

PROFESSIONAL BUILDING OFFICIAL, PLAN REVIEW AND INSPECTION SERVICES AGREEMENT

THIS AGREEMENT is made and entered into this 1st day of October, 2019, by and between Charles Abbot Associates, Inc, whose address is 3001 North Rocky Point Drive East, Suite 200, Tampa, Fl 33607, hereinafter called the "CONTRACTOR" and the City of Green Cove Springs, a political subdivision of Florida, by and through its City Council, hereinafter referred to as "CITY", whose address is City of Green Cove Springs, 321 Walnut Street, Green Cove Springs, Florida 32043.

WITNESSETH:

WHEREAS, the CITY has identified the need to retain a Building Official, Plan Review and Inspection Service to assist City personnel with all associated services related to the Building Department; and

WHEREAS, the CITY issued a Request for Proposals (RFP) No. LC 2019-05; and

WHEREAS, the CITY received two (2) replies from CONTRACTORS in response to the RFP; and

WHEREAS, the CONTRACTOR submitted a "PROPOSAL" that is attached hereto and incorporated herein as Exhibit "A"; and

WHEREAS, the City Council accepted the ranking of the Selection Committee for the top two (2) firms; and

WHEREAS, the CONTRACTOR is competent and qualified to furnish professional building official, inspection and plan review services to the CITY and desires to provide professional services according to the terms and conditions stated herein; and

WHEREAS, the CITY has followed the selection and negotiation process in accordance with the City's Purchasing Policies.

NOW, THEREFORE, in consideration of the mutual understandings and covenants set forth herein, the CITY and the CONTRACTOR agree as follows:

1. **SERVICES** – The CITY does hereby retain the CONTRACTOR to furnish professional services and perform those tasks as further described, but not limited to those in the RFP LC 2019-05, "Scope of Services" attached hereto as Exhibit "A" and made a part hereof.

2. **TERM** – The Term of this Agreement will commence upon the date of City Council approval as first written above and will be effective for one (1) year with an option to review every ninety days, for the first year. The City shall have the option of four (4) successive one (1) year periods, subject to the mutual consent of the CITY and the CONTRACTOR, unless otherwise amended or terminated as provided herein.
3. **AUTHORIZATION FOR SERVICES**
Authorization for performance of professional services by the CONTRACTOR under this Agreement shall be in the form of the hourly rate schedule as more fully described in Exhibit "B".
4. **COMPENSATION** – The CITY agrees to compensate the CONTRACTOR for the professional services called for under this Agreement as defined in Exhibit "B".
5. **PAYMENT FOR EXTRA WORK** -- Should additional hours of work beyond the hours described in Exhibit "B" be required, it will be paid for as an additional cost at the same rate agreed upon in Exhibit "B". If additional work hours beyond the rate schedule is needed, a work order as provided in Exhibit "E" shall need to be completed. If work beyond that described in Exhibit "A", which would be beyond the scope of functions typically required as a building department is required it shall be agreed to in a separate written agreement by the City and the Consultant prior to commencement of the additional work. Any Authorized Additional Work shall be billed to the City at the hourly rates set forth in Exhibit "B", unless otherwise agreed by the Parties in writing.
6. **TIME FOR COMPLETION** – The turnaround time for plan review and inspection services to be rendered by the CONTRACTOR shall be completed within the deadlines specified in Exhibit "C".
7. **REIMBURSABLE EXPENSES** –

The agreement is on a lump sum basis and as a result, there shall be no reimbursable expenses.
8. **PAYMENT AND BILLING**
 - a. As a condition precedent for any payment, the CONTRACTOR shall submit monthly, an invoice to the CITY requesting payment for services properly rendered and expenses due. The CONTRACTOR'S invoice shall describe with reasonable particularity each service rendered, the date thereof, the time expended if such services were rendered pursuant to an Hourly Rate Basis and the person's position rendering such service. The CONTRACTOR'S invoice shall be accompanied by such documentation or data in support of expenses for which payment is sought as the CITY may require. Each invoice shall bear the signature of the CONTRACTOR, which signature shall constitute the CONTRACTOR'S representation to the CITY that the services indicated in the invoice have reached the level stated, have been properly and timely performed as required herein, that the expenses included in the invoice have been reasonably incurred in accordance with this Agreement, that all services provided are for a public purpose, that all obligations of the CONTRACTOR covered by prior invoices have been paid in full, and that the amount requested is currently due and owing, there being no reason known to the CONTRACTOR that payment of any portion thereof should be withheld. Submission of the CONTRACTOR's invoice for final payment will be clearly marked Final Invoice and shall further constitute the CONTRACTOR'S

representation to the CITY that, upon receipt by the CONTRACTOR of the amount invoiced, all obligations of the CONTRACTOR to others, including its SUBCONTRACTORS, incurred in connection with the services provided, will be paid in full.

- b. If the Scope of Services to be performed is clearly defined in advance of the work effort, a Purchase Order may be issued on a "Lump Sum Basis." Upon the CONTRACTOR'S acceptance of the Purchase Order, the CONTRACTOR shall perform all work required but in no event, shall the CONTRACTOR be paid more than the negotiated "Lump Sum Fee" amount stated therein.
- c. If the Scope of Services to be performed by CONTRACTOR is not clearly defined, the Purchase Order may, at the sole discretion of the CITY, be issued on an "Hourly Rate Basis" or Combination Rate and contain a "Not-to Exceed" amount. Upon the CONTRACTOR'S acceptance of the Purchase Order, the CONTRACTOR shall perform all work required but in no event, shall the CONTRACTOR be paid more than the "Not-to-Exceed" amount stated therein.
- d. For Purchase Orders issued on a "Lump Sum Basis," the CONTRACTOR may invoice the amount due based on the percentage of total services actually performed and completed, but in no event, shall the invoice amount exceed a percentage of the "Lump Sum Fee" amount equal to a percentage of the total services actually completed.
- e. For Purchase Orders issued on an "Hourly Rate Basis" with a "Not-to-Exceed" amount, the CONTRACTOR may invoice the amount due for actual work hours performed, but in no event, shall the invoice amount exceed a percentage of the "Not-to-Exceed" amount equal to a percentage of the total services actually completed.
- f. For Purchase Orders issued on an "Hourly Rate Basis" with a "Limitation of Funds" amount, the CONTRACTOR may invoice the amount due for services actually performed and completed.
- g. Each Purchase Order, whether issued on a "Lump Sum Basis" or an "Hourly Rate Basis" with a "Not-to-Exceed" amount shall be treated separately.
- h. The CITY shall make payments to the CONTRACTOR when requested as work progresses for services furnished, but not more than once monthly. Each Purchase Order shall be invoiced separately. The CONTRACTOR shall render to the CITY, at the close of each calendar month, an itemized invoice properly dated, describing any services rendered, the cost of the services, the name and address of the CONTRACTOR, Purchase Order Number, and all other information required by this Agreement.
- i. Invoices shall be reviewed and approved by the Project Manager prior to payment. The original invoice shall be sent to the:

Project Manager
City of Green Cove Springs

321 Walnut Street
Green Cove Springs, Florida 32043

9. **GENERAL TERMS OF PAYMENT AND BILLING**

- a. Payments for all sums properly invoiced shall be made upon satisfactory completion of work required hereunder. Upon final acceptance of the work by the CITY, the CONTRACTOR may invoice the CITY for the full amount of compensation provided for under the terms of this Agreement, less any amount already paid by the CITY. The CITY shall pay the CONTRACTOR within forty-five (45) days from receipt of a correct invoice.
- b. The CITY may perform or have performed an audit of the records of the CONTRACTOR either within one (1) year following project completion and final payment for services covered under this Agreement, or at any time during the project term. This audit would be performed at a time mutually agreeable to the CONTRACTOR and the CITY either subsequent to the close of the final fiscal period in which the last work is performed or during the term of this Agreement. Total compensation to the CONTRACTOR may be determined subsequent to an audit as provided for in Subsections (b) and (c) of this Section, and the total compensation so determined shall be used to calculate final payment to the CONTRACTOR. Conduct of this audit shall not delay final payment as provided by Subsection (a) of this Section.
- c. The CONTRACTOR agrees to maintain all books, documents, papers, accounting records and other evidences pertaining to work performed under this Agreement in such a manner as will readily conform to the terms of this Agreement and to make such materials available at the CONTRACTOR'S office at all reasonable times during the Agreement period and for three (3) years from the date of final payment under the Agreement for audit or inspection as provided for in Subsection (b) of this Section or as required by Chapter 119, Florida Statutes, and schedules established by the Bureau or Archives and Record Management for the State of Florida, whichever shall be greater.
- d. In the event any audit or inspection conducted after final payment, but within the period provided in Subsection (c) of this Section reveals any overpayment by the CITY under the terms of the Agreement, the CONTRACTOR shall refund such overpayment to the CITY within thirty (30) days written notice by the CITY, in the form prescribed in Section 26.

10. **RESPONSIBILITIES OF THE CONTRACTOR**

- a. The Contractor shall become fully acquainted with the available information related to the Services. The Contractor shall affirmatively request from the City Representative and the City such information that the Contractor, based on the Contractor's professional experience, should reasonably expect is available and which would be relevant to the performance of the Services. All documents or other data provided to the Contractor by the City shall be returned to the City. The Contractor is authorized to make copies of such documents or other data at its own expense. The Contractor shall not disclose City information to third parties without prior written consent from the City or pursuant to a lawful court order directing such disclosure. The Contractor shall promptly inform the City concerning ambiguities and uncertainties related to the Contractor's performance that

are not addressed by the Agreement. The Contractor shall provide all of the Services in a timely and professional manner. The Contractor shall comply with all applicable federal, state and local laws, ordinances, regulations, and resolutions.

- b. The CONTRACTOR shall be responsible for the professional quality, technical accuracy, competence, methodology, accuracy and the coordination of all of the following which are listed for illustration purposes and not as a limitation: documents, analysis, reports, data, plans, plats, maps, surveys, specifications, and any and all other services of whatever type or nature furnished by the CONTRACTOR under this Agreement. The CONTRACTOR shall, without additional compensation, correct or revise any errors or deficiencies in his plans, analysis, data, reports, designs, drawings, specifications, and any and all other services of whatever type or nature.
- c. Neither the CITY'S review, approval or acceptance of, nor payment for, any of the services required shall be construed to operate as a waiver of any rights under this Agreement nor of any cause of action arising out of the performance of this Agreement. The CONTRACTOR shall be and always remain liable to the CITY in accordance with applicable law for any and all damages to the CITY caused by the CONTRACTOR'S negligent or wrongful performance of any of the services furnished under this Agreement.
- d. Liability for Employment-Related Rights and Compensation. The Contractor shall be solely responsible for all compensation, benefits, insurance and employment-related rights of any person providing Services hereunder during the course of or arising or accruing as a result of any employment, whether past or present, with the Contractor, as well as all legal costs including attorney's fees incurred in the defense of any conflict or legal action resulting from such employment or related to the corporate amenities of such employment. The Contractor will comply with all laws, regulations, municipal codes, and ordinances and other requirements and standards applicable to the Contractor's employees, including, without limitation, federal and state laws governing wages and overtime, equal employment, safety and health, employees' citizenship, withholdings, reports and record keeping. CONTRACTOR ACKNOWLEDGES THAT NEITHER IT NOR ITS AGENTS OR EMPLOYEES ARE ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS UNLESS CONTRACTOR OR SOME ENTITY OTHER THAN THE CITY PROVIDES SUCH BENEFITS. CONTRACTOR FURTHER ACKNOWLEDGES THAT NEITHER IT NOR ITS AGENTS OR EMPLOYEES ARE ENTITLED TO WORKERS' COMPENSATION BENEFITS. CONTRACTOR ALSO ACKNOWLEDGES THAT IT IS OBLIGATED TO PAY FEDERAL AND STATE INCOME TAX ON ANY MONEYS EARNED OR PAID PURSUANT TO THIS AGREEMENT. To the maximum extent permitted by law. Contractor waives all claims against the City for any Employee Benefits; the Contractor will defend the City from any claim and will indemnify the City against any liability for any Employee Benefits for the Contractor imposed on the City ; and the Contractor will reimburse the City for any award, judgment, or fine against the City based on the position the Contractor was ever the City 's employee, and all attorneys' fees and costs the City reasonably incurs defending itself against any such liability
- e. Interaction with Public. The Contractor recognizes that its conduct during the performance of the Services hereunder reflects upon its reputation in the community as well as upon the public perception of the City. Therefore, the Contractor offers and warrants to the City that the Contractor, its agents and employees will conduct all of their interactions with the citizens and the public relating to

the performance of the Services hereunder in such a manner as to provide customer service that reflects positively upon its reputation and the City's public image.

