal Change.

i. A cardinal change is a significant change in contract work (property or services) that causes a major deviation from the original purpose of the work or the intended method of achievement, or causes a revision of contract work so extensive, significant, or cumulative that, in effect, the contractor is required to perform very different work from that described in the original contract.

ii. FEMA considers a cardinal change to a contract to be a noncompetitive award and will evaluate whether the NFE meets the necessary conditions precedent for using the procurement through noncompetitive proposal method.

iii. A change within the scope of the contract (sometimes referred to as an "in-scope" change) is not a cardinal change. Nothing restricts a NFE from exercising reasonable freedom to make minor adjustments contemplated fairly and reasonably by the parties when they entered into the contract.

d. Evaluation of Changes. FEMA will, in determining whether the NFE has made a prohibited cardinal change, evaluate whether the change is "within the general scope of the contract" and "within the scope of competition."

i. Scope of the Contract. FEMA will, in determining whether changes are beyond the scope of the contract, usually compare the total work performed by the contractor to the work called for by the original contract. This includes evaluating the nature of the work being performed and also the amount of effort the contractor is required to perform in order to evaluate the cumulative impact on the contract's quantity, quality, costs, and delivery terms.

ii. Scope of Competition. FEMA will, in determining whether changes are beyond the scope of competition, usually evaluate whether there is a material difference between the modified and original contract that was originally competed, to include considering whether the solicitation for the original contract adequately advised offerors of the potential for the type of changes at issue or whether the changes are of a nature that potential offerors would have reasonably anticipated them.

iii. In both evaluations, FEMA has not adopted a specific detailed list of acceptable contract changes, as cardinal changes cannot be easily established by setting specific objective and measurable threshold criteria that would apply in all cases. Such evaluations will be conducted on a case-by-case basis.

e. Changes Clause. FEMA recommends that NFEs incorporate a "changes clause" in their contracts. A changes clause is one that permits the NFE contracting officer to make unilateral changes, in designated areas, within the general scope

of the contract, to be followed by such equitable adjustments in the price and delivery schedule as the changes make necessary.

CHAPTER VI

OTHER PROCUREMENT METHODS AND ADDITIONAL TOPICS

1. FEDERAL SUPPLY SCHEDULES

a. Background. GSA establishes long-term government-wide multiple award schedule ("MAS") contracts with commercial firms to provide access to millions of commercial products and services at volume discount pricing. The MAS contracts, also referred to as GSA Schedule and Federal Supply Schedule contracts, are indefinite delivery, indefinite quantity contracts.

b. Permissible Use of Federal Supply Schedules – Disaster Purchasing.

i. Federal law authorizes "state and local governments" access to buy goods and services from GSA Federal Supply Schedules to facilitate recovery from a major disaster declared by the President under the Stafford Act; facilitate disaster preparedness or response; or facilitate recovery from terrorism or nuclear, biological, chemical, or radiological attack. 40 U.S.C. § 502(d)(1).

ii. The Department of Homeland Security has determined that all of the products and services available under GSA Federal Supply Schedules qualify as those that could be used in preparation or response to all disasters, as well as recovery from major disasters declared by the President, or recovery from terrorism or nuclear, biological, chemical, or radiological attack. 40 U.S.C. § 502(d)(2).

iii. Participation by a firm that sells to the Federal Government through the schedule is voluntary with respect to a sale to the state or local government through such supply schedule. 40 U.S.C. § 502(d)(1).

iv. Key Definitions.

(1) State and Local Governments. Only states or local governments may access and buy goods and services from GSA Federal Supply Schedules. A NFE falling outside the definition of a state or local government is not authorized to use GSA Federal Supply Schedules pursuant to 40 U.S.C. § 502(c) or (d).

a. The term "state or local government" includes any state, local, regional, or tribal government, or any instrumentality thereof (including any local educational agency or institution of higher education). 40 U.S.C. § 502(c)(3)(A).

b. The term "tribal government" means: (1) the governing body of any Indian tribe, band, nation, or other organized

group or community located in the continental United States (excluding the State of Alaska) that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, and (2) any Alaska Native regional or village corporation established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. § 1601 *et seq.*). 40 U.S.C. § 502(c)(3)(B).

c. The term "local educational agency" has the meaning given that term in section 8013 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. § 7713). 40 U.S.C. § 502(c)(3)(C).

d. The term "institution of higher education" has the meaning given that term in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. § 1001(a)). 40 U.S.C. § 502(c)(3)(D).

(2) Preparedness, Response, and Recovery. State and local governments may buy goods and services from GSA Federal Supply Schedules in preparation or response to all disasters, facilitate *recovery* from a major disaster declared by the President under the Stafford Act; or facilitate *recovery* from terrorism or nuclear, biological, chemical, or radiological attack.

a. "Preparedness" means actions that involve a combination of planning, resources, training, exercising, and organizing to build, sustain, and improve operational capabilities. Preparedness is the process of identifying the personnel, training, and equipment needed for a wide range of potential incidents, and developing jurisdiction – specific plans for delivering capabilities when needed for an incident. U.S. General Services Administration, *Disaster Purchasing FAQs.*

b. "Response" means immediate actions to save lives, protect property and the environment, and meet basic human needs. Response also includes the execution of emergency plans and actions to support short-term recovery. U.S. General Services Administration, *Disaster Purchasing FAQs.*

c. "Recovery" means the development, coordination, and execution of service- and site-restoration plans; the reconstitution of government operations and services; individual, private-sector, nongovernmental, and public-assistance programs to provide housing and to promote

restoration; long-term care and treatment of affected persons; additional measures for social, political, environmental, and economic restoration; evaluation of the incident to identify lessons learned; post incident reporting; and development of initiatives to mitigate the effects of future incidents. U.S. General Services Administration, *Disaster Purchasing FAQs*.

c. Permissible Use of Federal Supply Schedules – Information Technology, Law Enforcement, Security, and Certain Other Related Items.

i. Federal law authorizes state and local governments access to buy information technology ("IT") through GSA's Federal Supply Schedule, which includes automated data processing equipment (including firmware), software, property, support equipment, and services (as contained in Federal supply classification code group 70). 40 U.S.C. § 502(c)(1)(A).

ii. Federal law also authorizes state and local governments access to buy alarm and signal systems, facility management systems, firefighting and rescue equipment, law enforcement and security equipment, marine craft and related equipment, special purpose clothing, and related services (as contained in Federal supply classification code group 84 or any amended or subsequent version of that Federal supply classification group). 40 U.S.C. § 502(c)(1)(B).

iii. Participation by a firm that sells to the Federal Government through the supply schedule shall be voluntary with respect to a sale to the state or local government through such supply schedule. 40 U.S.C. § 502(c)

iv. Key Definitions. The definitions of state and local government, tribal government, local educational agency, and institution of higher education are set forth in Chapter VI, ¶ 1.b.iv(1).

d. Ordering Procedures and Additional Information.

i. Federal law requires that all users of Federal supply schedules, including non-Federal users, shall use the schedules in accordance with the ordering guidance provided by the GSA Administrator. 40 U.S.C. § 502(f).

ii. GSA has provided guidance that a NFE must follow its own procurement procedures when ordering goods and services from the GSA Federal Supply Schedules. In addition to ensuring compliance with its own procurement procedures, a NFE is encouraged—but not required—to use GSA's Schedule Ordering Procedures to ensure competition and to receive best value from GSA Federal Supply Schedule contractors. *See* U.S. General Services Administration, *Disaster Purchasing FAQs* and *Cooperative Purchasing FAQs*. These ordering procedures can be found

at 48 C.F.R. § 8.405-1 (Ordering Procedures for Property and Services Not Requiring a Statement of Work) and § 8-405-2 (Ordering Procedures for Services Requiring a Statement of Work).

iii. Orders placed under the Disaster Purchasing program must include the following statement: "This order is placed under GSA Schedule number _____ under the authority of the GSA Disaster Purchasing program. The products and services purchased will be used in preparation or response to disasters or recovery from major disaster declared by the President, or recovery from terrorism or nuclear, biological, chemical, or radiological attack."

iv. If a NFE uses the GSA ordering procedures, *it will have fulfilled the requirements for full and open competition.* The NFE must also ensure that all required clauses in 2 C.F.R. § 200.326 are included in the contract and determine whether the GSA price is reasonable. The NFE may seek a lower price than that published on the schedules.

v. If a NFE does not follow the GSA ordering procedures, it must at least follow ordering procedures that meet the minimum requirements for full and open competition.

2. USE OF EXISTING CONTRACTS

a. Background. A NFE may wish to use an existing contract in order to perform work under a FEMA award. FEMA considers an "existing contract" as a contract that, when formed, was intended to be limited to the parties, and does not include state, local, or tribal purchasing schedules or purchasing contracts.

b. Permissible Use of Existing Contracts. FEMA permits a NFE to use an existing contract in the following circumstances:

i. The NFE originally procured the contract in full compliance with the procurement standards under the Uniform Rules.

ii. The scope of work to be performed falls within the scope of work of the original contract and there are no cardinal changes.

iii. The scope of work of the contract as originally procured did not exceed the amount of property and services required to meet the NFE's original, reasonably expected needs.

(1) The Uniform Rules require the NFE to establish procedures to avoid the purchase of unnecessary or duplicative items. 2 C.F.R. § 200.318(d).

(2) The NFE should only contract for its current and reasonably expected needs under the FEMA award, and may not add

quantities or options to contract for solely for the purpose of a potential use at a later date. Therefore, an existing contract could have an improper, original scope if the NFE added excess capacity in the original procurement primarily for its future use. Moreover, an existing contract with an overbroad scope of work may lead to unreasonable pricing and should not be used.

(3) The quantity of property or services a NFE reasonably believes it may need at the time of contract award could decrease due to changed circumstances or other reasons. In those situations, the NFE may use the excess contract authority to perform work under the FEMA award.

c. Advance Contracts. A NFE may award advance contracts, also referred to as prepositioned contracts or pre-awarded contracts, before an incident occurs for the potential performance of work under the Public Assistance Grant Program under a Stafford Act emergency or major disaster.

i. This approach enables a NFE to conduct a deliberate procurement process outside of the pressure and immediate demands of an incident and also helps to ensure that the NFE has a contractor(s) ready to perform work very quickly after an incident occurs when needed most.

ii. The use of such contracts is permissible so long as the circumstances below are met:

(1) The NFE originally procured the contract in full compliance with the procurement standards under the Uniform Rules.

(2) The scope of work originally procured must not exceed the reasonably expected needs during a future declaration.

(3) The scope of work performed must fall within the scope of work of the original contract and there are no cardinal changes.

(4) The pricing structure must be reasonable.

a. The contract price may come at a premium based on the need for the contractor to be able to perform services with little or no notice. Such a pricing structure is not, per se, unreasonable, although FEMA will scrutinize premium prices for work. For example, FEMA will scrutinize such work at premium prices extending beyond the period of time in which the NFE could have completed a competitive procurement following the declaration and the winning contactor begun work at non-premium prices.

b. The contract price may have built-in contingencies that result in unreasonable pricing for the work to be performed.

For example, a state could procure a statewide debris removal contract that is available for use by all state agencies and also all local governments in the state. Even assuming the procurement was conducted in full compliance with the Uniform Rules for non-state recipients and subrecipients and consistent with Chapter VI, ¶ 2.c.ii.(1)-(3), the contract would presumably have unit pricing that builds in a contractor's costs for potential debris removal anywhere in the state and on a large-scale basis. This means that the application of such a rate to a particular jurisdiction—where the scope of work is very narrow and the market rate for such services are less—may result in unreasonable pricing as applied to that particular jurisdiction. While this may be the case, per 2 C.F.R. § 200.404, costs are not unreasonable simply because there may have been a method whereby the recipient could have received a better price. A finding of "unreasonable costs" must be based on a determination that the costs incurred appear to be unreasonable because they do not reflect the actions a prudent person would take in the circumstances.

iii. Permissibility of Use of Contracts Awarded Under the Old Procurement Standards After the Implementation of the Uniform Rules.

(1) If a prepositioned (advanced/pre-awarded) contract was properly awarded in accordance with the old Federal procurement standards found at 44 C.F.R. pt. 13 – and to a lesser extent, 2 C.F.R. pt. 215 – on a general basis, the NFE would not likely be required to necessarily re-solicit or re-award the existing contract for use during a disaster or emergency declaration issued after December 26, 2014. If the existing contracts were properly solicited and awarded under the old procurement standards at 44 C.F.R. § 13.36(a)-(i), they'll likely be in compliance when it comes to using these existing contracts today and maintaining the potential for maximum reimbursement of eligible expenses – at least from a purely procurement-related perspective. The final determination of course will need to be made on a case-by-case basis.

(2) The old procurement standards found at 44 C.F.R. § 13.36(a)-(i) served as the basis for the new procurement standards identified at 2 C.F.R. §§ 200.317-200.326. However, with few exceptions, the new procurement standards are much more lenient than the older standards. If for example, the competition requirements, socioeconomic requirements and non-competitive proposal requirements were met under the prior rules, they would most likely survive any scrutiny under the current rules. Many of the requirements under the Uniform Rules were carried over from the old standards found at 44 C.F.R. § 13.36(b)-(i). For example, the

competition requirement (with the exception of the prohibition on award to contractors that assist in the development of a specification or requirement, Invitations for Bid or Requests for Proposals from competing for and receiving that very same contract award) and the socioeconomic standards are identical. Few requirements are more onerous such as the prohibition on award mentioned immediately above, while most changes are in fact more lenient, such as the elimination of the two-step process of analysis under non-competitive proposals, involving a preliminary determination as to whether any other contract method is infeasible for use under the four contemplated circumstances (only one source, exigent/emergency circumstances, FEMA or pass through entity pre-approval, or inadequate competition), or requirement to conduct cost or price analysis only where procurements are in excess of the simplified acquisition threshold.

(3) As indicated above, contracts that are found to have been properly solicited and awarded IAW the old procurement standards will most likely meet the current standards, with two noticeable potential exceptions:

a. 2 C.F.R. § 200.319 – prohibiting a contractor from developing the specifications and requirements; Invitation for Bids or Request for Proposals; and competing for and receiving the subsequent award. This prohibition wasn't specifically addressed in the old regulations. If this situation exists in the existing contract, it would be difficult to impossible to cure this deviation in order to ensure that the existing contract meets the requirements of the current procurement standards.

b. 2 C.F.R. § 200.326 – requiring each purchase order or contract to include certain contract provisions. The contract provisions required by the new procurement standards have been revised in subtle ways. It would be a matter of local, state, and tribal analysis to determine whether the current contract provisions could be added through a contract modification to the existing contract and still remain within scope.

(4) As the differences between the new standards and the old procurement standards for Institutions of Higher Education, Hospitals, and certain Private Non-profits has changed more drastically with the conversion to the Uniform Rules, use of existing contracts for these types of entities that were awarded under the old procurement standards would necessarily require a more intensive analysis by these entities to ensure that the existing contracts were solicited and awarded in a manner that would have

met the new procurement standards.