- f. Standard of Performance. In performing the Services, the Contractor warrants that it shall use that degree of care, skill, and professionalism ordinarily exercised under similar circumstances by highly competent members of the same profession practicing in the State of Florida. The Contractor represents to the City that the Contractor is, and its employees or subcontractors performing such Services are, properly licensed and/or registered within the State of Florida for the performance of the Services (if licensure and/or registration is required by applicable law) and that the Contractor and employees possess the skills, knowledge, and abilities to perform the Services competently, timely, and professionally in accordance with this Agreement. In addition, the Contractor warrants and represents that it will provide the Services in accordance with more specific standards of performance as are included within Exhibit A. The Contractor represents, covenants and agrees that the Services will be provided to the City free from any material errors. The Contractor's failure to meet or exceed any of the foregoing standards and warranties may be considered a material breach of this Agreement and may be grounds for termination of the Agreement pursuant to Section 12 below.
- g. Review of Books and Records. The Contractor shall promptly comply with any written City request for the City or any of its duly authorized representatives to reasonably access and review any books, documents, papers, and records of the Contractor that are pertinent to the Contractor's performance under this Agreement for the purpose of the City performing an audit, examination, or other re- view of the Services.
- h. Licenses and Permits. The Contractor shall be responsible at the Contractor's expense for obtaining, and maintaining in a valid and effective status, all licenses and permits necessary to perform the Services unless specifically stated otherwise in this Agreement
- i. Duty to Warn. The Contractor agrees to call to the City's attention errors in any drawings, plans, sketches, instructions, information, requirements, procedures, and/or other data supplied to the Contractor (by the City or by any other party) that it becomes aware of and believes may be unsuitable, improper, or inaccurate in a material way. However, the Contractor shall not independently verify the validity, completeness or accuracy of such information unless included in the Services or otherwise expressly engaged to do so by the City.

11. **OWNERSHIP OF DOCUMENTS**

- a. The CITY shall have the unlimited rights, for the benefit of the City, in all original drawings, designs, specifications, notes and other CONTRACTOR's work produced in the performance of this Agreement, or in contemplation of the work, including the right to use same on any other City work. All documents, including drawings and specifications prepared by the CONTRACTOR pursuant to this Agreement shall be instruments of service in respect of the project. They are not intended or represented to be suitable for reuse by the CITY or any others for any other project.

12. **TERMINATION**

- a. The CITY may by giving written notice to the CONTRACTOR, in the form
CAA agreement

prescribed in Section 26, terminate this Agreement or any Purchase Order issued hereunder, in whole or in part, immediately, for cause, due to the failure of the CONTRACTOR to fulfill its Agreement obligations. The CITY shall be the sole judge of non-performance. Further, either the CITY or the CONTRACTOR may terminate this Agreement for convenience, with a thirty (30) day written notice, in the form prescribed in Section 26. The City Manager is authorized to terminate this Agreement on behalf of the CITY as directed by the City Council. Upon receipt of such written notice, the CONTRACTOR shall:

- (1) Immediately discontinue all services affected unless the notice directs otherwise, and
 - (2) Promptly deliver to the CITY all data, drawings, specifications, reports, estimates, summaries, and any and all such other information and materials of whatever type or nature as may have been accumulated by the CONTRACTOR in performing this Agreement, whether completed or in process.
- b. If the termination is for the convenience of the CITY, the CONTRACTOR shall be paid compensation for services performed to the date of termination within thirty (30) days after delivery of such work and upon receipt of an invoice. If this Agreement calls for the payment based on a "Lump Sum Basis", the CITY shall pay the CONTRACTOR no more than a percentage of the "Lump Sum Basis" amount equivalent to the percentage of the completion of work, as determined solely and conclusively, contemplated by this Agreement.
- c. If the termination is due to the failure of the CONTRACTOR to fulfill its Agreement obligations, the CITY may take over the work and ensure its completion by either other Agreements or in a manner that is in the best interest of the CITY to do so. In such case, the CONTRACTOR shall be liable to the CITY for all reasonable additional costs occasioned to the CITY thereby. The CONTRACTOR shall not be liable for such additional costs if the failure to perform the Agreement arises without any fault or negligence of the CONTRACTOR; provided, however, that the CONTRACTOR shall be responsible and liable for the actions of its subcontractors, agents, employees and persons and entities of a similar type or nature. Such causes may include acts of God or of the public enemy, acts of the CITY in its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather; but in every case, the failure to perform must be beyond the control and without any fault or negligence of the CONTRACTOR.
- d. If, after notice of termination for failure to fulfill its Agreement obligations, it is determined that the CONTRACTOR had not so failed, the termination shall be conclusively deemed to have been affected for the convenience of the CITY. In such event, adjustment in the Agreement price shall be made as provided in Subsection (b) of this Section.
- e. If funds to finance this Agreement become unavailable, the CITY may terminate the Agreement with no less than twenty-four (24) hours written notice to the CONTRACTOR in the form prescribed in Section 26. The CITY will be the final authority as to the availability of funds. The CITY will pay the CONTRACTOR for all work completed prior to any notice of termination.

- f. The rights and remedies of the CITY provided for in this Section are in addition and supplemental to any and all other rights and remedies provided by law or under this Agreement.
13. **AGREEMENT AND PURCHASE ORDER IN CONFLICT** – Whenever the terms of this Agreement conflict with any Purchase Order issued pursuant to it, the Agreement shall prevail.
14. **NO CONTINGENT FEES** – The CONTRACTOR warrants that it has not employed or retained any company or person, other than a Bonafide employee working solely for the CONTRACTOR to solicit or secure this Agreement and that it has not paid or agreed to pay any person, company, corporation, individual or firm, other than a bonafide employee working solely for the CONTRACTOR, any fee, commission, percentage, gift, or other consideration contingent upon or resulting from award or making of this Agreement. For the breach or violation of this provision, the CITY shall have the right to terminate the Agreement at its sole discretion, without liability and to deduct from the Agreement price, or otherwise recover, the full amount of such fee, commission, percentage, gift, or consideration.
15. **CONFLICT OF INTEREST**
- a. The CONTRACTOR agrees that it will not contract for or accept employment for the performance of any work or service with any individual, business, corporation or government unit that would create a conflict of interest in the performance of its obligations pursuant to this Agreement with the CITY.
- b. The CONTRACTOR agrees that it will neither take any action nor engage in any conduct that would cause any City employee to violate the provisions of Chapter 112, Florida Statutes, relating to ethics in government.
- c. In the event that the CONTRACTOR causes or in any way promotes or encourages a City officer, employee, or agent to violate Chapter 112, Florida Statutes, the CITY shall have the right to terminate this Agreement pursuant to Section 11.
16. **ASSIGNMENT** – This Agreement, or any interest herein, shall not be assigned, transferred, or otherwise encumbered, under any circumstances, by the parties hereto without prior written consent of the other party and in such cases only by a document of equal dignity herewith.
17. **SUBCONTRACTORS** – In the event that the CONTRACTOR, during the course of the work under this Agreement, requires the services of any subcontractor or other professional associates in connection with services covered by this Agreement, the CONTRACTOR must first secure the prior express written approval of the CITY. If subcontractor or other professional associates are required in connection with the services covered by this Agreement, the CONTRACTOR shall remain fully responsible for the services of subcontractors or other professional associates.
18. **INDEMNIFICATION** – The CONTRACTOR agrees to indemnify and hold harmless the CITY, and its officers and employees, from claims, liabilities, damages, losses, and costs, including, but not limited to, reasonable attorney's fees, to the extent caused by the negligence, recklessness, or intentionally wrongful conduct of the CONTRACTOR and other persons employed or utilized by the design professional in the performance of the Agreement.

Nothing contained herein shall be construed or interpreted as a waiver of sovereign immunity of the State of Florida or of the CITY beyond the waiver provided in Section 768.28, Florida Statutes.

19. **INSURANCE** – The CONTRACTOR will, for the life of this Agreement, maintain insurance in the types and amounts detailed in Exhibit “D”. The CONTRACTOR will provide the CITY with Certificates of Insurance that demonstrate coverage in at least the types and amount required herein and that the CITY shall be notified in writing at least thirty (30) days before any such insurance is cancelled. The CONTRACTOR shall certify that all subcontractors comply with the same insurance requirements.
 - a. Obligations – Compliance with the foregoing insurance requirements shall not relieve the CONTRACTOR, its employees or agents of liability from any obligation under a Section or any other portions of this Agreement.
20. **MODIFICATIONS, AMENDMENTS OR ALTERATIONS** – No modification, amendment or alteration in the terms or conditions contained herein shall be effective unless contained in a written document executed with the same formality and of equal dignity herewith.
21. **INDEPENDENT CONTRACTOR** – It is agreed that nothing herein contained is intended or should be construed as in any manner creating or establishing a relationship of co-partners between the parties, or as constituting the CONTRACTOR (including its officers, employees, and agents) the agent, representative, or employee of the CITY for any purpose, or in any manner, whatsoever. The CONTRACTOR is to be and shall remain forever an independent contractor with respect to all services performed under this Agreement.
22. **EMPLOYEE STATUS** – Persons employed by the CONTRACTOR in the performance of services and functions pursuant to this Agreement shall have no claim to pension, workers' compensation, unemployment compensation, civil service or other employee rights or privileges granted to the CITY'S officers and employees either by operation of law or by the CITY.
23. **SERVICES NOT PROVIDED FOR** – The CITY shall honor no claim for services furnished by the CONTRACTOR not specifically provided for herein.
24. **PUBLIC RECORDS LAW REQUIREMENTS**

Notwithstanding any provision in this agreement to the contrary, the following public records requirements shall apply:

1. Keep and maintain public records required by the public agency (City/Organization) to perform the service.
2. Upon request from the public agency's custodian of public records (City Clerk), provide the public agency with a copy of the requested records or allow the records to be inspected or copied within a reasonable time at a cost that does not exceed the cost provided in Chapter 119, F.S. or as otherwise provided by law.
3. Ensure that public records that are exempt or confidential and exempt from public records disclosure requirements are not disclosed except as authorized by law for the duration of the contract term and following completion of the contract if the contractor does not transfer the records to the public agency.
4. Upon completion of the contract, transfer, at no cost, to the public agency all public records in possession of the contractor or keep and maintain public records required by the public agency to perform the service. If the contractor transfers all public

records to the public agency upon completion of the contract, the contractor shall destroy any duplicate public records that are exempt or confidential and exempt from public disclosure requirements. If the contractor keeps and maintains public records upon completion of the contract, the contractor shall meet all applicable requirements for retaining public records. All records stored electronically must be provided to the public agency upon request from the public agency's custodian of public records, in a format that is compatible with the information technology systems of the public agency.