(5) Additionally, while states have fewer requirements under the Federal procurement standards than other entities, existing contracts awarded by a state would need to be analyzed on a case-by-case basis in order to determine whether they meet the new procurement standards at 2 C.F.R. § 200.317, requiring compliance with the new contract provisions found at 2 C.F.R. § 200.326.

(6) However, in the absence of such confirmations, the grace period available at 2 C.F.R. § 200.110 could be exercised by a NFE, in accordance with the Uniform Rules' requirements for doing so, with the existing contracts (compliant with the old procurement standards but not the new) continuing to be used during the two additional fiscal years associated with the grace period, while follow on contracts were solicited and awarded pursuant to the new procurement standards. Under this scenario, the NFE would have an additional two fiscal years after the Uniform Rules went into effect on December 26, 2014 to get its procurement systems and contracts in line with the new standards.

iv. Impermissible Use of Existing Contracts. A NFE may not use FEMA assistance to finance cardinal changes (e.g. out of scope changes – after-the-fact addition of parties able to use the contract, changes in the type or extent of work to be performed, use of the contract in manner and/or duration that was not originally anticipated, etc.) of an existing contract for its use under a subsequent FEMA award.

3. JOINT PROCUREMENTS

a. Background. The Uniform Rules provide that—to foster greater economy and efficiency and in accordance with efforts to promote cost-effective use of shared services across of the Federal government—a NFE is encouraged to enter into state and local intergovernmental agreements or inter-entity agreements where appropriate for procurement or use of common or shared goods and services. 2 C.F.R. § 200.318(e). FEMA has interpreted this regulation as encouraging NFEs to collaborate in joint procurements.

b. Meaning of Joint Procurement. FEMA uses the term "joint procurement" to mean a method of contracting in which two or more NFEs agree from the outset to use a single solicitation document and enter into a single contract with a vendor for delivery of property or services in a fixed quantity, even if expressed as a total minimum or total maximum. This is typically done to obtain advantages unavailable for smaller procurements, and a joint procurement is separate and distinct from a purchasing schedule.

c. Compliance with Uniform Rules. When procuring goods or services using a joint procurement, the NFEs must comply with all applicable procurement standards

set forth in the Uniform Rules and detailed in this document.

d. Responsibilities under the Joint Procurement. The NFE responsible for undertaking the joint procurement may, upon contract award, assign to the other participants responsibilities for administering those parts of the contract affecting their property or services. Participation in a joint procurement, however, does not relieve any participating NFE from the requirements and responsibilities it would have if it were procuring the property or services itself, and does not relinquish responsibility for the actions of other participants merely because the primary administrative responsibility for a particular action resides in another NFE other than in itself. In other words, each party taking action under a joint procurement, must ensure that all applicable Federal procurement standards are met in order to maximize the potential for reimbursement for all eligible expenses incurred under the procurement.

e. Joint Procurements: Statewide Debris Removal Contracts. A state may establish a statewide debris removal contract that could permissibly be used by a local government under a Public Assistance award through a joint procurement. Under such an approach, the state would procure a single contractor to provide debris removal services statewide for state agencies and, at their election, for the local government.

f. Compliance with State Law and Regulation. The state's procurement of the original contract and its use by local governments must comply with state and local law, regulations, and written procurement procedures. Importantly, the state must procure the contract with the express purpose of making it available to local governments and the contract must specifically allow for such use.

g. Scope of Work. The scope of the work to be performed for the local government must fall within the scope of work under the statewide contract as to type, amount, haul distance, and geography.

h. Definitive Requirements. FEMA expects the state to limit the acquisition of Federally-assisted debris removal services to the amount it needs to support its and other NFE's Public Assistance project(s).

i. Compliance with the Uniform Rules. The state's procurement of the contract must comply with all of the procurement standards *applicable to a local government* at 2 C.F.R. §§ 200.318 to 326. This is a very important caveat, as the state would otherwise not be required to comport with the regulations when procuring services or property for its own use, but only with the regulation at 2 C.F.R. § 200.317. However, because local governments are subject to the requirements of 2 C.F.R. §§ 200.318 to 326, the state must comply with those procurement standards in order for the local governments to permissibly use the statewide contract.

j. Pricing. It is possible that a joint procurement may not have pricing that accounts

for variables in geographic and market conditions unique to the local government availing itself of the contract. This may or may not lead to a local government paying more than it otherwise may have paid had the local government procured its own contract. While this may be the case, per 2 C.F.R. § 200.404, costs are not unreasonable simply because there may have been a method whereby the recipient could have received a better price. A finding of "unreasonable costs" must be based on a determination that the costs incurred appear to be unreasonable because they do not reflect the actions a prudent person would take in the circumstances.

4. PURCHASING SCHEDULES

a. Background. FEMA uses the term "state, local, or tribal purchasing schedule" to mean an arrangement that a state, local, or tribal government has established with several or many vendors in which those vendors agree to provide essentially an option to the state, local, or tribal government (and their subordinate government entities) to acquire specific property or services in the future at established, binding prices. If permitted by state, local, or tribal laws and regulations, a non-governmental NFE may also use the state, local, or Indian tribal purchasing schedule.

b. Use Permitted. The Uniform Rules encourage state, local, and tribal governments to enter into intergovernmental agreements or inter-entity agreements where appropriate for procurement or use of common or shared goods and services. As such, FEMA allows a NFE to use a state, local, or tribal purchasing schedule to procure services and property under a FEMA award if the schedule was established in a manner that complies with 2 C.F.R. §§ 200.318 to 326.

c. Ordering Procedures.

i. A NFE must follow its own procurement procedures which reflect applicable state, local, or tribal laws and regulations when ordering property and services. These procedures must at least meet the minimum requirements of full and open competition and the source selection requirements under the Uniform Rules. FEMA may, in reviewing such a procurement, request not only the procurement records for originally establishing the supply schedule, but also records concerning the ordering solicitation prepared by the ordering NFE, documentation demonstrating that an adequate number of sources were solicited, documentation showing the evaluation of bids or offers received, rationale for source selection (including the cost or price analysis), and other documentation as required.

ii. Any property ordered must be an end item from the supply schedule, such as office property, computers, other commercial off the shelf items, and construction materials. Minor modifications or modifications customarily available in the marketplace may be permissible so long as the

modifications do not comprise a cardinal change.

iii. Any services ordered must be for the specific tasks and/or specific outcomes to be achieved as detailed in the supply schedule, and not for tasks and/or specific outcomes falling outside the scope of the supply schedule. The acquisition of new construction services or non-routine alterations and repair services will rarely, if ever, be appropriate to order from a supply schedule, as a purchasing schedule or contract for new construction or non-routine alterations and repairs will lack the specificity for critical circumstances common to such efforts, such as the technical approach for completion of the work, innumerable combinations of site requirements (weather, physical conditions, etc.), and tailored pricing.

5. OBTAINING GOODS AND SERVICES THROUGH MUTUAL AID AGREEMENTS

a. FEMA, pursuant to Subchapter H of Ch. V of the Public Assistance Program and Policy Guide, FP 104-009-2, January 2016, allows a subrecipient to use Public Assistance funding to pay for work performed by another entity through a mutual aid agreement.

b. FEMA does not treat a mutual aid agreement as a procurement for the purposes of 2 C.F.R. pt. 200 so long as the work provided under the agreement falls within certain categories of work. Rather, FEMA treats the mutual aid assistance performed by a providing entity's employees as akin to temporary hires of the requesting entity.

c. This applies to all forms of mutual aid assistance, including agreements between a requesting and providing entity, statewide mutual aid agreements, and mutual aid services provided under the Emergency Management Assistance Compact ("EMAC").

d. There are three types of mutual aid work eligible for FEMA assistance:

i. ***Emergency Work (Public Assistance Categories A and B)*** – Mutual aid work provided in the performance of emergency work necessary to meet immediate threats to life, public safety, and improved property.

ii. ***Emergency Utility Restoration (Regardless of whether it is deemed Category B or F)*** – Work that is of a permanent nature but is necessary for emergency restoration of utilities. For example, work performed to restore electrical and other power.

iii. ***Grant Management Work*** – Work associated with the performance of the grantee's responsibilities as grant administrator. EMAC provided assistance to perform these tasks is eligible mutual aid work.

e. If mutual aid work falls within the scope described above, then FEMA will next look to see if the providing entity performed the work using force account labor or

contract resources. A subrecipient (the requesting entity) may use Public Assistance funding to pay for the costs of *the force account labor or use of equipment* of the entity providing assistance (the providing entity) consistent with Subchapter H of Ch. V of the Public Assistance Program and Policy Guide, FP 104-009-2.

f. If, however, the providing entity performs mutual aid work through contract, then FEMA will perform the following analysis:

i. Contract Services or Supplies are Incidental to the Work Performed by the Providing Entity. In those cases where contract services or supplies are incidental to the work performed by the providing entity, then FEMA will generally not treat the mutual aid agreement as a procurement and evaluate it according to the criteria at 2 C.F.R. Part 200.

ii. The Providing Entity Predominantly or Exclusively Performs Mutual Aid Work Through Contract. In other cases, however, a providing entity may perform the work under the mutual aid agreement predominantly or exclusively through contract. FEMA will, in these cases, treat the mutual aid agreement as a procurement and evaluate it against the criteria of 2 C.F.R. §§ 200.318-200.326.

6. ASSIGNMENT OF CONTRACT RIGHTS

a. Background. A NFE may find it advantageous to use existing contract rights of another NFE. An "existing contract" does not include, for the purposes of this section, a state, local, or tribal supply schedule or the GSA Federal Supply Schedule.

b. Exercise of Assignment Rights. Although FEMA generally discourages a NFE from obtaining contract rights from another NFE, a NFE may exercise contractual rights obtained through assignment subject to the following limitations.

i. Original Procurement. The original contract must have been procured in full compliance with the procurement standards under the Uniform Rules.

ii. Original Scope. The scope of the contract originally procured by the assigning party does not exceed the amount of property and services required to meet the assigning party's original, reasonably expected needs. The regulation at 2 C.F.R. § 200.318(d) requires a NFE to have procurement procedures that preclude it from acquiring property or services it does not need. Therefore, a contract would have an improper original scope if the original party added excess capacity in the original procurement primarily to permit assignment of those contract rights to another entity. Moreover, an assignable contract with an overbroad scope of work may lead to unreasonable pricing and thus should not be used.

iii. Assignability Provisions. The original contract must contain appropriate

assignability provisions that permit the assignment of all or a portion of the specified deliverables under the terms originally advertised, competed, evaluated, and awarded, or contains other appropriate assignment provisions.

iv. No Cardinal Changes. The scope of work, terms, and conditions of the assigned contract rights that the NFE seeks to exercise must be the same or substantially similar to those in the original contract and there are no cardinal changes.

v. Quantities. The quantities the assigning party acquired, coupled with the quantities the acquiring recipient or subrecipient seeks, do not exceed the amounts available under the assigning entity's contract

vi. Price. The NFE may not exercise assigned contract rights unless it has determined that the price is fair and reasonable.

c. Noncompetitive Procurement. FEMA will treat an assignment of contract rights that does not meet the limitations described in Chapter VI, ¶ 5.b as a sole source procurement, such that a NFE may only use such a method if it meets the requirements for procurement through noncompetitive proposals.

7. USE OF PURCHASING AGENTS

a. General. FEMA uses the term "purchasing agent" to generally refer to a contracted agent of the NFE that assists in the procurement of goods and services. The purchasing agent may assist the NFE in, among other things, conducting market research, preparing solicitations, evaluating bids or proposals, and negotiating contracts, and screening information about products on the behalf of the recipient or subrecipient.

b. Use Permitted. If the NFE lacks qualified personnel within its organization to undertake the various tasks required to comply with the procurement standards, FEMA expects the NFE to acquire the necessary services from sources outside the NFE's organization, such as a purchasing agent. The use of a purchasing agent should be specified in the NFE's written procurement procedures.

c. Conflicts of Interest. A purchasing agent shall not participate in the selection, award, or administration of a contract supported by a FEMA award if he or she has a real or apparent conflict of interest. *See* 2 C.F.R. § 200.318(c)(1); Chapter IV, ¶ 3. In addition, the NFE must take appropriate steps to prevent or mitigate organizational conflicts of interest that would result in conflicting roles that might bias a contractor's judgment or would result in unfair competitive advantage.

8. FEDERAL EXCESS PROPERTY

a. The Uniform Rules encourage NFEs to use Federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and

reduces project costs. 2 C.F.R. § 200.318(f). A NFE would acquire such equipment and property through the Federal Surplus Personal Property Donation Program.

b. The General Services Administration ("GSA") carries out the Federal Surplus Personal Property Donation Program under which GSA will donate "surplus" Federal property—through a state agency for surplus property—to eligible public agencies and eligible nonprofit educational or public health institutions. *See* 40 U.S.C. § 549; 41 C.F.R. Part 102-37. Surplus personal property (surplus property) means excess personal property not required for the needs of any Federal agency, as determined by GSA.

c. A NFE interested in obtaining Federal surplus personal property should contact its servicing FEMA Regional Administrator for additional information.

APPENDIX A

AUTHORIZING LEGISLATION AND GRANT PROGRAMS

1. A number of Federal laws provide the authority for FEMA to carry out its grant and cooperative agreement programs.

2. Public Assistance Grant Program. The Public Assistance ("PA") Grant Program is authorized by the Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 93-288, §§ 402, 403, 406, 407, and 502 (1974) (codified as amended at 42 U.S.C. §§ 5170a, 5170b, 5172, 5173, and 5192) ("Stafford Act"). The implementing regulations for this program are set forth at 44 C.F.R. Part 206, subparts C, G, H, I, and M. FEMA has also issued the *Public Assistance Program and Policy Guide* ("PAPPG"), which includes most of the Public Assistance policy. Additional documents not yet superseded by the PAPPG are available online.

3. Hazard Mitigation Grant Program. The Hazard Mitigation Grant Program ("HMGP") is authorized by the Stafford Act, § 404 (codified as amended at 42 U.S.C. § 5170c) under a major disaster declaration. The implementing regulations are set forth at 44 C.F.R. Part 206, subpart N. FEMA has also issued the *Hazard Mitigation Assistance Unified Guidance* to provide additional guidance.

4. Fire Management Assistance Grant Program. The Fire Management Assistance Grant ("FMAG") Program is authorized by the Stafford Act, § 420 (codified as amended at 42 U.S.C. § 5187) under a fire declaration. The implementing regulations are set forth at 44 C.F.R. Part 204. FEMA has also issued a number of policy documents and issued the *FMAG Guide* to describe the basic provisions, processes, and procedures of the program.

5. Crisis Counseling Assistance and Training Grant Program. The Crisis Counseling Assistance and Training Grant Program is authorized by the Stafford Act, § 416 (codified as amended at 42 U.S.C. § 5183) under a major disaster declaration. The implementing regulations are set forth at 44 C.F.R. § 206.171.

6. Disaster Case Management Grant Program. The Disaster Case Management Service Grant Program is authorized by the Stafford Act, § 426 (codified as amended at 42 U.S.C. § 5189d) under a major disaster declaration. FEMA has adopted *Disaster Case Management Program Guidance* to provide implementing guidance for this grant program.

7. Federal Assistance to Individual and Households – Other Needs Assistance (State Option). The Other Needs Assistance ("ONA") program is authorized by the Stafford Act, § 408 (codified as amended at 42 U.S.C. § 5174) under either an emergency or major disaster declaration. The implementing regulations are set forth at 44 C.F.R. Part 206, subpart D.

8. Flood Mitigation Assistance Grant Program. The Flood Mitigation Assistance ("FMA") Program is authorized by the National Flood Insurance Act of 1968, Pub. L. No. 90-448, § 1366 (1968) (codified as amended at 42 U.S.C. § 4104c) ("NFIA"). The implementing

regulations are set forth at 44 C.F.R. Parts 78 and 79. FEMA has also issued the *Hazard Mitigation Assistance Unified Guidance*

9. Pre-Disaster Mitigation Grant Program. The Pre-Disaster Mitigation ("PDM") Program is authorized by Stafford Act, § 203 (codified as amended at 42 U.S.C. § 5133). FEMA has issued the *Hazard Mitigation Assistance Unified Guidance* to provide additional guidance.

10. Cooperating Technical Partners Cooperative Agreement Program. The Cooperating Technical Partners Program ("CTPP") is authorized by the NFIA, § 1360 (codified as amended at 42 U.S.C. § 4101).

11. National Dam Safety Grant Program. The National Dam Safety Program is authorized by the National Dam Safety Program Act, Pub. L. No. 93-367, § 8 (1972) (codified as amended at 33 U.S.C. § 467f).

12. Earthquake Hazards Reduction Cooperative Agreement Program. The Earthquake Hazard Reduction Program is authorized by the Earthquake Hazard Reduction Act ("EHRA") of 1977, Pub. L. No. 95-124, § 5 (1977) (codified as amended at 42 U.S.C. § 7704). The implementing regulations are set forth at 44 C.F.R. Part 361.

13. Emergency Management Preparedness Grant. The Emergency Management Preparedness Grant ("EMPG") is authorized by the Stafford Act, §§ 611 and 613 (codified as amended at 42 U.S.C. §§ 5196 and 5196b); Post-Katrina Emergency Management Reform Act of 2006, Pub. L. No. 109-295, § 662 (2006) (codified as amended at 6 U.S.C. § 762); NFIA; and EHRA. FEMA publishes each year the *Emergency Management Performance Grant Program Funding Opportunity Announcement* that provides detailed information about this program. This announcement is posted on the Preparedness (Non-Disaster) Grants webpage.

14. Homeland Security Grant Program. The Homeland Security Grant Program is authorized by the Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 2002 and 2003 (2002) (codified as amended at 6 U.S.C. §§ 603 and 604) ("Homeland Security Act"). The Homeland Security Grant Program is comprised of three interconnected grant programs: State Homeland Security Program, Urban Areas Security Initiative, and Operation Stonegarden. FEMA publishes each year the *Homeland Security Grant Program Funding Opportunity Announcement* that provides detailed information about this program. This announcement is posted on the Preparedness (Non-Disaster) Grants webpage.

15. Nonprofit Security Grant Program. The Non-Profit Security Grant Program is authorized by the Homeland Security Act, § 2003 (codified as amended at 6 U.S.C. § 604). FEMA publishes each year the *Nonprofit Security Grant Program Funding Opportunity Announcement* that provides detailed information about this program. This announcement is posted on the Preparedness (Non-Disaster) Grants webpage.

16. Tribal Homeland Security Grant Program. The Tribal Homeland Security Grant Program is authorized by the Homeland Security Act, § 2005 (codified as amended at 6 U.S.C. § 606). FEMA publishes each year the *Tribal Homeland Security Grant Program Funding*

Opportunity Announcement that provides detailed information about this program. This announcement is posted on the Preparedness (Non-Disaster) Grants webpage.

17. Transit Security Grant Program. The Transit Security Grant Program is authorized by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 1406 (2007) (codified as amended at 6 U.S.C. § 1135). FEMA publishes each year the *Transit Security Grant Program Funding Opportunity Announcement* that provides detailed information about this program. This announcement is posted on the Preparedness (Non-Disaster) Grants webpage.

18. Port Security Grant Program. The Port Security Grant Program is authorized by the Maritime Transportation Security Act of 2002, Pub. L. No. 107-295, § 102 (2002) (codified as amended at 46 U.S.C. § 70107). FEMA publishes each year the *Port Security Grant Program Funding Opportunity Announcement* that provides detailed information about this program. This announcement is posted on the Preparedness (Non-Disaster) Grants webpage.

19. Fire Prevention and Safety Grant Program. The Fire Prevention and Safety Grant Program is authorized by the Federal Fire Prevention and Control Act of 1974, Pub. L. No. 93-498, § 33 (1974) (codified as amended at 15 U.S.C. § 2229) ("Federal Fire Prevention and Control Act"). The implementing regulations are set forth at 44 C.F.R. Chapter I, Subchapter C. FEMA also publishes each year the *Fire Prevention and Safety Grant Program Funding Opportunity Announcement* that provides detailed information about this program. This announcement is posted at the Assistance to Firefighters Grant Program webpage.

20. Staffing for Adequate Fire and Emergency Response. The Staffing for Adequate Fire and Emergency Response Program is authorized by the Federal Fire Prevention and Control Act, § 34 (codified as amended at 15 U.S.C. § 2229a). The implementing regulations are set forth at 44 C.F.R. Chapter I, Subchapter C. FEMA also publishes each year the *Staffing for Adequate Fire and Emergency Response Funding Opportunity Announcement* that provides detailed information about this program. This announcement is posted at the Assistance to Firefighters Grant Program webpage.

21. Continuing Training Grants. The Continuing Training Grant Program is authorized by the annual DHS Appropriations Acts.

APPENDIX B

DEFINITIONS

1. All definitions at 2 C.F.R. Part 200, subpart A apply to this circular, and the definitions marked by an "*" below are restatements of several of those definitions. In addition, there are additional definitions provided below that apply to this Supplement.

2. Approval means a written statement transmitted in written hard copy or in electronic format or medium of a FEMA official authorized to permit the NFE to take or omit an action required by the grant agreement, cooperative agreement, Uniform Rules, or this circular, which action may not be taken or omitted without such permission. An oral permission or interpretation has no legal effect, force, or authority.

3. Best value means a procurement by competitive proposal process in which the NFE reserves the right to select the most advantageous offer by evaluating and comparing factors in addition to cost or price, consistent with the stated evaluation criteria. Under such a process, the NFE may award a contract to the offeror whose offer is the most technically superior but is higher in price than the lowest priced, technically acceptable proposal.

4. Cardinal change means a significant change in contract work (property or services) that causes a major deviation from the original purpose of the work or the intended method of achievement, or causes a revision of contract work so extensive, significant, or cumulative that, in effect, the contractor is required to perform very different work from that described in the original contract.

5. Change order means an order authorized by the recipient or subrecipient to make changes, pursuant to contract provisions for such changes; may be issued with or without consent of the contractor, depending upon the language of the provision.

6. Constructive change means an act or omission by the NFE that, although not identified as a "change order," does in fact cause a change in the contract work.

7. *Contract means a legal instrument by which a NFE purchases property or services needed to carry out the project or program under a Federal award. The term does not include legal instrument, even if the NFE considers it a contract, when the substance of the transaction meets the definition of a Federal award or subaward. 2 C.F.R. § 200.22.

8. *Cooperative agreement means a legal instrument of financial assistance between a Federal awarding agency or pass-through entity and a NFE that, consistent with 31 U.S.C. §§ 6302-6305:

   a. Is used to enter into a relationship the principal purpose of which is to transfer anything of value from the Federal awarding agency or pass-through entity to the NFE to carry out a public purpose authorized by a law of the United States (*see* 31 U.S.C. § 6101(3));

and not to acquire property or services for the Federal government or pass-through entity's direct benefit or use;

b. Is distinguished from a grant in that a cooperative agreement provides for substantial involvement between the Federal awarding agency or pass-through entity and the NFE in carrying out the activity contemplated by the Federal award.

c. The term does not include:

i. A cooperative research and development agreement as defined in 15 U.S.C. § 3710a;

ii. An agreement that provides only: (a) Direct United States Government cash assistance to an individual; (b) A subsidy; (c) A loan; (d) A loan guarantee; or (e) Insurance. 2 C.F.R. § 200.24.

9. Department or DHS means the Department of Homeland Security.

10. Design-build means a procurement method consisting of contracting for design and construction simultaneously with a contract award to a single contractor or contractor team that will be responsible for both the project's design and construction.

11. *Federal awarding agency means the Federal agency that provides a Federal award directly to the NFE. 2 C.F.R. § 200.37. In this circular, the Federal awarding agency is FEMA.

12. FEMA financial assistance means the assistance that NFEs receive or administer in the form of grants and cooperative agreements under the programs set forth in Chapter I, ¶ 3.

13. FEMA means the Federal Emergency Management Agency.

14. FEMA Award or "Award" has the meaning, depending on the context, of:

a. The FEMA financial assistance that a NFE receives directly from FEMA or indirectly from a pass-through entity under one of the grant and cooperative agreement programs set forth in Chapter I, ¶ 3; or

b. The instrument setting forth the terms and conditions associated with FEMA financial assistance.

15. *Fixed amount award means a type of grant agreement under which the Federal awarding agency or pass-through entity provides a specific level of support without regard to actual costs incurred under the Federal award. This type of Federal award reduces some of the administrative burden and recordkeeping requirements for both the NFE and Federal awarding agency or pass-through entity. Accountability is based primarily on performance and results. 2 C.F.R. § 200.45.

16. Full and open competition generally means that a complete requirement is publicly solicited and all responsible sources are permitted to compete.

17. *Grant agreement means a legal instrument of financial assistance between a Federal awarding agency or pass-through entity and a NFE that, consistent with 31 U.S.C. §§ 6302, 6304:

    a. Is used to enter into a relationship the principal purpose of which is to transfer anything of value from the Federal awarding agency or pass-through entity to the NFE to carry out a public purpose authorized by a law of the United States (*see* 31 U.S.C. § 6101(3)); and not to acquire property or services for the Federal awarding agency or pass-through entity's direct benefit or use;

    b. Is distinguished from a cooperative agreement in that it does not provide for substantial involvement between the Federal awarding agency or pass-through entity and the NFE in carrying out the activity contemplated by the Federal award.

    c. Does not include an agreement that provides only: (1) Direct United States Government cash assistance to an individual; (2) A subsidy; (3) A loan; (4) A loan guarantee; or (5) Insurance. 2 C.F.R. § 200.51.

18. *Indian tribe means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. Chapter 33), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians (25 U.S.C. § 450b(e)). *See* annually published Bureau of Indian Affairs list of Indian Entities Recognized and Eligible to Receive Services. 2 C.F.R. § 200.54.

19. *Institution of higher education is defined at 20 U.S.C. § 1001. 2 C.F.R. § 200.55.

20. *Local government means any unit of government within a state, including a: (a) County; (b) Borough; (c) Municipality; (d) City; (e) Town; (f) Township; (g) Parish; (h) Local public authority, including any public housing agency under the United States Housing Act of 1937; (i) Special district; (j) School district; (k) Intrastate district; (l) Council of governments, whether or not incorporated as a nonprofit organization under state law; and (m) any other agency or instrumentality of a multi-, regional, or intra-state or local government. 2 C.F.R. § 200.64.

21. Joint procurement means a method of contracting in which two or more purchasers agree to use a single solicitation document and enter into a single contract with a vendor for delivery of property or services for a fixed quantity. The fixed quantity may be expressed as a total minimum and total maximum. Unlike a State, local, or Indian tribal purchasing schedule, a joint procurement is not drafted for the purpose of accommodating the needs of other parties that may later choose to participate in the benefits of that contract.

22. *Micro-purchase means a purchase of property or services using simplified acquisition procedures, the aggregate amount of which does not exceed the micro-purchase threshold. Micro-purchase procedures comprise a subset of a NFE's small purchase procedures. The NFE uses such procedures in order to expedite the completion of its lowest-dollar small purchase transactions and minimize the associated administrative burdens and costs. The

micro-purchase threshold is set by the Federal Acquisition Regulation at 48 C.F.R. Part 2 (Definitions of Words and Terms), subpart 2.1 (Definitions). The regulations state that it is $ 3,000 *except as otherwise discussed in subpart 2.1 of that regulation*, but this threshold is periodically adjusted for inflation. 2 C.F.R. § 200.67. As of 1 October 2015, the current micro-purchase threshold, after adjustment for inflation, is $ 3,500.

23. *NFE means a state, local government, Indian tribe, institution of higher education, hospital, or nonprofit organization that carries out a Federal award as a recipient or subrecipient. 2 C.F.R. § 200.69.

24. *Nonprofit organization means any corporation, trust, association, cooperative, or other organization, not including IHEs, that:

    a. Is operated primarily for scientific, educational, service, charitable, or similar purposes in the public interest;

    b. Is not organized primarily for profit; and

    c. Uses net proceeds to maintain, improve, or expand the operations of the organization. 2 C.F.R. § 200.69.

25. Option means a unilateral right in a contract by which, for a specified time, a NFE may elect to purchase additional equipment, property, or services called for by the contract, or may elect to extend the term of the contract for a set period of time.

26. Office of Inspector General or "OIG" means the independent auditing organization within the Department of Homeland Security.

27. *Pass-through entity means a NFE that provides a subaward to a subrecipient to carry out part of a Federal program. 2 C.F.R. § 200.74.

28. *Personal property means property other than real property. It may be tangible, having physical existence, or intangible. 2 C.F.R. § 200.78.

29. *Property means real property or personal property. 2 C.F.R. § 200.81.

30. Purchasing agent means an agent of the NFE that assists in the procurement of goods and services. The purchasing agent may assist the NFE in, among other things, conducting market research, preparing solicitations, evaluating bids or proposals, and negotiating contracts, and screening information about products.

31. *Real property means land, including land improvements, structures or appurtenances thereto, but excludes machinery and equipment. 2 C.F.R. § 200.85.

32. *Recipient (formerly "Grantee) means a NFE that receives a Federal award directly from a Federal awarding agency to carry out an activity under a Federal program. The term recipient does not include subrecipients. 2 C.F.R. § 200.86.

33. *Simplified acquisition threshold means the dollar amount below which a NFE may purchase property or services using small purchase methods. NFEs adopt small purchase procedures in order to expedite the purchase of items costing less than the simplified acquisition threshold. The simplified acquisition threshold is set by the Federal Acquisition Regulation at 48 C.F.R. Subpart 2.1 (Definitions) and in accordance with 41 U.S.C. § 1908. As of the publication of this circular, the simplified acquisition threshold is $150,000, but this threshold is periodically adjusted for inflation. 2 C.F.R. § 200.88.

34. *State means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any agency or instrumentality thereof exclusive of local governments. 2 C.F.R. § 200.90. A State does not include an Indian tribe.