If the Contractor has questions regarding the application of Chapter 119 Florida Statutes, for their duties to provide public records relating to this contract then contact the City's custodian of Public Records City Clerk Erin West at (904) 297-7500 X 3307, or e-mail ewest@greencovesprings.com, 321 Walnut St, Green Cove Springs, Fl 32043.

25. **COMPLIANCE WITH LAWS AND REGULATIONS** – In providing all services pursuant to this Agreement, the CONTRACTOR shall exercise usual and customary professional care in its efforts to abide by all statutes, laws, ordinances, rules, and regulations pertaining to, or regulating the provisions of, such services, including those now in effect and hereafter adopted. Engineer shall secure all licenses or permits required by law or regulations, and shall comply with all ordinances, laws, orders, rules and regulations pertaining to its work hereunder. Any violation of said statutes, laws, ordinances, rules, or regulations shall entitle the CITY to terminate this Agreement immediately, for cause, upon written notice in the form prescribed in Section 26 to the CONTRACTOR.
26. **NOTICE** – Whenever either party desires to give notice unto the other, it must be given by written notice, sent by certified United States mail, with return receipt requested, addressed to the party for whom it is intended at the place last specified and the place for giving of notice shall remain such until it shall have been changed by written notice in compliance with the provisions of this Section. For the present, the parties designate the following as the respective places for giving of notice to-wit:

FOR CITY:

Steven Kennedy, City Manager

Michael Daniels, City Planning and Zoning Director

City of Green Cove Springs
321 Walnut Street
Green Cove Springs, Florida 32043

FOR CONTRACTOR:

Charles Abbott Associates, Inc.
3001 North Rocky Point Drive East,
Suite 200 Tampa, FL 33607

27. **SUCCESSORS AND ASSIGNS** – The CITY and CONTRACTOR each bind the other and their respective successors and assigns in all respects to all of the terms, conditions, covenants, and provisions of this Agreement.
28. **THIRD PARTY BENEFICIARIES** – This Agreement does not create any relationship with, or any rights in favor of, any third party.
29. **NON-WAIVER** – The failure of any party to exercise any right in this Agreement shall not

be considered a waiver of such right.

30. **WAIVER OF JURY TRIAL** -- This Agreement shall be governed by and construed and enforced in accordance with the Laws of the State of Florida applicable to contracts entered into and to be performed in such state. The parties hereto agree to waive any right to trial by jury in any dispute arising from or related to this agreement.
31. **GOVERNING LAW AND VENUE** – This Agreement is governed in accordance with the laws of the State of Florida. Venue shall be in Clay County.
32. **ATTACHMENTS** – All exhibits attached to this Agreement are incorporated into and made part of this Agreement by reference.
33. **AMENDMENTS** – The parties may amend this Agreement only by mutual written agreement of the parties with the same formality and of equal dignity herewith.
34. **CAPTIONS AND SECTION HEADINGS** – Captions and section headings used herein are for convenience only and shall not be used in construing this Agreement.
35. **CONSTRUCTION** – This Agreement shall not be construed more strictly against one party than against the other merely by virtue of the fact that it may have been prepared by one of the parties. It is recognized that both parties have substantially contributed to the preparation of this Agreement.
36. **COLLUSION** – By signing this Agreement, the CONTRACTOR declares that this Agreement is made without any previous understanding, agreement, or connections with any persons, contractors or corporations and that this Agreement is fair, and made in good faith without any outside control, collusion, or fraud.
37. **RIGHTS AT LAW RETAINED** – The rights and remedies of the CITY, provided for under this Agreement, are in addition and supplemental to any other rights and remedies provided by law.
38. **ENTIRE AGREEMENT** – This Agreement constitutes the entire and supersedes all per or written or oral agreements, understandings, or representations.

IN WITNESS WHEREOF, the parties hereto have made and executed this Agreement on the date first written above by the CITY.

CITY OF GREEN COVE SPRINGS

CHARLES ABBOTT ASSOCIATES, INC

By: 
Steven Kelley, Mayor

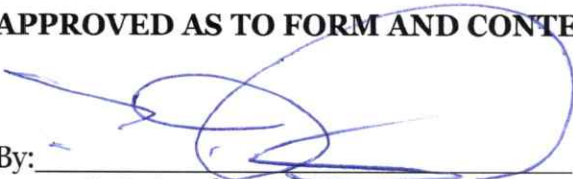
By: _____

By: 
Steven Kennedy, City Manager

ATTEST:

By: 
Erin West, City Clerk

APPROVED AS TO FORM AND CONTENT:

By: 
L. J. Arnold, III, City Attorney

Six (6) Exhibits:

- Exhibit "A" – Scope of Services-RFP
- Exhibit "B" – Hourly Rate Schedule
- Exhibit "C" – Turnaround Time for Plan Checks
- Exhibit "D" --Insurance
- Exhibit "E" --Sample Work Order
- Exhibit "F" --CAA Proposal

EXHIBIT "A"

Scope of Services – RFP LC #2019-05

REQUEST FOR PROPOSALS (RFP)
PROFESSIONAL SERVICES AGREEMENT FOR
BUILDING OFFICIAL, PLAN REVIEW AND
BUILDING INSPECTION SERVICES



RFP: RFP LC No. 2019-05

Project Name: Building Official, Plan Review and Building Inspection Services

Contracting Agency: City of Green Cove Springs

Address: 321 Walnut Street

Green Cove Springs, FL 32043

Telephone: (904) 297-7500 ext. 3323

Notice of Request for Proposals

Qualifications-based competitive sealed proposals will be received at the City Hall Office, 321 Walnut Street, Green Cove Springs, FL 32043 **until 2:00p.m., XXXXX, 2019 at XXX p.m.**, local time, for: RFP No. LC No. 2019-05, Building Official, Plan Review and Building Inspection Services.

Proposals shall be labeled “RFP No. LC No. 2019-05 Building Official, Plan Review and Building Inspection Services.” Number of Copies: Submit a total of one (1) original, so labeled, and four (4) complete hardcopies of the entire response and one thumb drive digital copy. An original signature must appear on the original hardcopy response. Executed Public Entity Crimes and Drug-Free Workplace forms, along with Standard Addendum to Contracts **must** accompany the submittal.

Any persons wishing their proposal to be considered is responsible for making certain that their proposal is received at the proper place and time. No oral, telegraphic, electronic, facsimile, or telephonic proposals or modifications will be considered unless specified. Proposals received after the scheduled submittal deadline will be returned unopened.

Request for Proposals packages can be obtained by website, www.greencovesprings.com under the Bid section. Additional information concerning the proposed service can be obtained by:

Laurie Copeland, Assistant Finance Director,
Assistant Finance Director,
At (904) 297-7500, ext. 3323
Email: lcopeland@greencovesprings.com

From 7:00a.m. – 5:30p.m., Monday – Thursday at the Green Cove Springs City Hall.

Steven Kennedy, City Manager
Mike Null, Assistant City Manager/Public Works Director
Michael Daniels, Planning and Zoning Director
Laurie Copeland, Assistant Finance Director

PROJECT DESCRIPTION:

The City of Green Cove Springs seeks proposals from Professional Building Service Firms capable of providing building official, plan review and building inspection services. The City seeks to engage responsive firms for a Continuing Services Contract.

I. SCOPE OF SERVICES

The scope of work to be performed by the awarded Contractor may consist of, but not be limited to the following:

1. Conduct inspections of building construction, erection, repair, addition, or alteration projects that require permitting indicating compliance with building, plumbing, mechanical, electrical, gas, fire prevention, energy, accessibility, and other applicable construction codes as required by law. The inspections shall be for both work performed under City issued permits and for non-permitted work/stop work order situations.
 - a. Firms must be able to provide the following categories of inspection services: building, commercial electrical, mechanical, plumbing, and fire.
 - b. It is the responsibility of the building code inspector to conduct inspections of construction, alteration, repair, remodeling, or demolition of structures and the installation of building systems, when permitting is required, to ensure compliance with the Florida Building Code and any applicable local technical amendments to the Code. Each building code inspector must be licensed in the appropriate category as defined in Florida Statute 468.603.
 - c. The Contractor shall provide appropriate personnel to perform the inspections and re-inspections no later than the following business day that it is requested by a permit applicant.
2. Plan Reviewer who is qualified to determine that plans submitted for purposes of obtaining building and other permits comply with the building, plumbing, mechanical, electrical, gas, fire prevention, energy, accessibility, and other applicable construction codes.
 - a. Categories of plan reviewers include: building, plumbing, mechanical, electrical, and fire.
 - b. It is the responsibility of the plan reviewers to conduct review of construction plans submitted in the permit application to assure compliance with the Florida Building Code and any applicable local technical amendments to the Code. The review of construction plans must be done by the building plans reviewer category as defined in Florida Statute 468.603. The plan reviewers' responsibilities will be performed under the supervision and authority of the building code administrator or building official.
 - c. The plans examiner shall attend any required meetings connected with the plan review or field inspection of the projects.

3. Provide a certified building official who will be responsible for signing off on permits, certificates of occupancy, final inspections, etc. The building official must be fully certified per the Department of Business and Professional Regulations.
4. All service providers shall be licensed and certified in accordance with all applicable laws, including but not limited to Florida Statutes 468 and 633.
5. Work effectively and respectfully with City elected officials and staff.
6. Inter-agency coordination as needed.
7. Attend City Council, Planning and Zoning Review Board, and Code Enforcement/Special Magistrate meetings as needed.
8. Contractor/Developer submittals shall also be submitted in digital format in addition to paper copies so can be available to the public.
9. Maintain records in accordance with local, State, and Federal public records retention requirements.
10. Provide support to Code Enforcement.
11. Ensure compliance with the Florida Building Code.
12. The contractor will need to be available in cases of natural disasters
13. Contractor shall maintain an office within Green Cove Springs City Hall, if selected. The office must be open Monday through Thursday, with regular hours.
14. Contractor shall provide all vehicles, clothing, inspection equipment, computers, cell phones, safety equipment, and other related materials necessary to perform the services. Inspectors must carry identification clearly showing they are City authorized inspectors. The cost to provide these materials shall be incorporated into the proposed bid amounts.
15. The Contractor will be expected to know the City's Comprehensive Plan and Land Development Regulations. Decisions are to be made in accordance with both documents.
16. The Contractor shall comply with all applicable public records law per section 119.0701, Florida Statutes.
17. This Bid may be utilized for FEMA projects and must follow the Field Manual for Public Assistance Grantee and Subgrantee Procurement Requirements attached hereto.