35. State, local government, or Indian tribe purchasing schedule or purchasing contract means an arrangement that a State, local government, or Indian tribe has established with multiple vendors in which those vendors agree to provide essentially an option to the State, local government, or Indian tribe and their subordinate government entities and others it might include in their programs, to acquire specific property or services in the future at established prices and consistent with the terms established in the schedule or purchasing contract.

36. *Subaward (formerly "Subgrant") means an award provided by a pass-through entity to a subrecipient for the subrecipient to carry out part of a Federal award received by the pass-through entity. It does not include payments to a contractor or payments to an individual that is a beneficiary of a Federal program. A subaward may be provided through any form of legal agreement, including an agreement that the pass-through entity considers a contract. 2 C.F.R. § 200.92.

37. *Subrecipient (formerly "Subgrantee") means a NFE that receives a subaward from a pass-through entity to carry out part of a Federal program; but does not include an individual that is a beneficiary of such program. A subrecipient may also be a recipient of other Federal awards directly from a Federal awarding agency. 2 C.F.R. § 200.93.

38. Third party contract means a "contract" as defined above.

39. Uniform Rules (also referred to as the Super Circular) means the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards codified at 2 C.F.R. Part 200, which DHS adopted on December 19, 2014.

40. *Value engineering means the systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lowest cost. Normally associated with construction or production contracts. 2 C.F.R. § 200.318(g).

APPENDIX C

APPLICABLE FEDERAL LAWS, REGULATIONS, AND EXECUTIVE ORDERS

1. Background.

   a. In addition to complying with the Uniform Rules and the enabling laws, implementing regulations, and FEMA policies for a grant or cooperative agreement program, each NFE must also comply with all other applicable Federal laws, regulations, and executive orders.

   b. Many of these laws, regulations, and executive orders will need to be included in third party contracts to the lowest tier necessary, and others, although not expressly referenced in a contract, will have a direct and indirect effect on a NFE's third party contracts.

   c. DHS issues, on an annual basis, Standard Terms and Conditions that apply to recipients of Federal awards from all DHS Components, including FEMA. In addition, a recipient executes a Standard Form ("SF") 424B or 424D with its grant or cooperative agreement application to FEMA that contains standard assurances. The DHS Standard Terms and Conditions and SF 424B and D contain references to many cross-cutting Federal laws and regulations that may apply to a FEMA award.

   d. The following provides a non-exhaustive list and description of some of the cross-cutting laws, regulations, and executive orders that may affect a NFE's procurement.

2. Debarment and Suspension

   a. NFEs and contractors are subject to the debarment and suspension regulations implementing Executive Order 12549, *Debarment and Suspension* (1986) and Executive Order 12689, *Debarment and Suspension* (1989) at 2 C.F.R. Part 180 and the Department of Homeland Security's regulations at 2 C.F.R. Part 3000 (Nonprocurement Debarment and Suspension). These regulations restrict awards, subawards, and contracts with certain parties that are debarred, suspended, or otherwise excluded from or ineligible for participation in Federal assistance programs and activities.

   b. The regulations at 2 C.F.R. Part 180 and 2 C.F.R. Part 3000 specifically prohibit a NFE from entering into a "covered transaction" with a party listed on the System for Award Management Exclusions ("SAM Exclusions"). SAM Exclusions is the list maintained by the General Services Administration that contains the names of parties debarred, suspended, or otherwise excluded by agencies, as well as parties declared ineligible under statutory or regulatory authority other than Executive Order 12549. SAM exclusions can be accessed at www.sam.gov. *See* 2 C.F.R. §§ 180.530.

   c. The Department of Homeland Security regulations at 2 C.F.R. Part 3000 include, within the meaning of a "covered transaction," a third party contract at any tier of

$25,000 or more; a third party contract at any tier for a Federally required audit (irrespective of the contract amount); and a third party contract at any tier that must be approved by an FEMA official irrespective of the contract amount. 2 C.F.R. § 3000.220; 2 C.F.R. § 180.220.

d. The Uniform Rules require a NFE to include contract provisions that require compliance with debarment and suspension prohibitions. *See* Chapter IV, ¶¶ 6.d and 12.a.ix; 2 C.F.R. Part 200, Appendix II, ¶ I; DHS Standard Terms and Conditions, v 3.0, ¶ X (Dec. 4, 2013)

3. Acknowledgement of FEMA Funding. A NFE must acknowledge its use of Federal funding when issuing statements, press releases, requests for proposals, bid invitations, and other documents describing projects or programs funded in whole or in part with FEMA financial assistance. Specifically, the document shall indicate that FEMA is providing the funds, the Catalog of Federal Domestic Assistance Number, as applicable, and the amount provided. *See* Financial Services and General Government Appropriations Act, 2015, Pub. L. No. 113-83, Division E, § 724 (2015); DHS Standard Terms and Conditions, v 3.0, ¶ II (Dec. 4, 2013).

4. Lobbying Certification and Disclosure.

a. A NFE must comply with 31 U.S.C. § 1352 and 44 C.F.R. Part 18, which provides that no FEMA financial assistance may be expended by a recipient, subrecipient, contractor, or subcontractor to pay any person to influence, or attempt 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 any Federal action concerning the award or renewal.

b. If a third party contract will exceed $100,000, before awarding the contract, the NFE must obtain a lobbying certification and, if applicable, a lobbying disclosure from a prospective third party contractor. 44 C.F.R. § 18.110.

c. The Uniform Rules require a contractor to include provisions in its contracts of $100,000 or more for compliance with lobbying certification and disclosure requirements. *See* Chapter IV, ¶ 12.a.x; 2 C.F.R. Part 200, Appendix II, ¶ J; DHS Standard Terms and Conditions, v. 3.0, ¶ XVIII (Dec. 4, 2013).

5. Civil Rights Requirements. A NFE is required to follow various civil rights requirements when carrying out activities under a FEMA award, and these requirements will flow down to a NFE's contractors at every tier.

a. Nondiscrimination.

i. Nondiscrimination on the Basis of Race, Color, and National Origin. Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d *et seq.*), FEMA's implementing regulations at 44 C.F.R. Part 7 (*Nondiscrimination in Federally Assisted Programs*), and the Department's implementing regulations at 6 C.F.R. Part 21 (*Nondiscrimination on the Basis of Race, Color, or National Origin in Programs*

or Activities Receiving Federal Financial Assistance) provide that no person in the United States will, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. *See* DHS Standard Terms and Conditions, v 3.0, ¶ VII (Dec. 4, 2013); Standard Form 424D, ¶ 10.

ii. Nondiscrimination on the Basis of Sex. Title IX of the Education Amendments of 1972 (codified as amended at 20 U.S.C. § 1681 et seq.), FEMA's implementing regulations at 44 C.F.R. Part 19 (*Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*), and the Department's implementing regulations at 6 C.F.R. Part 15 (*Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*) prohibit discrimination on the basis of sex in any education program or activity receiving Federal financial assistance. *See* DHS Standard Terms and Conditions, v 3.0, ¶ IX (Dec. 4, 2013); Standard Form 424D, ¶ 10.

iii. Nondiscrimination on the Basis of Disability. The Americans with Disability Act of 1990 (codified as amended at 42 U.S.C. §§ 12101-12213) prohibits discrimination against qualified individuals with disabilities in programs, activities, and services, and imposes specific requirements on public and private public and private entities. Contractors must comply with the responsibilities under Titles I, II, III, IV, and V of the Americans with Disability Act of 1990 in employment, public services, public accommodations, telecommunications, and other provisions, many of which are subject to regulations issued by other Federal agencies. *See* DHS Standard Terms and Conditions, v 3.0, ¶ V (Dec. 4, 2013); Standard Form 424D, ¶ 10.

iv. Nondiscrimination on the Basis of Handicap. Section 504 of the Rehabilitation Act of 1973 (codified as amended at 29 U.S.C. § 794) and FEMA's implementing regulations at 44 C.F.R. Part 16 (*Enforcement of Nondiscrimination on the Basis of Handicap in Programs or Activities Conducted by the Federal Emergency Management Agency*) provide that no otherwise qualified handicapped individual in the United States will, solely by reason of handicap, be excluded from participation in, be denied the benefits of, or be subjected to, discrimination under any program or activity receiving Federal financial assistance. *See* DHS Standard Terms and Conditions, v 3.0, ¶ XXIII (Dec. 4, 2013); Standard Form 424D, ¶ 10.

v. Nondiscrimination on the Basis of Age. The Age Discrimination Act of 1975 (codified as amended at 42 U.S.C. § 6101 *et seq.*), and Department of Health and Human Services implementing regulations at 45 C.F.R. Part 90 (*Nondiscrimination on the Basis of Age in Programs or Activities Receiving Federal Financial Assistance*) prohibit discrimination against individuals on the basis of age in any program or activity receiving Federal financial assistance. *See* DHS Standard Terms and Conditions, v 3.0, ¶ IV (Dec. 4, 2013); Standard Form 424D, ¶ 10.

vi. Nondiscrimination on the Basis of Limited English Proficiency. Title VI of the Civil Rights Act of 1964 prohibition against discrimination on the basis of national origin requires that recipients and subrecipients of FEMA assistance take reasonable steps to provide meaningful access to persons with limited English proficiency. Executive Order 13166, *Improving Access to Services for Persons with Limited English Proficiency* (Aug. 11, 2000), requires Federal agencies to issue guidance to recipients, assisting such organizations and entities in understanding their language access obligations. The Department published the required guidance, which is entitled DHS Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 76 Fed. Reg. 21755-21768 (Apr. 18, 2011). *See* DHS Standard Terms and Conditions, v 3.0, ¶ XVII (Dec. 4, 2013).

vii. Consistent with the preceding nondiscrimination requirements, a NFE's contractors must comply with the following requirements.

(1) A contractor of a NFEs must not discriminate against any employee or applicant for employment because of race, color, creed, national origin, sex, age, English proficiency, or disability.

(2) A contractor of a NFE carrying a program or activity under a FEMA award must not, on the grounds of race, color, creed, national origin, sex, age, English proficiency, or disability, exclude a person from participation in, deny him/her benefits, or subject him/her to discrimination.

(3) Contractors must adhere to any Federal implementing regulations and other requirements that the Department and the FEMA have with respect to nondiscrimination.

b. Equal Opportunity

i. Race, Creed, National Origin, Sex. A contractor must, in accordance with Title VII of the Civil Rights Act of 1968, comply with all applicable equal employment opportunity requirements of U.S. Department of Labor regulations at 41 C.F.R Part 60 (Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor), which implement Executive Order No. 11246, *Equal Employment Opportunity*, as amended by Executive Order No. 11375, *Amending Executive Order 11246 Relating to Equal Employment Opportunity*, 42 U.S.C. § 2000e note. The Contractor must take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, creed, national origin, sex, or age. 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. *See* DHS Standard Terms and Conditions, v 3.0, ¶ VII (Dec. 4, 2013); Standard Form 424D, ¶ 10.

ii. Age. A contractor must refrain from discrimination against present and prospective employees for reason of age in accordance with section 4 of the Age Discrimination in Employment Act of 1967 (codified as amended at 29 U.S.C. § 623).

iii. Disabilities. A contractor must, in accordance with Section 102 of the Americans with Disabilities Act of 1990 (codified as amended at 42 U.S.C. § 12112) and the requirements of the U.S. Equal Employment Opportunity Commission at 29 C.F.R. Part 1630 (Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act) pertaining to employment of persons with disabilities.

iv. Except as otherwise provided under 41 C.F.R. Part 60, the Uniform Rules require that all contracts that meet the definition of "Federally assisted construction contract" in 41 C.F.R. § 60-1.3 must include the equal opportunity clause provided under 41 C.F.R. § 60-1.4(b), in accordance with Executive Order 11246, *Equal Employment Opportunity* (30 Fed. Reg. 12319, 12935, 3 C.F.R. Part, 1964-1965 Comp., p. 339), as amended by Executive Order 11375, *Amending Executive Order 11246 Relating to Equal Employment Opportunity*, and implementing regulations at 41 C.F.R. Part 60 (Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor). *See* Chapter IV, ¶ 12.a.iii; 2 C.F.R. Part 200, Appendix II, ¶ C.

6. Environmental and Historic Preservation Protections. Federal laws, regulations, and executive orders and the terms and conditions of specific FEMA award require the NFE to comply with applicable environmental and historic preservation requirements, which will, in turn, necessitate the NFE's implementation of these requirements as necessary in its third party contracts. *See* Standard Form 424D, ¶¶ 15, 16, and 17.

a. General – Environmental and Historic Preservation Compliance. FEMA will identify various environmental and historic preservation mitigation measures with which a NFE must comply when performing the scope of work under a FEMA award. FEMA expects the NFE to include adequate third party provisions to facilitate compliance with such measures that the NFE has agreed to implement as a term and condition of the FEMA award. The following sections provide brief discussion of a few of the applicable environmental and historic preservation statutes.

b. National Environmental Policy Act

i. The National Environmental Policy Act ("NEPA") requires FEMA to consider the environmental impact of proposed actions (such as awarding Federal grants and cooperative agreements), including adverse consequences and reasonable alternatives, before making decisions or taking actions that may significantly affect the quality of the human environment. *See* National Environmental Policy Act of 1969, Pub. L. No. 91-190 (1969) (codified as amended at 42 U.S.C. §§ 4321-4347); Standard Form 424D, ¶ 15.

ii. A NFE should not have a contractor proceed with contract work until FEMA has completed any necessary NEPA review and awarded the grant, cooperative agreement, and individual project under such grant or cooperative agreement.

iii. Occasionally, a NFE will request funding for an action that has been initiated and/or completed before FEMA has completed environmental review and documentation as required by NEPA and FEMA's implementing regulations at 44 C.F.R. Part 10 (Environmental Considerations) and the Council for Environmental Quality implementing regulations at title 40 of the C.F.R.

iv. It is FEMA policy that actions initiated and/or completed without fulfilling the specific documentation and procedural requirements of NEPA may not be considered for funding. There are, notably, statutory exclusions to this requirement, and FEMA may provide additional exceptions in emergency situations. *See* FEMA Environmental Planning and Historic Preservation Policy No. 108.024.4, *Projects Initiated Without Environmental Review Required by the National Environmental Policy Act* (NEPA) (Dec. 18, 2013).

v. The statutory exclusions and exceptions do not relieve FEMA of the responsibility to comply with other legal requirements under the National Historic Preservation Act, Endangered Species Act, Clean Water Act, other laws, and various executive orders. Furthermore, FEMA may not consider for funding work commenced before FEMA has completed review under these other legal requirements, even where NEPA review is not required.

c. Endangered Species Act

i. The Endangered Species Act ("ESA") requires all Federal agencies to consider the effects of their actions (such as grants and cooperative agreement awards) on listed species and their critical habitats. *See* Endangered Species Act of 1973, Pub. L. No. 93-205 (1973) (codified as amended at 16 U.S.C. §§ 1531-1544); Standard Form 424D, ¶ 15.

ii. FEMA must consult with the National Marine Fisheries Service or U.S. Fish and Wildlife Services to ensure that any proposed action funded under a grant or cooperative agreement is not likely to jeopardize the continued existence of any endangered or threatened species or result in in the destruction or adverse modification of a habitat. This consultation, if necessary, must take place before the action is taken, although there are exceptions for emergency actions.

d. Clean Air Act

i. The Clean Air Act establishes the basic structure for regulating air pollutants, which requires the Environmental and Protection Agency ("*EPA*") to establish national air quality standards and states to adopt enforceable plans to achieve the standards. 42 U.S.C. §§ 7401-7671q.

ii. Section 306 of the Clean Air Act (42 U.S.C. § 7606) and EPA's implementing regulations at 2 C.F.R. Part 1523, subpart J, disqualify persons convicted of certain offenses from eligibility to receive any contract, subcontract, assistance, subassistance, loan, or other nonprocurement benefit or transaction that is prohibited by a Federal agency under the government debarment and suspension system if a person will perform any part of the transaction or award at the facility giving rise to the conviction and the person owns, leases, or supervises the facility.

iii. The Uniform Rules require a contractor to agree to comply with this and all other applicable standards, orders, or regulations issued pursuant to the Clean Air Act for contracts over $150,000. *See* Chapter IV, ¶ 12.a.vii and 2 C.F.R. Part 200, Appendix II, ¶ G; Standard Form 424D, ¶ 15.

e. Federal Water Pollution Control Act

i. The Federal Water Pollution Control Act ("Clean Water Act") establishes the basic structure for regulating discharges of pollutants into the waters of the United States and regulating quality standards for surface waters. 33 U.S.C. §§ 1251-1387.

ii. Section 508 of the Clean Water Act (33 U.S.C. § 1368) and EPA's implementing regulations at 2 C.F.R. Part 1523, subpart J, disqualify persons convicted of certain offenses from eligibility to receive any contract, subcontract, assistance, subassistance, loan, or other nonprocurement benefit or transaction that is prohibited by a Federal agency under the government debarment and suspension system if a person will perform any part of the transaction or award at the facility giving rise to the conviction and the person owns, leases, or supervises the facility.

iii. The Uniform Rules require a contractor to agree to comply with this and all other applicable standards, orders, or regulations issued pursuant to the Clean Water Act for contracts over $150,000. *See* Chapter IV, ¶ 12.a.vii and 2 C.F.R. Part 200, Appendix II, ¶ G; Standard Form 424D, ¶ 15.

f. Recycled Products

i. A NFE that is a State agency or agency of a political subdivision of a State and its contractors must comply with section 6002 of the Resource Conservation and Recovery Act of 1976. 42 U.S.C. § 6962; 2 C.F.R. § 200.322.

ii. The requirements of Section 6002 include procuring only items designated in guidelines of the EPA at 40 C.F.R. Part 247 that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds $10,000 or the value of the quantity acquired by the preceding fiscal year exceeded $10,000; procuring solid waste management services in a manner that maximizes energy and resource recovery; and establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines.

iii. The Uniform Rules require a NFE to include provisions in its contracts for compliance with section 6002 of the Resource Conservation and Recovery Act of 1976. *See* Chapter IV, ¶ 12.a.xi and Chapter V, ¶ 7; 2 C.F.R. Part 200, Appendix II, ¶ K.

7. Davis-Bacon Act

a. When required by FEMA grant or cooperative agreement program legislation, all prime construction contracts in excess of $2,000 awarded by NFEs must include a provision for compliance with the Davis-Bacon Act (40 U.S.C. §§ 3141-3144 and 3146-3148) as supplemented by Department of Labor regulations at 29 C.F.R. Part 5 (Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction). *See* Chapter IV, ¶ 12.a.iv; 2 C.F.R. Part 200, Appendix II, ¶ D.

b. In accordance with the statute, a NFE's contractors must 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.

c. 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, such as the Public Assistance Grant Program.

8. Copeland "Anti-Kickback" Act

a. The Copeland "Anti-Kickback" Act (40 U.S.C. § 3145), as supplemented by its implementing regulations at 29 C.F.R. Part 3 (Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States) apply to any NFE contract which is subject to Federal wage standards and which is for the construction, prosecution, completion, or repair of public buildings, public works or buildings or works financed in whole or in part by loans or grants from the United States. This law prohibits a contractor from inducing, by any means, any employee to give up any part of his or her compensation to which he or she is otherwise entitled.

b. The Uniform Rules require a NFE to include a provision for compliance with the Copeland Anti-Kickback Act in all contracts *subject to* the Davis-Bacon Act. *See* Chapter IV, ¶ 12.a.iv; 2 C.F.R. Part 200, Appendix II, ¶ D.

9. Contract Work Hours and Safety Standards Act

a. The Uniform Rules require, where applicable, all contracts awarded by the NFE in excess of $100,000 that involve the employment of mechanics or laborers to include a provision for compliance with 40 U.S.C. §§ 3702 and 3704, as supplemented by Department of Labor regulations at 29 C.F.R. Part 5 and 29 C.F.R. Part 1926. *See* Chapter IV, ¶ 12.a.v; 2 C.F.R. Part 200, Appendix II, ¶ E.

b. Under 40 U.S.C. § 3702, each contractor must be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than one and a half times the basic rate of pay for all hours worked in excess of 40 hours in the work week.

c. The requirements of 40 U.S.C. § 3704 are applicable to construction work and provide that no laborer or mechanic must be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of property or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence

10. Seismic Safety

a. All construction of new buildings for which FEMA award funding will be used must use appropriate seismic design and construction standards and practices pursuant to the Earthquake Hazard Reduction Act of 1977, Pub. L. No. 95-124 (1977) (codified as amended at 42 U.S.C. §§ 7701-7709) and Executive Order 12699, *Seismic Safety of Federal and Federally Assisted or Regulated New Building Construction* (1990).

b. A NFE should include compliance with seismic safety provisions in its third party contracts for construction.

11. Hotel and Motel Fire Safety. The Hotel and Motel Fire Safety Act of 1990, Pub. L. No. 391 (1990) (codified at 15 U.S.C. § 2225a) prohibits, among other things, a NFE from using FEMA award funding to source contract costs to sponsor or fund in whole or in part a meeting, convention, conference, or training seminar that is conducted in, or that otherwise uses the rooms, facilities, or services of, a place of public accommodation that does not meet the requirements of the fire prevention and control guidelines described in section 29 of the Federal Fire Prevention and Control Act of 1974 (15 U.S.C. § 2225).

12. Buy American Act.

a. General. The Buy American Act is a major domestic preference statute governing procurement by the Federal government. 41 U.S.C. §§ 8301-8305; 48 C.F.R. Part 25. In brief, the Federal government is required to buy domestic "articles, materials, and property" when they are acquired for public use unless a specific exception applies. The Buy American Act, however, only applies to direct procurements by the Federal government and does not apply to procurement by NFEs even when using FEMA assistance funding.

b. "Little Buy American Acts." In addition to the Buy American Act, Congress has passed numerous "Little Buy American Acts" to govern specific types of procurements that are not covered by the Buy American Act. There are currently no such Little Buy American Acts for FEMA grant and cooperative agreements subject to this circular.

c. Stafford Act Grant Programs. The Disaster Mitigation Act of 2000 amended various provisions of the Stafford Act—this included Sections 404, 406, and 408 of the

Stafford Act, which are the enabling authorities for the Hazard Mitigation Grant Program, Public Assistance Grant Program, and Individual and Households Program. Notably, Section 306(a) of the Disaster Mitigation Act of 2000 also had a general provision that provided that "No funds ***authorized to be appropriated*** under...any amendment made by [the Disaster Mitigation Act of 2000] may be expended by an entity unless the entity, in expending the funds, complies with chapter 83 of title 41." Disaster Mitigation Act of 2000, Pub. L. No. 106-390, § 306(a) (2000) (codified at 42 U.S.C. § 5206(a)) (emphasis added). There is, however, currently no authorization of appropriations for the Stafford Act, rendering Section 306(a) of the Disaster Mitigation Act of 2000 inapplicable to Stafford Act grant and cooperative agreements.

13. Federal Criminal Law. A NFE may not use funding under a FEMA award to violate any Federal criminal law either directly or through its contractors. Any such activity that FEMA administratively determines to violate a criminal law is ineligible for FEMA assistance, and FEMA may terminate an entire award based on the violation. The following provides a summary of several of those laws.

    a. Representational Statutes. Sections 203 and 205 of title 18 of the United States Code impose restrictions on outside activities of Federal employees involving representation of others before the Federal government. The prohibitions under 18 U.S.C. §§ 203 and 205 apply to all FEMA employees, including Disaster Reservists. Disaster Reservists are personnel authorized by the special hiring authority in the Stafford Act that are not full-time employees, but rather work on an on-call, intermittent basis to perform disaster response and recovery activities. In some cases, a NFE may hire a contractor to perform work under a FEMA award, and the contractor may have employees who are also Disaster Reservists (not currently activated by FEMA) perform that work. These Disaster Reservists are prohibited from performing any representational activity on behalf of the contractor and NFE before any Federal agency, including FEMA.

    b. False Statements Act. The False Statement Act sets forth liability for, among other things, any person who knowingly submits a false claim to the Federal government or causes another to submit a false claim to the government or knowingly makes a false record or statement to get a false claim paid by the government. 31 U.S.C. §§ 3729-3733. For example, a false claim could include false billing documentation submitted by a NFE from a third-party contractor under a FEMA award.

VOLUME 3
TECHNICAL SPECIFICATIONS

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SECTION 01 10 00

SUMMARY OF WORK

PART 1 GENERAL

1.01 SECTION INCLUDES

A. Contract description.

B. Specification conventions.

1.02 CONTRACT DESCRIPTION

A. Anticipated scopes of work are industrial in nature and consistently include civil, mechanical, electrical, and structural trades.

1.03 SPECIFICATION CONVENTIONS

A. These specifications are written in imperative mood and streamlined form. This imperative language is directed to the Contractor, unless specifically noted otherwise. The words “shall be” are included by inference where a colon (:) is used within sentences or phrases.

PART 2 PRODUCTS (Not Used.)

PART 3 EXECUTION (Not Used.)

END OF SECTION

SECTION 01 14 00

COORDINATION AND SITE CONDITIONS

PART 1 GENERAL

1.01 SECTION INCLUDES

A. Requirements for coordinating and sequencing the work under the Contract, and requirements regarding existing site conditions.

1.02 SITE CONDITIONS

A. Information On Site Conditions:
   1. General: Information obtained by the Owner from other sources regarding site conditions, topography, subsurface information, groundwater elevations, existing construction of site facilities as applicable, and similar data will be available for inspection at the office of the Owner upon request. The Owner assumes no responsibility for its accuracy or completeness or for the Contractor's interpretation of such information.

B. Existing Utilities:
   1. Location:
      a. Contractor shall exercise reasonable care to verify locations of utilities and facilities marked by locating agencies or shown on the Drawings and to determine the presence of those not shown. Immediate and adjacent areas where excavations are to be made shall be thoroughly checked by visual examination for indications of underground facilities, and also checked with electronic metal and pipe detection equipment.
      b. Where there is reasonable cause to verify the presence or absence of an underground facility, make exploratory excavations prior to proceeding with major excavation in the area.
      c. Where information on buried facilities is required to verify their nature, shape, configuration, dimensions, materials, or other properties, make exploratory excavations as acceptable to the Owner.
   2. Contractor's Responsibilities:
      a. Where Contractor's operations could cause damage or inconvenience to railway, telegraph, telephone, television, power, oil, gas, water, sewer, or irrigation systems, the Contractor shall make arrangements necessary for the protection of these utilities and services. Replace existing utilities removed or damaged during construction, unless otherwise provided for in these Contract Documents.
         1) Rock traps shall be installed in all downstream outlets of manholes. No concrete, pipe, or any debris shall be left in the sewer lines after construction. It is the sole responsibility of the contractor to install and maintain rock traps. Rock trap design shall be approved by the Owner.
      b. Notify utility offices that are affected by construction operations at least 48 hours in advance. Under no circumstances expose any utility without

first obtaining permission from the appropriate agency. Once permission has been granted, locate, expose, and provide temporary support for the utilities. Contact Underground Services Alert (U.S.A.) at telephone number 1-800-227-2600 for marking prior to digging.

c. Protect all utility poles from damage. If interfering utility poles will be encountered, notify the Owner at least 5 days in advance of construction operations to permit necessary arrangements with the utility company for protection or relocation of the interfering poles.

d. Contractor shall be solely and directly responsible to Owner and operator of such properties for damage, injury, expense, loss, inconvenience, delay, suits, actions, or claims of any character brought because of injuries or damage which may result from construction operations under this Contract.

e. Neither Owner nor its officers or agents shall be responsible to Contractor for damages as a result of Contractor's failure to protect utilities encountered in the work.

f. In event of interruption to domestic water, sewer, storm drain, or other utility services as a result of accidental damage due to construction operations, promptly notify the proper authority. Cooperate with said authority in restoration as promptly as possible and pay for repair. Prevent interruption of utility service unless granted by the utility owner.

g. In the event Contractor encounters water service lines that interfere with trenching, obtain prior approval of the water utility, shut down the service, dig through, remove service as necessary, and restore service to previous conditions using equal materials.

3. Names of known Utilities: Notify the following applicable utilities if conflicts or emergencies arise during the work:

a. Gas Mains and Services:

PG&E Engineering:	Jason Conihar at (415) 257-3404 or Mindee Rayburn at (415) 257-3405
Emergency:	(800) 743-5000

b. Electrical Utilities:

PG&E	
Service Planning:	(415) 257-3431 or Al Caballero at (415) 257-3174
Emergency:	(800) 743-5000

c. Telephone Utilities:

SBC/AT&T	Debbie Barrios at (707) 575 2077or (707)321 6207
Emergency:	(800) 310-2355

c. Marin County Public Works Department:

Front Desk:	(415) 499-6530

d. City of San Rafael:

Front Desk:	(415) 485-3355

e. Marin Municipal Water District:

Front Desk: (415) 945-1400

f. Comcast:
Customer Service: (866) 690 6996

C. Interfering Structures:
1. Take necessary precautions to prevent damage to existing structures whether on the surface, aboveground, or underground. An attempt has been made to show major structures on the Drawings. While the information has been compiled from the best available sources, its completeness and accuracy cannot be guaranteed.
2. Protect existing structures from damage, whether or not they lie within limits of easements obtained by the Owner. Where existing fences, gates, barns, sheds, buildings, or other structure must be removed to properly carry out work, or are damaged during work, restore them to original condition and to the satisfaction of property owner.
3. Contractor may remove and replace in equal or better than original condition, small structures such as fences, mailboxes, and signposts that interfere with Contractor's operations.

D. Field Relocation:
1. During construction, it is expected that minor relocations of proposed facilities will be necessary. Make such relocations only by direction of the Owner. If existing structures are encountered that prevent construction as shown, notify the Owner before continuing with work so Owner may make necessary field revisions.
2. Where shown or directed by and acceptable to the Owner provide relocation of existing facilities to include piping, utilities, equipment, structures, electrical conduit wiring, electrical duct bank, and other miscellaneous items. Use only new materials for relocation of existing facilities. Match materials of existing facilities, unless otherwise shown or specified. Perform relocations to minimize downtime of existing facilities. Install new portions of existing facilities in their relocated position prior to removing existing facilities, unless otherwise accepted by Owner. Comply with cutting and patching requirements in this section.