II: TERMS OF CONTRACT

1. The term of this contract is three (3) years with an option for the City to renew for two additional two (2) year terms.
2. The City may terminate this Agreement at any time for cause, and may terminate the Agreement with or without cause by giving at least thirty (30) days prior written notice. The Contractor may terminate this Agreement at any time by giving ninety (90) days prior

written notice to the City. In the event of termination by mutual agreement, the Contractor shall be compensated for services rendered.

3. All property, finished and unfinished documents, data, studies and reports prepared by the Contractor become the City's property in the event of termination.
4. Contractor shall be deemed an independent contractor as to all work required and not an agent or servant in the employ of the City. Contractor is, and shall at all times remain as to the City, a wholly independent contractor. Contractor shall have no power to incur any debt, obligation, or liability on behalf of the City or otherwise act on behalf of the City as an agent.
5. Contractor shall perform all work to the highest professional standards and in a manner reasonably satisfactory to the City Manager or his designee. The City Manager or his designee may from time to time assign additional or different tasks or services to the Contractor, provided such tasks are within the scope of services described in this document. However, no additional or different tasks or services will be performed by Contractor other than those specified or those so assigned in writing by the City Manager or his designee.
6. Contractor, in the course of its duties, may have access to confidential data of the City, private individuals, or employees of the City. Contractor covenants that all data, documents, discussion, or other information developed or received by Contractor or provided for performance of this Agreement are deemed confidential and shall not be disclosed without written authorization by the City. The City shall grant such authorization if disclosure is required by law. All City data shall be returned to the City upon termination of this Agreement. Contractor's covenant under this section shall survive the termination of this Agreement.
7. All reports, documents, or other written material developed by Contractor in the performance of this Agreement shall be and remain the property of the City without restriction or limitation upon its use or dissemination by the City. Such material shall not be the subject of a copyright application by Contractor.
8. Contractor covenants that it presently has no interest and shall not acquire any interest, direct or indirect, which may be affected by the services to be performed by Contractor under this Agreement, or which would conflict in any manner with the performance of its services hereunder. Contractor further covenants that, in performance of this Agreement, no person having any such interest shall be employed by it. Furthermore, Contractor shall avoid the appearance of having any interest which would conflict in any manner with their performance of services pursuant to this Agreement.
9. Contractor represents that it has, or will secure at its' own expense, all personnel required to perform the services under this Agreement. All services required under this Agreement will be performed by Contractor or under its supervision, and all personnel engaged in the work shall be qualified to perform such services.

10. Contractor reserves the right to determine the assignment of its own employees to the performance of Contractor's services under this Agreement, but the City reserves the right, for good cause, to require Contractor to exclude any employee from performing services on the City's premises or on the City's behalf.
11. Contractor shall keep itself informed of State, Federal, and local laws, ordinances, codes, and regulations which in any manner affect those employed by it or in any way affect the performance of its service pursuant to this Agreement. Contractor shall at all times comply with such laws, ordinances, codes, and regulations. Without limiting the generality of the foregoing, if Contractor is an out-of-state corporation or LLC, it must be qualified or registered to do business in the State of Florida. The City, its officers, and employees shall not be liable at law or in equity occasioned by failure of Contractor to comply with this section.
12. At all times during the term of this Agreement, Contractor shall have in full force and effect all licenses required of it by law for performance of the services hereunder.

III. ESTIMATED WORKLOAD

- a. The total number of inspections conducted in 2018 was 3,819. The number of permits issued was 790. The fees collected for permits in 2018 was \$385,397.96.
- b. There is no guarantee that the actual number of building permits and inspections will fall into the range described, as the numbers depend on a number of factors, including, but not limited to, economic and construction activity.
- c. The types of permits reviewed and inspected by the City along with their corresponding fees are provided in Exhibit A.

IV: QUALIFICATIONS AND EXPERIENCE REQUIREMENTS:

1. Provide qualified inspector(s) who are multi-disciplined. This requirement will allow the City to benefit from inspectors who can perform inspection services for both plumbing and building components in lieu of multiple inspectors inspecting a single project.
2. Plumbing and mechanical inspections vary from underground, aboveground, roughs, finals, stack tests, gas tests, gas piping, mechanical boiler, lawn sprinkler, backflow inspections, residential, commercial, temperatures, property maintenance, and other duties as performed by a licensed plumbing inspector.
3. Building, electrical, and mechanical inspections include but are not limited to residential, commercial, and industrial, and are to include various construction site property maintenance, mechanical, structural, accessibility, low voltage, commercial and residential electric overhead and underground services, above ceiling, roughs, final inspections and other duties as performed by Certified International Code Council

Inspectors.

4. Minimum qualifications:
 - a. Three (3) years of construction trade experience.
5. The highest code professional certification level available through the Plan reviews and responses shall be performed and/or supervised by Master Code Professionals International Code Council.
6. All staff assigned to provide the required services shall have obtained their designated certificates and qualifications prior to the award of contract.

V: QUALIFICATIONS AND EXPERIENCE REQUIREMENTS:

1. Provide a letter of interest and introduction. Briefly describe your firm and provide the website. Include the name, address, email, and phone number of the contact person as well as a summary of your understanding of the scope of services and overall approach to
 - a. The scope of services. The letter should be signed by an officer of the firm authorized to bind the firm to all commitments made in the proposal.
2. Company Profile
 - a. The location of staffing and firm resources expected to be made available to serve the City.
 - b. General capabilities.
 - c. Number of years in business.
 - d. Whether the firm is a certified minority business as defined by the Florida Small and Minority Business Assistance Act of 1985.
3. Experience and Specific Capabilities
 - a. Qualifications, experience, and expertise of your company as a whole.
 - b. Provide a description of the firm's personnel who will be assigned to the work detailed in the Scope of Services, including each individual's professional qualifications (education, licenses, certifications, etc.), and pertinent experience.
 - c. Detail the firm's past experience providing services of the type required by the City to other public-sector clients.
 - d. Demonstrate how the operation will be supervised and what current quality control policies would be in place for the service.
 - e. Provide a statement of credit or other proof of ability to perform based on financial resources.
 - f. Provide any litigation or disciplinary proceedings that the firm has been involved

c. A table similar to the following shall be submitted.

Type of Job	Turnaround Time First Check	Turnaround Time Re-Check
Residential		
New Construction	working days	working days
Addition	working days	working days
Remodel	working days	working days

Non-Residential	Turnaround Time First Check	Turnaround Time Re-Check
New Construction	working days	working days
Addition	working days	working days
Remodel	working days	working days

8. Fee Structure

The cost for providing these services on behalf of the City will be either be on an hourly rate or on a percentage basis of the City fees collected. As part of your proposal, provide the proposed fee structure for all plan reviews and inspections. Also, include your fee structure for inspections in cases of natural disasters. No other payments will be made to the Contractor for the services provided.

VI. INQUIRIES AND INTERPRETATIONS:

Responses to inquiries which directly affect an interpretation or change to this RFP will be issued in writing by addendum and mailed or faxed to all parties recorded by the City as having received a copy of the RFP. All information regarding this RFP shall be placed on the City's website www.greencovesprings.com . Requests for interpretation or changes to this RFP must be received by the City's contact person listed. All such addenda issued by the City prior to the last date that submittals are required to be received shall be considered part of the RFP, and the Respondent shall be required to consider and acknowledge receipt of such in its response. Firms receiving this RFP other than directly from the City are responsible for notifying the Finance Department that they are in receipt of a submittal package and are to provide a name and address in the event an amendment is issued. It is the obligation of the Respondent to make sure that it has received all addenda prior to submission of its response. Respondents may obtain information on all addenda issued to the date of inquiry from the City's contact person or at <http://www.greencovesprings.com>.

Only those responses to inquiries, which are made by formal written addenda, shall be binding. Oral and other interpretations or clarifications will be without legal effect, and shall not be binding on the City. The Respondent must acknowledge receipt of all addenda in its response.

VII. SELECTION PROCESS:

The selection process will be conducted in accordance with Florida Statutes, Chapter 287.055 and as outlined on Proposal Evaluation Criteria, Section VI of the RFP. A Selection Committee will evaluate and rank the proposals based on Criteria outlined within the RFP.

Review of Written Proposals

▶ Using the criteria given in items 1 through 5 described in the "Proposal Evaluation Criteria" section VI of this RFP and with emphasis on professional competence, the City of Green Cove Springs Selection Committee shall review all proposals received to determine those firms, who are fully qualified, responsible and suitable to provide the professional services set forth by this Request for Proposals.

▶ Discussion and Interviews

The City of Green Cove Springs Selection Committee may then hold an interview with one or more of the firms who have been deemed by the Committee to be fully qualified, responsible and suitable to provide the services set forth by this Request for Proposals.

▶ Evaluation

Using all of the information developed during the proposal review and interview stages, the City of Green Cove Springs shall then select in order of preference those firms whose professional qualifications are deemed most meritorious. The City Manager will be the tie breaker if such a tie develops in the reviewing stage. At that time, the City will then present to Council.

VIII. PROPOSAL EVALUATION CRITERIA

The City of Green Cove Springs Evaluation criteria shall include the following factors which shall be considered in the evaluation and ranking process.

1. Past performance of the Firm [25 points]

- A summary of the firm's experience in providing the services required in the request for proposals.
- A list of current contracts with government agencies in Florida.
- Provide a minimum of three (3) references relating to work you have done for clients with full name, title, address, phone and fax numbers

2. Qualifications and Experience of Designated Personnel (25 points)

- Certifications
- Number and diversity of types of plans reviewed and inspections conducted

3. Methodology and Management Approach (25 points)

- Amount of training provided to staff by Firm
- Customer Service Skills (references)
- Proposed Office Hours

4. Fees (20 points)

- Pricing structure (either a percentage of fees or hourly rates)
- Any other costs

5. Financial / Other (5 points)

- Overall completeness, clarity and quality of proposal
- Financial resources and capabilities
- Evidence of insurance/bonding capability
- Litigation/disciplinary proceedings

The City of Green Cove Springs reserves the right to negotiate and contract with any firm(s) or individual suited to provide the services required under this Request for Proposals.

IX. Schedule

<i>Activity</i>	<i>Date</i>
Date of Issue	TBD
Bid Closing Date	TBD
Evaluation Process	TBD
Display and Communication of Best Evaluated Bidder Notice	TBD
Presentation to council	TBD

X. ADDITIONAL REQUIREMENTS

TERM “OWNER”

The term “Owner” where used in these documents, refers to the City of Green Cove Springs.

DATE AND RECEIPT OF RFP

Formally advertised Request for Proposals indicates a time and date for receipt of the RFP. Responses are date stamped upon receipt, those received after the scheduled closing time will be returned unopened to the proposing firm.

WITHDRAWAL OF RFP

The proposing firm may request withdrawal of their sealed proposal prior to the scheduled receipt date and time via written request to the Assistant Finance Director. After being opened, the RFP will be valid for 60 calendar days and may not be withdrawn during that time.