E. Monuments and Markers:
1. Preserve and protect survey monuments and markers throughout construction. If damage occurs or removal becomes necessary, immediately notify Owner.
2. All survey markers or monuments which are damaged or removed as a result of the Contractor's operations will be reset by the Owner at the Contractor's expense.
3. In order to allow for properly referencing any existing survey monuments or markers which may be damaged or removed, the Contractor shall provide the Owner with a minimum of 10 working days' notice before proceeding with any work which might damage or remove any existing markers.

F. Easements:
1. Where portions of work will be located on public or private property, easements and permits have been obtained by Owner. Easements will provide for use of property for construction purposes only to the extent indicated on easements.

Copies of these easements and permits will be available from Owner for inspection. Contractor shall determine the adequacy of easements obtained and abide by easement provisions. Confine construction operations to within easement limits or make special arrangements with property owners or appropriate public agency for additional area required.

2. Before final payment will be authorized, Contractor shall furnish the Owner written releases from property owners or public agencies where side agreements or special easements have been made, or where Contractor's operations have not been kept within the Owner's construction right-of-way or property.
3. In the event Contractor is unable to secure written releases, inform the Owner of the reasons.
    a. Owner or its representatives will examine the site, and Owner will direct Contractor to complete work that may be necessary to satisfy terms of the easement.
    b. Should Contractor refuse to do this work, Owner reserves the right to have it done by separate contract and deduct the cost of same from the Contract amount, or require the Contractor to furnish a satisfactory bond in a sum to cover legal claims for damages.
    c. When Owner is satisfied that work has been completed in agreement with the Contract Documents and terms of easements, the right is reserved to waive the requirement for written release if:
        1) Contractor's failure to obtain such statement is due to the grantor's refusal to sign, and this refusal is not based upon any legitimate claims that Contractor has failed to fulfill the terms of the easement, or
        2) Contractor is unable to contact or has had undue hardship in contacting the grantor.

1.03 SALVAGE OF MATERIALS

A. Remove material to be salvaged with extreme care so as not to damage it for future use. Damage caused by the Contractor to equipment or material shall be replaced or repaired by the Contractor. Deliver salvaged material to Owner or at a site specified by the Owner. Hauling and disposal shall be at the expense of the Contractor.

1.04 CONNECTING TO EXISTING FACILITIES

A. Unless otherwise shown or specified, determine methods of connecting new work to existing facilities, and obtain Owner's review and acceptance of connections.
    1. Determine location, elevation, nature, materials, dimensions, and configurations of existing facilities where necessary for connecting new work.
    2. Inspect existing record drawings and shop drawings, conduct exploratory excavations and field inspections, and conduct similar activities as needed.

1.05 PROGRESS MEETINGS

A. Owner will schedule regular progress meetings at least monthly to review work progress, schedules, and other matters needing discussion and resolution.

1.06 SEQUENCE OF WORK

A. Time of Work:

1. Work hours are specified by governing agencies having jurisdiction through encroachment permits. If applicable, see Appendix section for encroachment permits from Marin County and City of San Rafael.
2. Work hours specified by other governing agencies through encroachment permits shall be the responsibility of the Contractor. At the sole discretion of the governing agencies, work maybe limited anytime at no additional cost to the Owner.
3. Unless noted otherwise, night work may be scheduled by Contractor only with the written permission of Owner. Such permission, however, may be revoked at any time if Contractor fails to properly execute and control nighttime work.

B. Overtime Notice: If Contractor for convenience should desire to carry on work at night or outside regular hours, submit written notice to the Owner and allow ample time for satisfactory arrangements to be made for inspecting work in progress. The Owner will be the sole judge of whether on-site inspection is required.

PART 2 PRODUCTS (Not Used)

PART 3 EXECUTION (Not Used)

PART 4 PAYMENT

4.01 GENERAL

A. Full compensation for the work specified herein shall be considered as included in the applicable lump sum or unit price items stated in the Contactor's proposal and no additional compensation will be allowed therefor.

END OF SECTION

SECTION 01 30 00

ADMINISTRATIVE REQUIREMENTS

PART 1 GENERAL

1.01 SECTION INCLUDES

A. Preconstruction meeting.

B. Cutting and patching.

C. Special procedures.

1.02 PRECONSTRUCTION MEETING

A. Architect/Engineer will schedule meeting after Notice of Award.

B. Attendance Required: Architect/Engineer and Contractor.

C. Agenda:
1. Submission of executed bonds and insurance certificates.
2. Distribution of Contract Documents.
3. Submission of list of Subcontractors, list of products, schedule of values, and progress schedule.
4. Designation of personnel representing parties in Contract and Architect/Engineer.
5. Procedures and processing of field decisions, submittals, substitution, applications for payments, proposal request, Change Orders, and Contract closeout procedures.
6. Scheduling.

D. Record minutes and distribute copies within two days after meeting to participants, with two copies to Architect/Engineer, and those affected by decisions made.

PART 2 PRODUCTS

Not Used.

PART 3 EXECUTION

3.01 CUTTING AND PATCHING

A. Employ skilled and experienced installer to perform cutting and patching.

B. Execute cutting, fitting, and patching including excavation and fill, to complete Work, and to:
1. Fit the several parts together, to integrate with other Work.
2. Uncover Work to install or correct ill-timed Work.

3. Remove and replace defective and non-conforming Work.
4. Remove samples of installed Work for testing.

C. Execute work by methods to avoid damage to other Work, and to provide proper surfaces to receive patching and finishing.

D. Cut masonry and concrete materials using masonry saw or core drill.

E. Restore Work with new products in accordance with requirements of Contract Documents.

F. Fit Work tight to pipes, sleeves, ducts, conduit, and other penetrations through surfaces.

G. Identify hazardous substances or conditions exposed during the Work to Architect/Engineer for decision or remedy.

3.02 SPECIAL PROCEDURES

A. Materials: As specified in product sections; match existing with new products for patching and extending work.

B. Employ skilled and experienced installer to perform alteration work.

C. Cut, move, or remove items as necessary for access to alterations and renovation Work. Replace and restore at completion.

D. Remove unsuitable material not marked for salvage, including rotted wood, corroded metals, and deteriorated masonry and concrete. Replace materials as specified for finished Work.

E. Remove debris and abandoned items from area and from concealed spaces.

F. Prepare surface and remove surface finishes to permit installation of new work and finishes.

G. Close openings in exterior surfaces to protect existing work from weather and extremes of temperature and humidity.

PART 4 PAYMENT

4.01 GENERAL

A. Full compensation for the work specified herein shall be considered as included in the applicable lump sum or unit price items stated in the Contactor's proposal and no additional compensation will be allowed therefor.

END OF SECTION

SECTION 01 33 00

SUBMITTALS

PART 1 GENERAL

1.01 SECTION INCLUDES

A. Requirements and procedures necessary for scheduling, preparation, and submission of submittals.

B. Requirements for preparation of progress schedules.

1.02 RELATED WORK SPECIFIED UNDER OTHER SECTIONS

A. The individual Specification sections in these Contract Documents contain additional and special submittal requirements. Individual sections shall take precedence in the event of a conflict with this section.

1.03 SUBMITTAL PROCEDURES

A. Owner reserves the right to modify the procedures and requirements for submittals, as necessary to accomplish the specific purpose of each submittal.

B. Review, acceptance, or approval of substitutions, schedules, shop drawings, lists of materials, and procedures submitted or requested by Contractor shall not add to the Contract amount, and additional costs which may result therefrom shall be solely the obligation of Contractor.

C. Owner is not precluded, by virtue of review, acceptance, or approval, from obtaining a credit for construction savings resulting from allowed concessions in the work or materials therefor.

D. Owner is not responsible to provide engineering or other services to protect Contractor from additional costs accruing from submittals.

E. Delays caused by the need for resubmittal shall not constitute basis for claim.

F. After checking and verifying all field measurements, make submittals to Owner, in accordance with the schedule of submittals for review.
   1. Submittals shall bear a stamp or specific written indication that Contractor has satisfied its responsibilities under the Contract Documents with respect to the review of the submittal.
   2. Data shown shall be complete with respect to quantities, dimensions, specified performance and design criteria, materials, and similar data to enable Owner to review the information.

G. Check samples, and accompany with specific written indication that Contractor has satisfied requirements under the Contract Documents with respect to review of

submittals, and identify clearly as to material, supplier, pertinent data such as catalog numbers and the intended use.

H. Before submission of each submittal, determine and verify quantities, dimensions, specified performance criteria, installation requirements, materials, catalog numbers, and similar data with respect thereto; review and coordinate each submittal with other submittals, requirements of the work, and the Contract Documents.

I. At the time of each submission, give Owner specific written notice of each variation that the submittal may have from the requirements of the Contract Documents; in addition, make specific notation on each shop drawing submitted to Owner for review and approval of each such variation.

1.04 SCHEDULES

A. General:
1. Submit estimated progress schedule and preliminary schedule of submittals in duplicate to Owner.
2. Schedules shall be submitted a minimum of 5 days prior to the time scheduled for the preconstruction meeting.
3. Revise and resubmit as specified, and identify all changes made from previous schedule submittals.
4. Failure to resubmit a revised schedule when requested may result in the withholding of monthly progress payments.

B. Progress Schedule:
1. The Contractor shall prepare and submit to the Owner, a progress schedule showing the dates on which each part or division of the work is expected to be started and finished.
2. The schedule shall be in the form of a CPM or bar chart, and shall show the complete sequence of construction by activity or stages of work.
3. The schedule shall reflect completion of all work within the specified time.
4. Show product lead time for any item which exceeds 4 weeks.
5. Show sufficient detail in breakdown so no activity exceeds 10 working days, excluding submittals and material lead time.
6. Show the average feet per day anticipated for each condition, area, and/or size of pipe.
7. Indicate the number of crews, the makeup of all crews, and the separate tasks to be preformatted by each crew.
8. Information on the progress schedule shall be maintained current at all times. Submit updated schedule to Owner with each progress pay request.
9. The updated schedule shall clearly show the date of the revision, and the revised performance periods. It shall also have an accurate history of the activities completed.

C. Submittal Listing:
1. Submit listing and schedule for all submittals required by the Specifications for review.

1.05 SHOP DRAWINGS

A. General:

1. Shop drawings, as defined herein, consist of all drawings, diagrams, illustrations, schedules, and other data which are specifically prepared by or for Contractor to illustrate some portion of the work; and all illustrations, brochures, standard schedules, performance charts, instructions, diagrams, and other information prepared by a manufacturer and submitted by Contractor to illustrate material or equipment for Owner portions of the work.
2. Submittal of incomplete or unchecked shop drawings will not be acceptable. Shop drawing submittals which do not clearly show Contractor's review stamp or specific written indication of Contractor review will be returned to Contractor for resubmission.
3. Submittal of shop drawings not required under these Contract Documents and not shown on the schedule of submittals will be returned to Contractor unreviewed and unstamped.

B. Procedures:

1. Submit to Owner for review and approval in accordance with the accepted schedule of submittals, five copies of shop drawings.
2. Transmit each submittal on Owner accepted form.
3. Sequentially number the transmittal forms; resubmittals to have original number with an alphabetic suffix.
4. Identify project, Contractor, Specification section number, pertinent drawing sheet and detail number(s), products, units and assemblies, and the system or equipment identification or tag number as shown.
5. Apply Contractor's stamp, signed or initialed certifying that review, verification of products required, field dimensions, adjacent construction work, and coordination of information, is in accordance with requirements of the Contract Documents.
6. Revise and resubmit submittals as required; identify all changes made since previous submittal.
7. Submittals will be acted upon and transmitted to Contractor not later than 20 working days after receipt.
8. When shop drawings have been reviewed by Owner, two copies will be returned to Contractor appropriately annotated.
    a. If major changes or corrections are necessary, shop drawing may be rejected and one set will be returned to Contractor with such changes or corrections indicated.
    b. Correct and resubmit the shop drawings in the same manner and quantity as specified for the original submittal.

1.06 SAMPLES AND TEST SPECIMENS

A. Where required in the Specifications, and as determined necessary by Owner, submit test specimens or samples of materials, appliances, and fittings to be used or offered for use in connection with the work. Include information as to their sources, prepay cartage charges, and submit such quantities and sizes for proper examination and tests to establish the quality or equality thereof, as applicable.

B. Submit samples and test specimens in ample time to enable Owner to make tests or examinations necessary, without delay to the work.

C. Submit additional samples as required by Owner to ensure equality with the original approved sample and/or for determination of Specification compliance.

D. Laboratory tests and examinations that Owner elects to make in its own laboratory will be made at Owner 's cost except that, if a sample of any material or equipment proposed for use by Contractor fails to meet the Specifications, Contractor shall bear cost of testing subsequent samples.

E. Tests required by the Specifications to be performed by an independent laboratory shall be made by a laboratory licensed or certified in accordance with state statues. Submit certified test results of specified tests in duplicate to Owner.

F. Samples and laboratory services shall be at the expense of Contractor and included in the prices bid for the associated work.

1.07 CONTRACT CLOSEOUT SUBMITTALS

A. Record Drawings:

1. Each month, or as otherwise agreed, submit to Owner a current listing and description of each change incorporated into the work since the preceding submittal. These changes shall be summarized on a full size set of Drawings in pencil or ink on an ongoing basis. Contractor will prepare a set of record drawings for the project which will include the changes made in materials, equipment, locations, and dimensions of the work. Final payment will not be made until a complete set of the annotated Drawings have been delivered to the Owner.

1.08 CONSTRUCTION PHOTOGRAPHS

A. Provide photographs in JPEG showing the preconstruction site conditions, construction progress, and the post-construction site conditions. Each photograph shall be labeled in chronological order, formatted consistently, with easily apparent date and time, location taken, and general subject/title. Deliver to Engineer/Owner the photographs in electronic format saved in a CD, DVD, or USB flash drive.

B. Take exposures of the preconstruction site and the property adjacent to the perimeter of the construction site. Particular emphasis shall be directed to structures both inside and outside the site, or as directed by Owner.

C. Take exposures monthly showing the progress of construction. The location of these photographs shall be determined by Owner.

D. Take exposures of the post-construction site and the property adjacent to the perimeter of the site. Particular emphasis shall be directed to structures both inside and outside the site, or as directed by Owner.

PART 2 PRODUCTS (Not Used)

PART 3 EXECUTION (Not Used)

PART 4 PAYMENT

4.01 GENERAL

A. Full compensation for the work specified herein shall be considered as included in the applicable lump sum or unit price items stated in the Contactor's proposal and no additional compensation will be allowed therefor.

END OF SECTION

SECTION 01 35 23

SAFETY AND HEALTH

PART 1.00 GENERAL

1.01 CONTRACTOR'S RESPONSIBILITY FOR SAFETY

A. The Contractor certifies that he is experienced and qualified to anticipate and meet the safety and health requirements of this Project pursuant to California Administrative Code, Title 8, "Industrial Relations", and Code of Federal Regulations, Sections 1900 through 1910, "Occupational Safety and Health Standards", and Section 1926 "Construction". For information purposes only the Contractor shall submit to the Owner a copy of his Injury and Illness Prevention Program. The Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the Work. This requirement will apply continuously twenty-four (24) hours a day every day until final acceptance of the Work and shall not be limited to normal working hours. The duties of the Owner, Engineer and Inspector do not include review of the adequacy of the Contractor's safety measures in, on, or about the site and vicinity.