CONTRACT AWARD

The City reserves the right to accept or reject any or all Proposals, to waive irregularities and technicalities, and to request resubmission or additional information. The City reserves the right to award the contract to the most responsible and responsive proposing firm, resulting in an agreement, which is most advantageous to and in the best interest of the City of Green Cove Springs. The City shall be the sole judge of the Qualifications and the resulting agreement that is in the best interests, and the City of Green Cove Springs’ decision shall be final.

CONTRACT DOCUMENTS

The contract entered into by the City of Green Cove Springs and the Lead Team firm shall consist of this Request for Proposals, any addendum issued including the City’s Standard Addendum to all City Contracts and Agreements document, the submitted proposal by the contractor, any approved change orders issued and the Standard Professional Engineering Service Agreement, all of which shall be referred to collectively as the Contract Documents.

ADDENDA AND INTERPRETATIONS

If it becomes necessary to revise any part of this Request for Proposals, a written addendum will be provided to all known prospective proposing firms which will be posted on City’s website. Interpretations, corrections, and changes shall not be binding unless made by Addendum. The proposing firm shall not rely upon interpretations, corrections, or changes made in any other manner, whether by telephone, or in person. All Addenda issued shall become part of the Contract documents. It is the proposing firm’s responsibility to ascertain that it has received all Addenda issued for this solicitation. All Addenda must be acknowledged.

TERMINATION FOR CONVENIENCE

The City of Green Cove Springs shall have the right to terminate at the City’s convenience, with or without cause, any Contract resulting from this RFP by specifying the date of termination in a written notice. In this event, the firm shall be entitled to just and equitable compensation for any satisfactory work completed. All work produced shall become the property of the City of Green Cove Springs.

XI. INDEMNIFICATION REQUIREMENT

The City shall require the following or similar indemnification paragraphs to be made part of the contract(s) as entered into with the successful proposer(s):

The City shall be held harmless against all claims for bodily injury, sickness, disease, death or personal injury or damage to property or loss of use resulting therefrom arising out of performance of the agreement or contract, unless such claims are a result of the City's sole negligence.

The City shall also be held harmless against all claims for financial loss with respect to the provision of or failure to provide professional or other services resulting in professional, malpractice, or errors or omissions liability arising out of performance of the agreement or contract, unless such claims are a result of the City's sole negligence.

PROOF OF INSURANCE AND WORKERS' COMPENSATION

The successful Bidder selected for the project will be required to procure and maintain during the life of the Contract with the City of Green Cove Springs, Florida insurance of the type and in the minimum amounts listed below:

- a. Commercial General Liability
 1. General Aggregate \$1,000,000
 2. Products and Completed Operations Aggregate \$1,000,000
 3. Personal and Advertising Injury \$1,000,000
 4. Each Occurrence \$1,000,000
 5. Fire Damage (any one fire) \$ 50,000
 6. Medical Expense (any one person) \$ 5,000
- b. Automobile Liability
 1. Any Automobile-Combined bodily injury/property damage, with minimum limits for all additional coverage \$1,000,000 as required by Florida law
- c. Workers' Compensation/Employers Liability
 1. Workers' Compensation statutory limits
 2. Employers Liability
 - a. Each Accident \$ 100,000
 - b. Disease-Policy \$ 500,000
 - c. Disease-Each Employee \$ 100,000
- d. Professional Liability
 1. When required by contract-per occurrence \$1,000,000

Insurance shall be written by an insurer holding a current certificate of authority pursuant to Chapter 624, Florida Statutes. Prior to commencing any work on the contract, certificates of insurance, approved by the City, evidencing the maintenance of said insurance shall be furnished to the City. The certificates shall provide that no material alteration or cancellation, including expiration and non-renewal, shall be effective until fifteen (15) days after receipt of written notice by the City. **All applicable coverages shall name the City as "additional insured"**. Receipt of certificates or other documents of insurance or policies or copies of policies by the City, or by any

of its representatives, which indicate less coverage than required will not constitute a waiver of the successful proposer(s)' obligation to fulfill the insurance requirements herein.

XII. ANTI-COLLUSION REQUIREMENT:

Under no circumstances shall any prospective proposer, or any person or persons acting for or on behalf of any said prospective proposer, seek to influence or gain the support of any member of the City Council or the City Staff favorable to the interest of any prospective proposer or seek to influence or gain the support of any member of the City Council or City Staff against the interest of any prospective proposer. Any such activities shall result in the exclusion of the prospective proposer from consideration by the City.

XIII. PUBLIC ENTITY CRIMES REQUIREMENT:

A person or affiliate who has been placed on the convicted vendor list following a conviction for a public entity crime may not submit a bid or a proposal on a contract with a public entity for the construction or repair of a public building or public work, may not submit bids on leases of real property to a public entity, and may not transact business with any public entity in excess of the threshold amount provided in SECTION 287.017, for CATEGORY TWO for a period of 36 months from the date of being placed on the convicted vendor list.

**SWORN STATEMENT PURSUANT TO SECTION 287.133(3)(a),
FLORIDA STATUTES, ON ENTITY CRIMES**

1. This sworn statement is submitted to _____
(print name of the public entity)

by _____
(print individual's name and title)

for _____
(print name of entity submitting sworn statement)

whose business address is

and (if applicable) its Federal Employer Identification Number (FEIN) is:

(If the entity has no FEIN, include the Social Security Number of the Individual signing this sworn statement: _____)

2. I understand that a "public entity crime" as defined in Paragraph 287.133(1)(g),

Florida Statutes, means a violation of any state or federal law by a person with respect to and directly related to the transaction of business with any public entity or with an agency or political subdivision of any other state or of the United States, including, but not limited to, any bid or contract for goods or services to be provided to any public entity or an agency or political subdivision or any other state or of the United States and involving antitrust, fraud, theft, bribery, collusion, racketeering, conspiracy, or material misrepresentation.

3. I understand that "convicted" or "conviction" as defined in Paragraph 287.133(1)(b), **Florida Statutes**, means a finding of guilt or a conviction of a public entity crime, with or without an adjudication of guilt, in any federal or state trial court of record relating to charges brought by indictment or information after July 1, 1989, as a result of jury verdict, nonjury trial, or entry of a plea of guilty or nolo contendere.

4. I understand that an "affiliate" as defined in Paragraph 287.133(1)(a), **Florida Statutes**, means:

a. A predecessor or successor of a person convicted of a public entity crime; or
b. An entity under the control any natural person who is active in the management of the entity and who has been convicted of a public entity crime. The term "affiliate" includes those officers, directors, executives, partners, shareholders, employees, members, and agents who are active in the management of an affiliate. The ownership by one person of shares constituting a controlling interest in another person or a pooling of equipment or income among persons when not for fair market value under an arm's length agreement, shall be a prima facie case that one person controls another person. A person who knowingly enters into a joint venture with a person who has been convicted of a public entity crime in Florida during the preceding 36 months shall be considered an affiliate.

c. I understand that a "person" as defined in Paragraph 287.133(1)(e), **Florida Statutes**, means any natural person or entity organized under the laws of any state or of the United States with the legal power to enter into binding contract and which bids or applies to bid on contracts for the provision of goods or services let by a public entity, or which otherwise transacts or applies to transact business with a public entity. The term "person" includes those officers, directors, executives, partners, shareholders, employees, members, and agents who are active in management of an entity.
d. Based on information and belief, the statement which I have marked below is true in relation to the entity submitting this sworn statement. **(indicate which statement applies.)**

_____ Neither the entity submitting this sworn statement, nor any of its officers, directors, executives, partners, shareholders, employees, members, or agents who are active in the management of the entity, nor any affiliate of the entity has been charged with and convicted of a public entity crime subsequent to July 1, 1989.

_____ The entity submitting this sworn statement, or one or more of its officers, directors, executives, partners, shareholders, employees, members, or agents who are active in the management of the entity or an affiliate of the entity has been charged with and convicted of a public entity crime subsequent to July 1, 1989.

_____ The entity submitting this sworn statement, or one or more of its officers, directors, executives, partners, shareholders, employees, members, or agents who are active in the management of the entity, or an affiliate of the entity has been charged with and convicted of a public entity crime subsequent to July 1, 1989. However, there has been a subsequent proceeding before a Hearing Officer of the State of Florida, Division of Administrative Hearings and the Final Order entered by the Hearing Officer determined that it was not in the public interest to place the entity submitting this sworn statement on the convicted vendor list. **(attach a copy of the final order)**

I UNDERSTAND THAT THE SUBMISSION OF THIS FORM TO THE CONTRACTING OFFICER FOR THE PUBLIC ENTITY IDENTIFIED IN PARAGRAPH 1 (ONE) ABOVE IS FOR THAT PUBLIC ENTITY ONLY AND, THAT HIS FORM IS VALID THOROUGH DECEMBER 31 OF THE CALENDAR YEAR IN WHICH IT IS FILED. I ALSO UNDERSTAND THAT I AM REQUIRED TO INFORM THE PUBLIC ENTITY PRIOR TO ENTERING INTO A CONTRACT IN EXCESS OF THE THRESHOLD AMOUNT PROVIDED IN SECTION 287.017, FLORIDA STATUTES FOR CATEGORY TWO OF ANY CHANGE IN THE INFORMATION CONTAINED IN THIS FORM.

(Signature)

Sworn to an subscribed before me this _____ day of _____, 20 _____

Personally known _____

OR produced identification _____ Notary Public - State of _____

(Type of identification) My commission expires _____

(Printed typed or stamped commissioned name of notary public)

DRUG-FREE WORKPLACE COMPLIANCE FORM

In order to have a drug-free workplace program, a business shall abide as follows:

The undersigned vendor/contractor in accordance with Florida Statute 287.087 hereby certifies that _____ (name of business) does:

- 1. Publish a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the workplace and specifying the actions that will be taken against employees for violations of such prohibition.
- 2. Inform employees about the dangers of drug abuse in the workplace, the company’s policy of maintaining a drug-free workplace, any available drug counseling, rehabilitation, and employee assistance programs, and the penalties that may be imposed upon employees or drug abuse violations.
- 3. Give each employee engaged in providing the commodities or contractual services that are under proposal a copy of the statement specified in item 1, above.
- 4. In the statement specified in item 1, notify the employees that as a condition of working on the commodities or contractual services which are under proposal, the employee will abide by the terms of the statement and will notify the employer of any conviction of, or plea of guilty or nolo contendere to any violation of Chapter 1893 or of any controlled substance law of the United States or any state, for a violation occurring in the workplace no later than five (5) days after such conviction.
- 5. Impose a sanction on, or require the satisfactory participation in a drug abuse assistance or rehabilitation program if such is available in the employee’s community, by any employee who is convicted.
- 6. Make a good faith effort to continue to maintain a drug-free workplace through implementation of this section.