1. Safety Officer. The Contractor shall designate a fully trained and responsible member of his organization at the site who is experienced in administering, enforcing and overseeing the safety standards contained in the California Administrative Code, Title 8 and 29, and the Code of Federal Regulations, Sections 1900 through 1910 and Section 1926, whose duty shall be the prevention of hazards and accidents and who shall have authority to direct work for the Contractor.
2. Safety Supervisor. The Contractor shall designate Safety Supervisors for each work site. One Safety Supervisor may be the Safety Officer. The other Safety Supervisors shall work for the Safety Officer. Each shall be fully trained for the type of work being performed and shall have authority to direct the Contractor's work.
3. Accident Reporting. Any accident occurring within the premise of the Regional Treatment Plant is to be reported to the Owner.

1.02 SAFETY MEASURES

A. The Contractor shall comply with all laws, ordinances, codes, rules, regulations and lawful orders of any public authority having jurisdiction for the safety of persons or property or to protect them from damage, injury or loss. The Contractor shall maintain copies of all documents mentioned or referenced in this Section readily available at the site until the Work is completed. In the event the Contractor fails to observe any of the necessary safety provisions, the Owner may stop the work and direct the Contractor to comply with the applicable provisions, or may order the necessary work done by others. All impacts, both monetary and time-related, associated with stoppage of the work in order to comply with the Owner's directives pertaining to safety requirements, and all costs of having the necessary work done by others shall be borne by and be the obligation of the Contractor.

1.03 CONFINED SPACE SAFETY

A. The Owner employs a "Permit Required" safety standard for all confined space entries per California General Industrial Safety Orders, Section 5157. Work performed in or about wastewater (sewage) facilities, including but not limited to manholes, pipes, tanks,

basins, and structures, carries with it the high potential for exposure of workers and other persons to hazardous conditions. The Contractor is required to be especially alert to these conditions and employ a "permit required" system for all confined space entries as specified in California General Industrial Safety Orders, Section 5157. These conditions may include, but are not limited to, exposure to hydrogen sulfide, carbon dioxide, methane, carbon monoxide and other gases; exposure to atmospheres containing insufficient oxygen to support human life; exposure to wastewater (sewage) which may contain bacteriological, chemical, and other constituents harmful to humans; working in conditions where engulfment or entrapment of personnel may occur (such as in trench excavations); and working in structures with uneven and slippery surfaces and with difficult and limited access. Many of these environments are classified as "confined spaces" in the Code of Federal Regulations, Sections 1900 through 1910 and Section 1926, the California Administrative Code, Title 8, and the State of California's General Industry Safety Orders. The Contractor shall be fully familiar with, and shall strictly adhere to and comply with, the applicable sections of these documents pertaining to confined spaces. In the event of a conflict between applicable requirements, the more restrictive shall apply.

1.04 PERSONAL HYGIENE

A. Persons involved in the work may be exposed to disease-producing organisms in wastewater (sewage). The Contractor shall require his personnel to observe proper hygienic precautions, including washing of hands and other exposed portions of the body with disinfecting soap and water before eating or smoking.

1.05 PUBLIC SAFETY AND CONVENIENCE

A. The Contractor shall conduct his work so as to insure the least possible obstruction to traffic and inconvenience to the general public in the vicinity of the work and to insure the protection of persons and property. No road or street shall be closed to the public except with the permission of the Owner and the proper governmental authority. Fire hydrants on or adjacent to the work shall be accessible to fire-fighting equipment. Temporary provisions shall be made by the Contractor to insure the use of sidewalks, private and public driveways and proper functioning of gutters, sewer inlets, drainage ditches and culverts, irrigation ditches and natural water courses.

1.06 WARNINGS AND BARRICADES

A. The Contractor shall provide and maintain barricades, guards, temporary bridges and walkways, watchmen, night lights and danger signals illuminated from sunset to sunrise, and all other necessary appliances and safeguards to protect the Work, life, property, the public, excavations, equipment, and materials. Barricades shall be of substantial construction and shall be painted such as to increase their visibility at night. Suitable warning signs shall be so placed and illuminated at night as to show in advance where construction, barricades, or detours exist. Guard rails shall be provided for bridges and walkways over or adjoining excavations, shafts, and other openings and locations where injury may occur.

1.07 FIRE PREVENTION

A. The Contractor's Safety Officer shall inspect the entire Work and site, including storage areas, at frequent intervals to verify that fire prevention measures are constantly enforced.

1. Fire Extinguishers and Hoses. The Contractor shall furnish and maintain fully charged fire extinguishers of the appropriate type, supplements with temporary fire hoses wherever an adequate water supply exists, at the places where burning, welding or other operations that may cause a fire are being performed.
2. Flammable, Hazardous or Toxic Materials. Solvents, gasoline, and other hazardous materials may be in the wastewater (sewage), and therefore, the work site may be hazardous to open flame, sparks, or unventilated occupancy. The Contractor shall take measures to assure his personnel observe proper safety precautions when working in these areas. Only a working supply of flammable, hazardous or toxic materials shall be permitted in or on any of the permanent structures and improvements, and shall be removed there from at the end of each day's operations. The Contractor shall store flammable, hazardous or toxic materials and waste separate from the Work and stored materials for the Work in a manner that prevents spontaneous combustion or dispersion, provides the appropriate level of secondary spill containment, and none shall be placed in any sewer or drain piping nor buried on the Owner's property. It is the Contractor's responsibility to request permission 15 days in advance, in writing, to bring hazardous, toxic, or flammable materials to the Owner's work site. The request will specify the type and quantity of material proposed to be brought on site, where and how it will be stored, what type of secondary containment will be used, where and by whom the material will be used, and what health hazards are associated with the proposed material (Material Safety Data Sheet). The Owner will respond to the Contractor, in writing, within seven days of the receipt of the request as to whether or not the material can be brought on site and of any special requirements the OWNER may have that are not covered in the Contractor's request. The Contractor shall maintain a current and up-to-date copy of all laws, ordinances, codes, rules, regulations and lawful orders of any regulatory authority having jurisdiction or control over flammable, hazardous or toxic materials and, at his expense, shall comply with said laws, ordinances, codes, rules, regulations and lawful orders.

1.08 SAFETY HELMETS, CLOTHING, AND EQUIPMENT

A. The Contractor shall not permit any person for whom he is responsible or liable to enter or remain on the site of the Work unless the person is equipped with and wearing a safety helmet and other protective clothing and safety equipment conforming to the requirements of California General Industrial Safety Orders, and shall discharge from the site all persons not so equipped. The Contractor shall post conspicuous signs at appropriate locations warning the public and persons engaged upon the Work of this requirement.

1.09 HAZARDOUS AREAS

A. The Contractor shall not permit or allow any person or persons to enter any pipe or space containing hazardous or noxious substances or gases, or where there is an insufficient amount of oxygen to sustain life and consciousness, or any other hazardous area unless equipped with lawful and appropriate safety equipment and life supporting apparatus, and unless those entering are continually monitored and guarded by and in communication with other persons outside the space or area who are equipped in the same way, can give

an alarm to others for assistance, and initiate immediate rescue operations in the event of mishap.

1.10 EMERGENCIES

A. Work During an Emergency. The Contractor shall perform any and all operations and shall furnish any materials and equipment necessary during an emergency endangering life or property and, in all cases, shall notify the Owner of the emergency as soon as practicable, but shall not wait for instruction before proceeding to properly protect both life and property. Any additional compensation or extension of Contract Time claimed by the Contractor on account of an emergency shall be applied for as provided in contract documents.
B. Representatives for Emergencies. The Contractor shall file with the Owner a written list giving the names, addresses, and telephone numbers of at least two of his representatives who can be contacted at any time in case of emergency. The representatives shall be fully authorized and equipped to correct unsafe or inconvenient conditions on short notice. The Contractor shall promptly notify the Owner of all changes in the listing.

1.11 SUBMITTALS

A. Prior to receiving Notice to Proceed, the Contractor shall submit to the District Project Manager the following: (1) a copy of his Injury and Illness Prevention Program Manual, (2) a list of safety equipment he will maintain on site, (3) the name of his Safety Officer and Safety Supervisor(s) who will be responsible for maintaining safety at each work site, and (4) a description of any job-specific measures he will be using which are not contained in his manual. The Owner shall not review these materials, but shall maintain these materials for record purposes.

1.12 IMPLEMENTATION

A. It is the Contractor's responsibility to follow his own safety program and provide one or more designated Safety Supervisor(s) at each work site.

1.13 COMMUNICATION

A. It is the Contractor's responsibility to communicate to the Owner all hazards which they plan to introduce to the work site, whether by procedure or material.

PART 3.00 EXECUTION (Not Used)

PART 4.00 PAYMENT

4.01 GENERAL

Full compensation for the work specified herein shall be considered as included in the applicable lump sum or unit price items stated in the Contactor’s proposal and no additional compensation will be allowed therefor.

END OF SECTION

SECTION 01 40 00

QUALITY REQUIREMENTS

PART 1 GENERAL

1.01 SECTION INCLUDES

A. Quality control and control of installation.

B. Tolerances

C. References.

D. Testing and inspection services.

E. Examination.

F. Preparation.

1.02 QUALITY CONTROL AND CONTROL OF INSTALLATION

A. Monitor quality control over suppliers, manufacturers, products, services, site conditions, and workmanship, to produce Work of specified quality.

B. Comply with manufacturers' instructions, including each step in sequence.

C. When manufacturers' instructions conflict with Contract Documents, request clarification from Architect/Engineer before proceeding.

D. Comply with specified standards as minimum quality for the Work except where more stringent tolerances, codes, or specified requirements indicate higher standards or more precise workmanship.

E. Perform Work by persons qualified to produce required and specified quality.

F. Verify field measurements are as indicated on Shop Drawings or as instructed by manufacturer.

G. Secure products in place with positive anchorage devices designed and sized to withstand stresses, vibration, physical distortion, or disfigurement.

1.03 TOLERANCES

A. Monitor fabrication and installation tolerance control of products to produce acceptable Work. Do not permit tolerances to accumulate.

B. Comply with manufacturers' tolerances. When manufacturers' tolerances conflict with Contract Documents, request clarification from Architect/Engineer before proceeding.

C. Adjust products to appropriate dimensions; position before securing products in place.

1.04 REFERENCES

A. For products or workmanship specified by association, trade, or other consensus standards, comply with requirements of standard, except when more rigid requirements are specified or are required by applicable codes.

B. Conform to reference standard by date of issue current on date of Contract Documents, except where specific date is established by code.

C. Obtain copies of standards where required by product specification sections.

D. When specified reference standards conflict with Contract Documents, request clarification from Architect/Engineer before proceeding.

E. Neither contractual relationships, duties, nor responsibilities of parties in Contract nor those of Architect/Engineer shall be altered from Contract Documents by mention or inference otherwise in reference documents.

1.05 TESTING AND INSPECTION SERVICES

A. Unless noted otherwise, Contractor will employ and pay for specified services of an independent firm to perform testing and inspection.

B. See Proposal, Bid Item Descriptions, for trench compaction requirements to be certified by a Registered Geotechnical Engineer to be hired by the Contractor.

C. The independent firm will perform tests, inspections and other services specified in individual specification sections and as required by Architect/Engineer.
   1. Laboratory: Authorized to operate at Project location.
   2. Laboratory Staff: Maintain full time specialist on staff to review services.
   3. Testing Equipment: Calibrated at reasonable intervals with devices of an accuracy traceable to National Bureau of Standards or accepted values of natural physical constants.

D. Testing, inspections and source quality control may occur on or off project site. Perform off-site testing as required by Architect/Engineer or Owner.

E. Reports will be submitted by independent firm to Architect/Engineer, indicating observations and results of tests and indicating compliance or non-compliance with Contract Documents.

F. Cooperate with independent firm; furnish samples of materials, design mix, equipment, tools, storage, safe access, and assistance by incidental labor as requested.
   1. Notify Architect/Engineer and independent firm 24 hours prior to expected time for operations requiring services.
   2. Make arrangements with independent firm and pay for additional samples and tests required for Contractor's use.

G. Testing and employment of testing agency or laboratory shall not relieve Contractor of obligation to perform Work in accordance with requirements of Contract Documents.

H. Re-testing or re-inspection required because of non-conformance to specified requirements shall be performed by same independent firm on instructions by Architect/Engineer. Payment for re-testing or re-inspection will be charged to Contractor by deducting testing charges from Contract Sum/Price.

I. Testing Agency Responsibilities:
1. Test samples of mixes submitted by Contractor.
2. Provide qualified personnel at site. Cooperate with Architect/Engineer and Contractor in performance of services.
3. Perform specified sampling and testing of products in accordance with specified standards.
4. Ascertain compliance of materials and mixes with requirements of Contract Documents.
5. Promptly notify Architect/Engineer and Contractor of observed irregularities or non-conformance of Work or products.
6. Perform additional tests required by Architect/Engineer.

J. Testing Agency Reports: After each test, promptly submit two copies of report to Architect/Engineer. When requested by Architect/Engineer, provide interpretation of test results. Include the following:
1. Date issued.
2. Project title and number.
3. Name of inspector.
4. Date and time of sampling or inspection.
5. Identification of product and specifications section.
6. Location in Project.
7. Type of inspection or test.
8. Date of test.
9. Results of tests.

K. Limits On Testing Authority:
1. Agency or laboratory may not release, revoke, alter, or enlarge on requirements of Contract Documents.
2. Agency or laboratory may not approve or accept any portion of the Work.
3. Agency or laboratory may not assume duties of Contractor.
4. Agency or laboratory has no authority to stop the Work.

PART 2 PRODUCTS

Not Used.

PART 3 EXECUTION

3.01 EXAMINATION

A. Verify existing site conditions and substrate surfaces are acceptable for subsequent Work. Beginning new Work means acceptance of existing conditions.

B. Verify existing substrate is capable of structural support or attachment of new Work being applied or attached.

C. Examine and verify specific conditions described in individual specification sections.

D. Verify utility services are available, of correct characteristics, and in correct locations.

3.02 PREPARATION

A. Clean substrate surfaces prior to applying next material or substance.
B. Seal cracks or openings of substrate prior to applying next material or substance.
C. Apply manufacturer required or recommended substrate primer, sealer, or conditioner prior to applying new material or substance in contact or bond.

PART 4 PAYMENT

GENERAL

A. Full compensation for the work specified herein shall be considered as included in the applicable lump sum or unit price items stated in the Contactor's proposal and no additional compensation will be allowed therefor.