As the person authorized to sign the statement, I certify that, _____

_____, (name of business), fully complies/does not comply with the above requirements.

Vendor/Contractor Signature

Date

STANDARD ADDENDUM

TO ALL

CITY CONTRACTS AND AGREEMENTS

Any other provisions of the Contract or Agreement to which this Standard Addendum is attached to the contrary notwithstanding, the parties specifically agree that the provisions hereinafter set forth will apply exclusively with respect to the matters addressed, whether addressed in said Contract or Agreement or not, and shall be deemed an integral part of said Contract or Agreement as if duly set out therein, having a force and effect of equal or superior dignity, as applicable, with the provisions thereof; provided, that if the provisions of the Contract or Agreement address a particular matter in a manner which results in a lower cost to the City than this Standard Addendum, then such provisions of the Contract or Agreement shall control and supersede the applicable provisions hereof (as used herein, the term "Contractor" means the vendor or other party in the Contract or Agreement providing construction, labor, materials, professional services, and/or equipment to the City thereunder; the term "City" means Green Cove Springs, a municipal corporation of the State of Florida, its City Council, or any other name or label set forth in the Contract or Agreement indentifying such entity).

1. All payments for services rendered, or supplies, materials, equipment and the like constructed, delivered or installed under the Contract or Agreement (the Work) shall be made by the City in accordance with the Local Government Prompt Payment Act (the Act). Upon receipt of a proper statement, invoice or draw request, the City shall have the number of days provided in the Act in which to make payment.
2. Any work or professional services sub-contracted for by the Contractor for which the City has agreed to reimburse the Contractor shall not be marked up, but shall be payable by the City only in the exact amount reasonably incurred by the Contractor. No other such sub-contracted services shall be reimbursed.
3. In the event the Contract or Agreement is for professional services, charged on a time basis, the City shall not be billed or invoiced for time spent traveling to and from the Contractor's offices or other points of dispatch of its sub-contractors, employees, officers, or agents in connection with the services being rendered.
4. The City shall not be liable to reimburse the Contractor for any courier service, telephone, facsimile, or postage charges incurred by the Contractor, except as follows, and then only in the exact amount incurred by the Contractor [if the space below is left blank, then "NONE" is deemed to have been inserted therein]:
5. The City shall not be liable to reimburse the Contractor for any copying expenses incurred by the Contractor, except as follows, and then only at \$0.05 per page [if the space below is left blank, then "NONE" is deemed to have been inserted therein]:
6. If and only if travel and per diem expenses are addressed in the Contract or Agreement in a manner which expressly provides for the City to reimburse the Contractor for the same, then the City shall reimburse the Contractor only for those travel and per diem expenses reasonably incurred and only in accordance with the provisions of Section 112.061, Florida Statutes or as otherwise limited by Florida law. In the event the Contractor has need to utilize hotel accommodations or common carrier services,

the City shall reimburse the Contractor for his, her, or its reasonable expense incurred thereby provided prior written approval of the City Manager of the City or his or her designee is obtained.

7. With respect to drawings and/or plans prepared on behalf of the City by the Contractor under the Contract or Agreement, unless specifically provided otherwise therein, complete sets of such drawings and/or plans shall be reproduced by the Contractor without cost to the City for all bidders requesting the same, and five (5) complete sets of such drawings and/or plans shall be reproduced and delivered to the City without cost.
8. With respect to any indemnification by the City provided under the Contract or Agreement, any such indemnification shall be subject to and within the limits set forth in Section 768.28, Florida Statutes, and shall otherwise be limited as provided by law.
9. In that the City is a governmental agency exempt from sales tax, the City shall pay no such taxes, any other provisions of the Contract or Agreement to the contrary notwithstanding. The City shall provide proof of its exempt status upon reasonable request.
10. Any pre-printed provisions of the Contract or Agreement to the contrary notwithstanding, the same shall not automatically be renewed but shall be renewed only upon subsequent agreement of the parties.
11. The Contractor acknowledges that in the budget for each fiscal year of the City during which the term of the Contract or Agreement is in effect, a limited amount of funds are appropriated which are available to make payments arising under the Contract or Agreement. Any other provisions of the Contract or Agreement to the contrary notwithstanding, and pursuant to applicable Florida Statutes, the maximum payment that the City is obligated to make under the Contract or Agreement from the budget of any fiscal year shall not exceed the appropriation for said fiscal year.
12. The Contractor shall comply with applicable provisions of Section 119.0701, Florida Statutes and any contract between the parties shall fully comply with such section.

CITY OF GREEN COVE SPRINGS

CONTRACTOR/FIRM/INDIVIDUAL

By: _____
Steven Kelley, Mayor

By: _____
(Printed Name and Title)

ATTEST:

By: _____
Erin West, City Clerk

ACKNOWLEDGEMENT OF ADDENDUM

I acknowledge the receipt of _____ Addendums to the original RFP.

Company Representative Signature

EXHIBIT A

BUILDING PERMIT FEES

New residential buildings: For each \$1,000.00 of estimated value or fraction thereof - contract shall be required to establish value	\$6.00
New commercial buildings (non-single family) : for each \$1,000.00 of estimated value or fraction thereof - contract shall be required to establish value	\$14.00
Renovation or modification of commercial (non-single family) : for each \$1,000.00 of value or fraction thereof - contract shall be required to establish value - this includes roofing	\$14.00
Mobile home (Singlewide)	\$250.00
Mobile home (Doublewide)	\$275.00
Mobile home (Triplewide)	\$300.00
Alterations—Remodeling For each \$1,000.00 of estimated value or fraction thereof - contract shall be required to establish value	\$6.00
Garages, accessory buildings For each \$1,000.00 of estimated value or fraction thereof - contract shall be required to establish value	\$6.00
Carports, screen porch, barns For each \$1,000.00 of estimated value or fraction thereof - contract shall be required to establish value	\$6.00
Roofing, or improvements (siding, interior, etc.) per \$1,000.00 value	\$13.00
Temporary or portable amusement devices per unit	\$100.00
Fireplace	\$100.00
Demolition of buildings or structures:	
For each building structure up to 5,000 s.f.	\$170.00
Greater than 5,000 s.f.	\$270.00
Change in occupant	\$100.00
Signs:	
For the first 100 square feet	\$175.00
For every 100 square feet	\$30.00
Minimum fee for a sign	\$175.00
Safety Inspection	\$100.00
Minimum fee for any building permits (Including Amendments)	\$100.00

INSPECTION FEES	
Re-inspection Fee (Per inspection) for failed or partial inspections	\$50.00
After Hours Inspection (Per inspection)	\$100.00
PLAN REVIEW FEES	
Residential Review Plan Fee	\$50.00
Amendments and Revisions to Residential Permits and/or Plans	\$50.00
Commercial Review Plan Fee (Based on value of job to be permitted)	Review Fee
Projects under \$25,000	\$50.00
\$25,000.00 to \$100,000.99	\$100.00
\$100,001.00 to \$250,000.99	\$200.00
\$250,001.00 to \$500,000.99	\$300.00
\$500,001.00 to \$1,000,000.99	\$400.00
In excess of \$1,000,000.00	\$600.00
Revisions (per Revision)	\$50.00
Public Safety Division:	Review Fee
Projects under \$100,000.00	\$50.00
\$100,000.01 to \$500,000.00	\$100.00
\$500,000.01 to \$1,000,000.00	\$200.00
\$1,000,000.01 or greater	\$300.00
Revision (per revision) between \$0.00 and \$500,000.00	\$50.00
Revision (per revision) \$500,000.01 or greater	\$100.00
OTHER BUILDING PERMIT RELATED FEES	
Annual License Fee	\$25.00
Change in Qualifying Agent	\$50.00

ELECTRICAL PERMIT FEES

(a) New residential construction and mobile homes:

New residential construction and mobile homes	\$150.00
Temporary service pole, installation of (for new construction)	\$85.00
Reconnect existing mobile home	\$70.00
Pool wire	\$70.00
Electrical sub feeds	\$70.00

(b) Existing residential units and mobile homes:

Air conditioning or electrical heat (each)	\$25.00
Minimum fee	\$70.00

(c) Commercial buildings (new construction):

0— 300 ampere service	\$150.00
301—400 ampere service	\$175.00
401—600 ampere service	\$200.00
601— and above ampere service	\$225.00
For each outlet, including lighting requiring electrical connection	\$.50
For each appliance, fixed or stationary, air conditioning and/or heating amperes requiring circuit capacity above 30	\$35.00
Temporary pole	\$85.00
Minimum fee	\$35.00

(d) Existing commercial structures:

Increase in additional ampere service each additional ampere	\$0.40
Additions or alterations requiring service from panel (Home Run)	\$1.60

For each outlet, including lighting requiring electrical connection	\$0.40
Circuits requiring capacity above 30 amperes, each	\$25.00
Minimum fee	\$70.00

MECHANICAL PERMIT FEES

(a) New Construction (Residential and Commercial)

Up to Three and one-half (3½) tons	\$120.00
Four (4) tons	\$125.00
Five (5) tons	\$130.00

(b) Mobile homes or Mechanical Change Outs:

Up to Three (3) tons	\$70.00
Three and one-half (3½) tons	\$80.00
Four (4) tons	\$85.00
Five (5) tons	\$90.00

(c) Other Mechanical Permits

Gas burner (each)	\$10.00
Underground tank (for each \$1,000.00 of value)	\$10.00
Boilers (including heating element) for the first 500,000 BTU per hours input of fuel used or fractional part thereof	\$40.00
For each additional 500,000 BTU	\$10.00
Air conditioning and refrigeration (total capacity in single installation) For each ton capacity or fractional part	\$10.00
Range hood (for each \$1,000.00 of value)	\$10.00

Oil furnace	\$10.00
Minimum fee	\$70.00

PLUMBING PERMIT FEES

(1) *New construction—Residential and mobile homes:*

Up to Three (3) baths	\$150.00
Each bath thereafter	\$20.00
Each additional fixture	\$10.00
Minimum fee	\$70.00

(2) *Commercial buildings (new construction):*

Additionally, for each fixture having a water supply and/or waste outlet, including floor drains and roof drains (each)	\$20.00
Minimum fee	\$70.00+ Above

(3) *Irrigation:*

Minimum Fee	\$70.00
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POOL PERMITS FEES

Minimum fee for first 15,000 gallons	\$175.00
For each additional 1,000 gallons	\$5.00
Re-marcite	\$100.00

**EXHIBIT B
FEMA Field
Manual**



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



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.

TABLE OF CONTENTS

I. INTRODUCTION	1
A. USE OF CONTRACTORS BY GRANTEES AND SUBGRANTEES	1
B. ROLE OF THE FEDERAL GOVERNMENT IN GRANTEE AND SUBGRANTEE CONTRACTING	2
C. STATE AND LOCAL LAWS AND REGULATIONS	3
D. STANDARD OF FEMA REVIEW	3
E. CONFLICTING FEDERAL REQUIREMENTS	4
F. ORGANIZATION OF MANUAL	4
II. OVERVIEW OF CONTRACTS	6
A. DEFINITION OF CONTRACT AND DISTINCTION FROM A SUBGRANT	6
B. CONTRACT PAYMENT OBLIGATIONS	7
1. Fixed Price and Cost-Reimbursement Contracts	8
2. Time and Materials (T&M) Contracts	9
C. TYPES OF CONTRACT BASED ON PROCUREMENT METHOD	9
1. Small Purchase Procedures	9
2. Sealed Bidding	10
3. Procurement through Competitive Proposals (or Negotiated Procurement)	10
4. Noncompetitive Procurement	10
III. PROCUREMENT BY A STATE	11
IV. PROCUREMENT BY LOCAL AND INDIAN TRIBAL GOVERNMENTS	14
A. GENERAL PROCUREMENT STANDARDS (44 C.F.R. § 13.36(b))	14
1. Contract Administration (44 C.F.R. § 13.36(b)(2))	15
2. Written Code of Procurement Standards of Conduct (44 C.F.R. § 13.36(b)(3))	16
3. Review of Proposed Procurements (44 C.F.R. § 13.36(b)(4))	19
4. Awards to Responsible Contractors (44 C.F.R. § 13.36(b)(8))	22
5. Procurement Records (44 C.F.R. § 13.36(b)(9))	23
6. Time and Material (T&M) Contracts (44 C.F.R. § 13.36(b)(10))	25
7. Settlement of Contractual and Administrative Issues (44 C.F.R. § 13.36(b)(11))	28
8. Protest and Dispute Procedures (44 C.F.R. § 13.36(b)(12))	29

<p>FIELD MANUAL</p> <p>Public Assistance Grantee and Subgrantee Procurement Requirements</p> <p>FEMA Office of Chief Counsel</p> <p>Procurement Disaster Assistance Team</p>
--

9. Encouraging Intergovernmental Agreements (44 C.F.R. § 13.36(b)(5))	30
10. Purchasing From the General Services Administration’s Schedules	32
11. Obtaining Goods and Services through Mutual Aid Agreements	34
12. Using Another Jurisdiction’s Contract	36
13. Using an Existing Contract of the Subgrantee	37
14. Changes in Contracts	38
15. Encouraging the Use of Federal Excess and Surplus Property (44 C.F.R. § 13.36(b)(6))	39
16. Encouraging the Use of Value Engineering (44 C.F.R. § 13.36(b)(7))	40
B. COMPETITION (44 C.F.R. § 13.36(c))	41
1. Situations Restrictive of Competition (44 C.F.R. § 13.36(c)(1))	41
2. Local Preferences in Contractor Selection (44 C.F.R. § 13.36(c)(2))	49
3. Contract Award Selection Procedures (44 C.F.R. § 13.36(c)(3))	52
4. Use of Prequalified Lists (44 C.F.R. § 13.36(c)(4))	53
C. METHODS OF PROCUREMENT (44 C.F.R. § 13.36(d))	55
1. Procurement by Small Purchase Procedures (44 C.F.R. § 13.36(d)(1))	56
2. Procurement by Sealed Bids (Formal Advertising) (44 C.F.R. § 13.36(d)(2))	56
3. Procurement by Competitive Proposals (44 C.F.R. § 13.36(d)(3))	60
4. Procurement by Noncompetitive Proposals (44 C.F.R. § 13.36(d)(4))	64
D. CONTRACTING WITH SMALL AND MINORITY FIRMS, WOMEN’S BUSINESS ENTERPRISES, AND LABOR AREA SURPLUS FIRMS (44 C.F.R. § 13.36(e))	73
1. Required Affirmative Steps to Assure Certain Firms Are Used (44 C.F.R. § 13.36(e)(2))	73
2. Meaning of Small Business, Minority Business, Labor Area Surplus Firm, and Women’s Business Enterprise	74
3. Set Asides for Small Businesses, Minority-Owned Firms, and Women’s Business Enterprises	75
E. COST OR PRICE ANALYSIS (44 C.F.R. § 13.36(f))	76
1. General Requirement (44 C.F.R. § 13.36(f)(1))	76
2. Profit as a Separate Element of Price (44 C.F.R. § 13.36(f)(2))	80
3. Costs or Prices Based on Estimated Costs (44 C.F.R. § 13.36(f)(3))	80
4. Cost Plus a Percentage of Cost and Percentage of Construction Costs Contracts (44 C.F.R. § 13.36(f)(4))	81
F. AWARDED AGENCY PREAWARD REVIEW OF SUBGRANTEE PROCUREMENTS (44 C.F.R. § 13.36(g))	83

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
 FEMA Office of Chief Counsel
 Procurement Disaster Assistance Team

1. Review of Technical Specifications on Proposed Procurements (44 C.F.R. § 13.36(g)(1))	83
2. Review of Other Procurement Documents (44 C.F.R. § 13.36(g)(2))	83
G. CONTRACTOR BONDING REQUIREMENTS (44 C.F.R. § 13.36(h))	84
1. Bid Guarantee (44 C.F.R. § 13.36(h)(1))	85
2. Performance and Payment Bonds (44 C.F.R. § 13.36(h)(2) and (3))	85
H. CONTRACT PROVISIONS (44 C.F.R. § 13.36(i))	86
1. Provisions for Contractual Remedies (44 C.F.R. § 13.36(i)(1))	86
2. Provisions for Termination for Cause and Convenience (44 C.F.R. § 13.36(i)(2))	87
3. Compliance with Executive Order 11,246 (44 C.F.R. § 13.36(i)(3))	87
4. Compliance with Copeland Anti-Kickback Act (44 C.F.R. § 13.36(i)(4))	89
5. Compliance with the Davis-Bacon Act (44 C.F.R. § 13.36(i)(5))	90
6. Compliance with the Contract Work Hours and Safety Standards Act (44 C.F.R. § 13.36(i)(6))	91
7. Notice of Awarding Agency Requirements and Regulations Pertaining to Reporting (44 C.F.R. § 13.36(i)(7))	92
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))	94
9. Access to Records (44 C.F.R. § 13.36(i)(10))	95
10. Retention of Records (44 C.F.R. § 13.36(i)(11))	95
11. Compliance with the Clean Air Act and Clean Water Act (44 C.F.R. § 13.36(i)(12))	96
12. Energy Efficiency (44 C.F.R. § 13.36(i)(13))	97
13. Suspension and Debarment	97
V. PROCUREMENT BY INSTITUTIONS OF HIGHER EDUCATION, HOSPITALS, AND OTHER NONPROFIT ORGANIZATIONS	101
A. SETTLEMENT AND SATISFACTOR OF ALL CONTRACTUAL AND ADMINISTRATIVE ISSUES (2 C.F.R. § 215.41)	101
B. WRITTEN STANDARDS OF CONDUCT (2 C.F.R. § 215.42)	102
1. No Personal Conflicts of Interest	102
2. Prohibitions Against Gratuities	102
3. Permitted Conflicts of Interests and Gifts	103
4. Requirement for Disciplinary Action	103
5. Arms-Length Transactions and Apparent Conflict of Interest	103

<p>FIELD MANUAL Public Assistance Grantee and Subgrantee Procurement Requirements FEMA Office of Chief Counsel Procurement Disaster Assistance Team</p>
--

C. COMPETITION (2 C.F.R. § 215.43)	105
1. Noncompetitive Procurements	108
2. Organizational Conflicts of Interest, Award Decisions, and Solicitations	110
D. PROCUREMENT PROCEDURES (2 C.F.R. § 215.44(a))	112
1. Purchasing Only Necessary Items and Services (2 C.F.R. § 215.44(a)(1))	112
2. Lease vs. Purchase (2 C.F.R. § 215.44(a)(2))	112
3. Solicitations for Goods and Services (2 C.F.R. § 215.44(a)(3))	113
E. CONTRACTING WITH SMALL BUSINESSES, MINORITY-OWNED FIRMS, AND WOMEN'S BUSINESS ENTERPRISES	114
1. Steps to Further Goal of Using Small Businesses, Minority-Owned Firms, and Women's Business Enterprises (2 C.F.R. § 215.44(b))	114
2. Meaning of Small Business, Minority-Owned Firm, and Women's Business Enterprise	116
3. Set Asides for Small Businesses, Minority-Owned Firms, and Women's Business Enterprises	116
F. TYPES OF CONTRACTS (2 C.F.R. § 215.44(c))	116
1. Cost-Plus-Percentage-of-Cost Contract	117
2. Time and Materials Contracts	117
G. RESPONSIBLE CONTRACTORS AND DEBARMENT (2 C.F.R. § 215.44(d))	119
H. FEMA PREAWARD REVIEW OF SUBGRANTEE CONTRACTING (2 C.F.R. § 215.44(e))	120
I. COST AND PRICE ANALYSIS (2 C.F.R. § 215.45)	121
J. PROCUREMENT RECORDS (2 C.F.R. § 215.46)	121
K. CONTRACT ADMINISTRATION (2 C.F.R. § 215.47)	122
L. BONDING REQUIREMENTS (2 C.F.R. § 215.48(c))	122
1. Contracts Less than \$100,000	122
2. Contracts Over \$100,000	122
M. REQUIRED CONTRACT PROVISIONS (2 C.F.R. § 215.48 and Appendix A)	123
1. Provisions for Contractual Remedies (2 C.F.R. § 215.48(a))	124
2. Provisions for Termination for Cause and Convenience (2 C.F.R. § 215.48(b))	124
3. Contract Clause Regarding Government Access to Records (2 C.F.R. § 215.48(d))	124
4. Compliance with Executive Order 11,246 (2 C.F.R. pt. 215, Appendix A, ¶ 1)	125
5. Compliance with the Copeland Anti-Kickback Act (2 C.F.R. pt. 215, Appendix A, ¶ 2)	125

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
 FEMA Office of Chief Counsel
 Procurement Disaster Assistance Team

6. Compliance with the Davis-Bacon Act (2 C.F.R. pt. 215, Appendix A, ¶ 3)	125
7. Compliance with the Contract Work Hours and Safety Standards Act (2 C.F.R. pt. 215, Appendix A, ¶ 4)	126
8. Rights to Inventions (2 C.F.R. pt. 215, Appendix A, ¶ 5)	126
9. Clean Air Act and Clean Water Act (2 C.F.R. pt. 215, Appendix A, ¶ 6)	127
10. Byrd Anti-Lobbying Amendment (2 C.F.R. pt. 215, Appendix A, ¶ 7)	127
11. Debarment and Suspension (2 C.F.R. pt. 215, Appendix A, ¶ 8)	129

APPENDIX A – SYPNOSES OF DHS OFFICE OF INSPECTOR GENERAL AUDITS CONCERNING PROCUREMENT UNDER PUBLIC ASSISTANCE GRANTS **A-1**

APPENDIX B – SYNOPSES OF FEMA SECOND APPEAL DECISIONS INVOLVING PROCUREMENT UNDER PUBLIC ASSISTANCE GRANTS **B-1**

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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).

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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 subgrantees⁴ 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

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.

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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.”).

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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 regulations⁹ 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.

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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.

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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

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.

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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.

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).

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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

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.

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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

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).

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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

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).

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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 State³⁸ 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

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).

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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

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:

- 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.

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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.

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

IV. PROCUREMENT BY LOCAL AND INDIAN TRIBAL GOVERNMENTS

Local⁴⁷ and Indian tribal governments⁴⁸ 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,

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.

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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.).

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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 Standards 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.

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.

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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

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:

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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

“[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).

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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

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.*

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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 equipment⁷³ 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

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).

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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.

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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).

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

- 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.

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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

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).

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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.

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).

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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).

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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

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.

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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.

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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.

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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 Purchasing¹¹⁰ 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 preparation¹¹¹

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 –

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

or response¹¹²; facilitate recovery¹¹³ 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.

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.*

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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

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.

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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 within 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).

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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 assignment¹²⁸ 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.

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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.

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.

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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.

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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

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.

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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

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

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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.