END OF SECTION

SECTION 01 50 00

CONSTRUCTION FACILITIES AND TEMPORARY CONTROLS

PART 1 GENERAL

1.01 SECTION INCLUDES

A. Temporary utilities required during construction.

B. Requirements for security and protection of facilities and property.

C. Requirements for traffic regulation and access to the work.

D. Temporary controls for protection of environment.

1.02 TEMPORARY UTILITIES

A. Electric Power:
1. Electric power is not available at the site. Contractor shall make arrangements with PG&E to obtain electrical power.
2. Temporary electric power installations shall meet construction safety requirements of OSHA, state, and other governing agencies.

B. Water:
1. No water is available at the project site. Contractor shall make arrangements and bear all costs for obtaining and transporting water to the construction areas.

C. Sewage:
1. Provide and maintain sanitary facilities for Contractor's employees and subcontractor's employees that comply with regulations of local and state health departments.
2. Provide chemical toilets of suitable types and maintain them in a sanitary condition at all times, conforming to code requirements and acceptable to the health authorities. They shall be of watertight construction so that no contamination of the area can result from their use. Make arrangements for frequent emptying of toilets.

PART 2 PRODUCTS (Not Used)

PART 3 EXECUTION

3.01 TEMPORARY CONSTRUCTION FACILITIES

A. Storage Yards and Buildings:
1. The Contractor shall maintain a suitable temporary office at or near the project site.
2. The Contractor shall be responsible for providing the site for the temporary office

and for a storage and staging area.

3. Store combustible materials (paints, solvents, fuels, etc.) in a well-ventilated building remote from other buildings.

3.02 SAFETY AND PROTECTION

A. Examination of Existing Facilities:

1. After the Contract is awarded and before the commencement of work, Contractor and Owner shall make a thorough examination of all existing buildings, structures, and other improvements in the vicinity of the work, as applicable, which might be damaged by construction operations.
2. Periodic examinations of existing buildings, structures, and other improvements in the vicinity of the work shall be made jointly by authorized representatives of the Contractor, Owner, and the affected property owners. The scope of the examination shall include cracks in structures, settlement, leakage, and similar conditions.
3. Records in triplicate of all observations shall be prepared by the Contractor and each copy of every document shall be signed by the authorized representative of the Owner and of the Contractor. Photographs, as requested by the Owner, shall be made by the Contractor and signed in the manner specified above. One signed copy of every document and photograph will be kept on file in the office of the Owner.
4. These records and photographs are intended for use as indisputable evidence in ascertaining whether and to what extent damage occurred as a result of the Contractor's operations, and are for the protection of the adjacent property owners, the Contractor, and the Owner.

B. Safety Requirements:

1. Contractor shall do whatever work is necessary for safety and be solely and completely responsible for conditions of the jobsite, including safety of all persons (including employees) and property during the Contract period. This requirement shall apply continuously and not be limited to normal working hours.
2. Safety provisions shall conform to Federal and State Departments of Labor Occupational Safety and Health Act (OSHA), and other applicable federal, state, county, and local laws, ordinances, codes, requirements set forth herein, and regulations that may be specified in other parts of these Contract Documents. Where these are in conflict, the more stringent requirement shall be followed. Contractor shall become thoroughly familiar with governing safety provisions and shall comply with the obligations set forth therein.
3. Contractor shall develop and maintain for the duration of the Contract, a safety program that will effectively incorporate and implement required safety provisions. Contractor shall appoint a qualified employee who is authorized to supervise and enforce compliance with the safety program.
4. Owner's duty to conduct construction review of the Contractor's performance is not intended to include a review or approval of the adequacy of Contractor's safety supervisor, safety program, or safety measures taken in, on, or near the construction site.
5. As part of safety program, Contractor shall maintain at his office or other well-

known place at the jobsite, safety equipment applicable to the work as prescribed by the governing safety authorities, and articles necessary for giving first-aid to the injured. Established procedures for the immediate removal to a hospital or a doctor's care of persons who may be injured on the jobsite.

6. Contractor shall do all work necessary to protect the general public from hazards, including, but not limited to, surface irregulations or unramped grade changes in pedestrian sidewalk or walkway, and trenches or excavations in roadway. Barricades, lanterns, and proper signs shall be furnished in sufficient amount to safeguard the public and the work.
7. Construct and maintain satisfactory and substantial temporary chain link fencing, solid fencing, railing, barricades or steel plates, as applicable, at all openings, obstructions, or other hazards in streets, sidewalks, floors, roofs, and walkways. Such barriers shall have adequate warning lights as necessary or required for safety.
8. Comply with Owner's safety rules while on Owner property.
9. If death or serious injuries or damages are caused, the accident shall be reported immediately by telephone or messenger to the Owner. In addition, Contractor shall promptly report in writing all accidents whatsoever arising out of, or in connection with, the performance of the work whether on or adjacent to the site, giving full details and statements of witnesses.
10. If claim is made by anyone against Contractor or any subcontractor on account of accident, Contractor shall promptly report the facts in writing, giving full details of the claim.

C. Protection of Work and Property:
   1. General:
      a. Contractor shall employ such means and methods necessary to adequately protect public property and property of the Owner against damage. In the event of damage to such property, immediately restore the property to a condition equal to its original condition ad to the satisfaction of the Owner and the owner of said property, and bear all costs therefor.
      b. Protect stored materials, trees and crops, and other items located adjacent to the proposed work. During construction operations, construct and maintain facilities to enable pedestrian access by all property owners to their property at all times. No person shall be cut off from vehicular access to residence or place of business, unless the Contractor has made special arrangement with the affected person.
      c. Protect from damage all trees outside the limits of the work and trees within the limits of the work which are designated on the Drawings to remain undisturbed. No trees, except those specifically shown on the Drawings to be removed, shall be removed without approval of the Owner. Dispose of removed trees in a legal manner off the jobsite.
   2. Finished Construction:
      a. Contractor shall assume the responsibility for protection of finished construction and shall repair and restore any and all damage to finished work to its original or better condition.
      b. At such time temporary facilities and utilities are no longer required for the work, notify Owner of intent and schedule for their removal.

Remove temporary facilities and utilities from the site as Contractor's property and leave the site in such condition as specified, as shown on the Drawings or as directed by the Engineer.

c. In unfinished areas, leave the site evenly graded in a condition that will restore original drainage, and with an appearance equal to or better than original. Existing planted or landscaped areas shall be restored and be left ready for replanting.

3.03 ENVIRONMENTAL CONTROLS

A. General:

1. The Contractor is executing the work shall maintain affected areas within and outside project boundaries free from environmental pollution that would be in violation of federal, state, or local regulations.

B. Water Pollution Control:

1. Comply with laws, rules, and regulations of the State of California and agencies of the United States Government prohibiting the pollution of lakes, wetlands, streams, or river waters from the dumping of refuse, rubbish, or debris.
2. Divert sewage and waste flow, including storm water flow, interfering wastewater treatment plant. Do not cause or permit action to occur which would cause an overflow to an existing waterway. Prior to commencing excavation and construction, obtain Owner's agreement with detailed plans showing procedures intended to handle and dispose of sewage, groundwater, and storm water flow, including dewatering pump discharges.
3. Contractor shall comply with the procedures outlined in the U.S. Environmental Protection Agency manuals entitled "Guidelines for Erosion and Sedimentation Control Planning and Implementation", "Processes, Procedures and Methods to Control Pollution Resulting from All Construction Activity", and "Erosion and Sediment Control-Surface Mining in Eastern United States".
4. The California Regional Water Quality Control Board has the power, derived from the Porter-Cologne Water Quality Control Act, to impose on the Owner up to $10,000 per day (or portion thereof) fine for bypassing of sewage flows to the San Francisco Bay. Contractors shall be responsible for violations of Regional Board requirements caused by their operations. If an overflow to the Bay occurs because of the Contractor's operations or neglect, and fines are levied against the Owner, the fines will be considered direct damages caused by the Contractor which the Owner may recover by retention.

C. Waste Material Disposal:

1. Cleaning and disposal shall comply with local ordinances and pollution control laws. Do not burn or bury rubbish or waste materials on the project site. Do not dispose of volatile wastes such as mineral spirits, oil, chemicals, or paint thinner in storm or sanitary drains. Disposal of wastes into streams or waterways is prohibited. Provide acceptable containers for collection and disposal of waste materials, debris, and rubbish.

D. Air Pollution Control:

1. Trash burning will not be permitted on the construction site.

2. Operations of dumping rock and of carrying waste or excess material away in trucks shall be conducted to cause a minimum of dust. Give unpaved streets, roads, detours, or haul roads used in the construction area a dust-preventive treatment, or periodically water to prevent dust. Strictly adhere to applicable environmental regulations for dust prevention.
3. Sweep work area on daily basis, wet as required to control dust during sweeping operations.

E. Noise Control:
1. Minimize noise by executing work using appropriate construction methods and equipment. Provide acoustical barriers so noise emanating from tools or equipment will not exceed legal noise levels.

PART 4 PAYMENT

4.01 GENERAL

A. No separate measurement or payment will be made for work in this section. Payment shall be included as part of the appropriate lump sum or unit price bid items stated in the Proposal.

B. Payment for furnishing and maintaining the Engineer's field office will be made as part of the lump sum bid amount for mobilization stated in the Proposal. Partial payments will be prorated based on the percent complete of the overall project costs.

END OF SECTION

SECTION 01 60 00

PRODUCT REQUIREMENTS

PART 1 GENERAL

1.01 SECTION INCLUDES

A. Products.

B. Product delivery requirements.

C. Product storage and handling requirements.

D. Product options.

E. Product substitution procedures.

1.02 PRODUCTS

A. Furnish products of qualified manufacturers suitable for intended use. Furnish products of each type by single manufacturer unless specified otherwise.

B. Do not use materials and equipment removed from existing premises, except as specifically permitted by Contract Documents.

C. Furnish interchangeable components from same manufacturer for components being replaced.

1.03 PRODUCT DELIVERY REQUIREMENTS

A. Transport and handle products in accordance with manufacturer's instructions.

B. Promptly inspect shipments to ensure products comply with requirements, quantities are correct, and products are undamaged.

C. Provide equipment and personnel to handle products by methods to prevent soiling, disfigurement, or damage.

1.04 PRODUCT STORAGE AND HANDLING REQUIREMENTS

A. Store and protect products in accordance with manufacturers' instructions.

B. Store with seals and labels intact and legible.

C. Store sensitive products in weather tight, climate controlled, enclosures in an environment favorable to product.

D. For exterior storage of fabricated products, place on sloped supports above ground.

E. Provide off-site storage and protection when site does not permit on-site storage or protection.

F. Cover products subject to deterioration with impervious sheet covering. Provide ventilation to prevent condensation and degradation of products.

G. Store loose granular materials on solid flat surfaces in well-drained area. Prevent mixing with foreign matter.

H. Provide equipment and personnel to store products by methods to prevent soiling, disfigurement, or damage.

I. Arrange storage of products to permit access for inspection. Periodically inspect to verify products are undamaged and are maintained in acceptable condition.

1.05 PRODUCT OPTIONS

A. Products Specified by Naming One or More Manufacturers with Provision for Substitutions: Submit request for substitution for any manufacturer not named in accordance with the following article.

1.06 PRODUCT SUBSTITUTION PROCEDURES

A. Substitutions may be considered when a product becomes unavailable through no fault of Contractor.

B. Document each request with complete data substantiating compliance of proposed Substitution with Contract Documents.

C. A request constitutes a representation that Contractor:
   1. Has investigated proposed product and determined that it meets or exceeds quality level of specified product.
   2. Will provide same warranty for Substitution as for specified product.
   3. Will coordinate installation and make changes to other Work which may be required for the Work to be complete with no additional cost to Owner.
   4. Waives claims for additional costs or time extension which may subsequently become apparent.
   5. Will reimburse Owner for review or redesign services associated with re-approval by authorities having jurisdiction.

D. Substitutions will not be considered when they are indicated or implied on Shop Drawing or Product Data submittals, without separate written request, or when acceptance will require revision to Contract Documents.

E. Substitution Submittal Procedure:
   1. Submit three copies of request for Substitution for consideration. Limit each request to one proposed Substitution.
   2. Submit Shop Drawings, Product Data, and certified test results attesting to proposed product equivalence. Burden of proof is on proposer.
   3. Architect/Engineer will notify Contractor in writing of decision to accept or reject request.

PART 2 PRODUCTS

Not Used.

PART 3 EXECUTION

Not Used.

PART 4 PAYMENT

4.01 GENERAL

A. Full compensation for the work specified herein shall be considered as included in the applicable lump sum or unit price items stated in the Contactor's proposal and no additional compensation will be allowed therefor.

END OF SECTION

SECTION 01 77 00

CONTRACT CLOSEOUT

PART 1 GENERAL

1.01 SECTION INCLUDES

A. Procedures to be followed in closing out the Contract.

1.02 FINAL SUBMITTALS

A. No Contract will be finalized until all of the following have been submitted as required in Section SUBMITTALS:
   1. Final shop drawings.
   2. Record drawings.
   3. Manufacturer's certification of proper installation.
   4. Video tapes, construction photographs, including completed project.

B. No Contract will be finalized until all guarantees, bonds, certifications, licenses, and affidavits required for work or equipment as specified are satisfactorily filed with the Owner.

1.03 RELEASE OF LIENS OR CLAIMS

A. No Contract will be finalized until satisfactory evidence of release of liens has been submitted to Owner as required by the General Conditions.

PART 2 PRODUCTS (Not Used)

PART 3 EXECUTION

3.01 FINAL CLEANING

A. At completion of work and immediately prior to final inspection, clean entire project according to the following provisions:
   1. Leave the structures and site in a complete and finished condition to the satisfaction of the Owner.
   2. Remove debris including dirt, sand, and gravel from sewers.

B. The Contractor shall:
   1. Repair, patch, and touch up marred surfaces to specified finish, and match adjacent surfaces.
   2. Broom clean paved surfaces; rake clean other surfaces.
   3. Remove temporary structures and materials, equipment, and appurtenances not required as part of, or appurtenant to, the completed work.
   4. Leave water courses, gutters, and ditches open and in condition satisfactory to Owner.

3.02 FINAL INSPECTION

A. After final cleaning and upon written notice from the Contractor that the work is completed, Owner will make preliminary inspection with the Contractor present. Upon completion of preliminary inspection, Owner will notify Contractor in writing of particulars in which the completed work is defective or incomplete.

B. Upon receiving written notice from Owner, Contractor shall immediately undertake work required to remedy defects and complete the work to the satisfaction of Owner.

C. After the items as listed in Owner's written notice are corrected or completed, inform Owner in writing that required work has been completed. Upon receipt of this notice, Owner, in the presence the Contractor, will make final inspection of the project.

D. Should the Owner find all work satisfactory at the time of final inspection, Contractor will be allowed to make application for final payment in accordance with provisions of the General Conditions. Should Owner still find deficiencies in the work, Owner will notify Contractor in writing of deficiencies and will not approve Contractor's request for final payment until such time as Contractor has satisfactorily completed the required work.

PART 4 PAYMENT

4.01 GENERAL

A. Full compensation for the work specified herein shall be considered as included in the applicable lump sum or unit price items stated in the Contactor’s Proposal, and no additional compensation will be allowed therefor.

END OF SECTION

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