I. 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

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.*

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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 disadvantaging 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

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 *eiusdem 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).

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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

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).

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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).

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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

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).

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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.*

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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

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.

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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.

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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.”).

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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.

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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

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).

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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).

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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

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).

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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

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).

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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).

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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 price²⁰⁶) is awarded to the responsible offeror whose

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.

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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

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.

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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 procurement 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

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

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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.

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).

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

- 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

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.*

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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).

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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

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).

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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

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 (Architect-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

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

- **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

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).

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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

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).

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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

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

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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 replaces 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.”

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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>").

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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).

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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

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

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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

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

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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).

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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.

I. 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

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].").

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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

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.

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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).

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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

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.*

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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.

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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 price²⁸⁶ 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,*

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.

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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 data²⁹¹ 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).

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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 be allowable only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with Federal cost principles.²⁹⁶

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).

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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

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*,

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
 FEMA Office of Chief Counsel
 Procurement Disaster Assistance Team

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).*

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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

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.

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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).

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

simplified acquisition threshold (\$150,000). As a preliminary matter, the awarding agency³¹³ 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 "obligee" 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

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.

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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.

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.

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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 construction³²⁹ contracts in excess of \$10,000.³³⁰

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.").

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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).

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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. § 874³³¹ and 40 U.S.C. § 3145³³²), 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

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).

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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).

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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 Act³³⁵ 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.

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).

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

- (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’s³³⁹ 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).

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

- (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.

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

- 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’s³⁴¹ 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.

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).

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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).

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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.”

FIELD MANUAL
Public Assistance Grantee and Subgrantee Procurement Requirements
FEMA Office of Chief Counsel
Procurement Disaster Assistance Team

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

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

Exhibit "B"
Hourly Rate Schedule

Position Title	Labor Rate/Hour	Hours per day
<i>Building Official</i>	89	1.5
<i>Plans Review</i>	79	2.5
<i>Inspector</i>	69	6

Exhibit "C"
Turnaround Time for
Plan Checks

Type of Job	Turnaround Time First Check	Turnaround Time Re- Check
Residential		
New Construction	10 working days or less	5 working days or less
Addition	5 working days or less	5 working days or less
Remodel	5 working days or less	5 working days or less
Type of Job	Turnaround Time First Check	Turnaround Time Re- Check
Non-Residential		
New Construction	10 working days or less	5 working days or less
Addition	5 working days or less	5 working days or less
Remodel	5 working days or less	5 working days or less

EXHIBIT "D"

INSURANCE

A. General

Before starting and until acceptance of the work by the City, the CONTRACTOR shall procure and maintain insurance of the types and to the limits specified in Section "B", paragraphs (1) to (4) inclusive below. All insurance policies herein required of the CONTRACTOR shall be written by company duly authorized and licensed to do business in the State of Florida and be executed by same agents, thereof, duly licensed as agents in said State.

The CONTRACTOR shall require each of his subcontractors to procure and maintain, until completion of that subcontractor's work, insurance of the types and to the limits specified in Section "B", paragraphs (1) to (4) inclusive below. It shall be the responsibility of the CONTRACTOR to ensure that all his subcontractors meet these requirements.

B. Coverage

Except as otherwise stated, the amounts and types of insurance shall conform to the following minimum requirements:

1. Workers' Compensation – Coverage to apply for all employees at the STATUTORY limits in accordance with Florida law.
2. Commercial General Liability – Coverage must be afforded that includes bodily injury, including death and property damage, in an amount *not less than* \$1,000,000 combined single limit per occurrence. This policy must also cover premises and/or operations, independent contractors, products and/or completed operations.
3. Business Automobile Policy – Coverage must be afforded including coverage for all Owned vehicles, and Hired/Non-Owned vehicles that includes bodily injury and property damage in an amount *not less than* \$1,000,000 per accident and in the aggregate.
4. Professional Liability – Coverage must be afforded, under an "occurrence" form policy or "claims made" form in an amount *not less than* \$1,000,000/Architects and Engineers E&O. It is required that Professional Liability Insurance coverage be provided for all acts and omissions that occur during the term of the Agreement. If this coverage is written as a "claims made" form, proof of extended reporting period coverage is required.

C. Certificates of Insurance

The Contractor shall provide all Certificates of Insurance to the City with a thirty (30) day notice of cancellation, non-renewal, or reduction in coverage provision. Certificates of all insurance required from the CONTRACTOR shall be filed with the City of Green Cove Springs before operations are commenced. The insurance indicated on the Certificate shall be subject to its approval for adequacy and protection. The Certificate will state the types of coverage provided, limits of liability and expiration dates. The required Certificates of Insurance may refer specifically to this Agreement and Section and the above paragraphs in accordance with which such insurance is being furnished, and may state that such insurance is as required by such paragraphs of this Agreement.

The Certificate should also indicate if coverage is provided under a "claims made" or "per occurrence" form. If any coverage is provided under claims made form, the Certificate will show a retroactive date, which should be the same date of the Agreement (original if Agreement is renewed) or prior.

If the initial insurance expires prior to the completion of the work, renewal Certificates shall be furnished thirty (30) days prior to the date of their expiration.

EXHIBIT "E"

SAMPLE WORK ORDER

PROFESSIONAL ENGINEERING SERVICES AGREEMENT

WORK ORDER NO.: _____ (For tracking purposes only, to be assigned by the CONTRACTOR after execution).

PURCHASE ORDER NO.: _____ (For billing purposes only, to be assigned by the CITY after execution.)

PROJECT NAME: _____

CITY: CITY OF GREEN COVE SPRINGS, a political subdivision of the State of Florida

PROJECT MANAGER: _____

CONTRACTOR: _____

CONTRACTOR'S ADDRESS: _____

Execution of the Work Order by the CITY shall serve as authorization for the CONTRACTOR to provide for the above project, professional services as set out in the Scope of Services attached as Exhibit "A Section 1", to that certain Agreement dated _____ day of _____, 2019 between the CITY and the CONTRACTOR and further delineated in the specifications, conditions and requirements stated in the following listed documents which are attached hereto and made a part hereof.

ATTACHMENTS (Check all that apply):

- DRAWINGS/PLANS/SPECIFICATIONS
- DETAILED SERVICES AND TASKS FOR PROJECT OR STUDY
- SPECIAL CONDITIONS
- _____

The CONTRACTOR shall provide said services pursuant to this Work Order, its attachments and the above-referenced Agreement, which is incorporated herein by reference as if it had been set out in its entirety. Whenever the Work Order conflicts with said Agreement, the Agreement shall prevail.

TIME FOR COMPLETION: The work authorized by this Work Order shall be commenced upon receipt of a Purchase Order by the CONTRACTOR and shall be completed within (_____) calendar days from receipt of a Purchase Order by the CONTRACTOR.

METHOD OF COMPENSATION:

- (a) This Work Order is issued on a:
 - "Lump Sum Basis"
 - "Hourly Rate Basis" with a "Not-to-Exceed" amount
 - "Hourly Rate Basis" with a "Limitation of Funds" amount

- (b) If the compensation is based on a "Lump Sum Basis," then the CONTRACTOR shall perform all work required by this Work Order for the sum of _____ DOLLARS (\$_____). In no event shall the CONTRACTOR be paid more than the "Lump Sum Fee" Amount.

- © If the compensation is based on an "Hourly Rate Basis" with a "Not-to-Exceed" Amount, then the CONTRACTOR shall perform all work required by this Work Order for a sum not exceeding _____ DOLLARS (\$_____). The CONTRACTOR'S compensation shall be based on the actual work required by this Work Order.

- (d) If the compensation is based on an "Hourly Rate Basis" with a "Limitation of Funds" Amount, then the CONTRACTOR is not authorized to exceed the "Limitation of Funds" amount of _____ DOLLARS (\$_____) without prior written approval of the CITY. Such approval, if given by the CITY, shall indicate a new "Limitation of Funds" amount. The CONTRACTOR shall advise the CITY whenever the CONTRACTOR has incurred expenses on this Work Order that equals or exceeds eighty percent (80%) of the "Limitation of Funds" amount. The CITY shall compensate the CONTRACTOR for the actual work performed under this Work Order.

The CITY shall make payment to the CONTRACTOR in strict accordance with the payment terms of the above-referenced Agreement.

It is expressly understood by the CONTRACTOR that this Work Order, until executed by the CITY, does not authorize the performance of any services by the CONTRACTOR and that the CITY, prior to its execution of the Work Order, reserves the right to authorize a party other than the CONTRACTOR to perform the services called for under this Work Order if it is determined that to do so is in the best interest of the CITY.

IN WITNESS WHEREOF, the parties hereto have made and executed this Work Order on this __
_____ day of _____, 2011, for the purposes stated herein.

Charles Abbott and Associates

Witness

By: _____
Tim Inglis, CBO, Director

CITY OF GREEN COVE SPRINGS

Witness

By: _____
Steve Kennedy, City Manager

Date: _____

EXHIBIT "F"

**Charles Abbot and Associates Proposal for
Building Official, Plan Review and Building Inspection Services**



“Helping public agencies provide effective and efficient municipal services to improve communities since 1984”

Proposal for

Building Official, Plan Review and Building Inspection Services

City of Green Cove Springs

321 Walnut Street
Green Cove Springs, FL 32043

Charles Abbott Associates, Inc.

3001 North Rocky Point Drive East, Suite 200
Tampa, FL 33607
Toll Free: (866) 530-4980

www.caaprofessionals.com

TABLE OF CONTENTS

Letter of Interest and Introduction	3
Key Personnel.....	4
Authorized Signature.....	4
Company Profile.....	5
Legal Name and Information.....	6
Experience and Specific Capabilities	8
Company History.....	8
Qualifications and Experience.....	8
Unique Strengths	9
Permitting Software.....	12
Personnel	13
Rusty R. Reed, P.E	13
Tim Inglis, CBO	14
Ron Grider, PE, CBO, OSD	15
Bill Golberg, CBO, CFM, MCP, MCEP.....	16
Steve Ahuna, PE, CBO	22
Allen Posey, CBO, MCP	23
Past Experience	25
Scope of Work.....	28
Quality Control	32
Financial Stability	32
Litigation.....	33
References.....	34
Proof of Insurance	40
Required Forms.....	41
Turnaround Time for Plan Checks	55
Fee Structure	56
Option A: Percentage of Fees.....	58
Option B: Hourly Rate Fee	58

LETTER OF INTEREST AND INTRODUCTION

Charles Abbott Associates, Inc. (**CAA**) is pleased to submit a proposal for **Building Official, Plan Review and Building Inspection Services** to the City of Green Cove Springs (City).

CAA is a professional services consulting firm specializing in providing Building & Safety, Fire Prevention, Engineering and Environmental Services. For more than 35 years, **CAA** has been fulfilling its mission in helping municipal governments and regional government agencies **deliver services more efficiently**. **CAA** is able to consistently achieve **high standards of service** as a direct result of the company's commitment to nurturing a team of professionals with an exceptional work attitude, mind-set, experience and skills that are unique to **CAA**. Each staff member is highly trained and extremely conscientious when it comes to carrying out the corporate mission of providing unsurpassed customer service.

CAA will provide the City with a team of **highly qualified, licensed, and certified individuals** to support your Building Services needs. We have daily pick-up and delivery or complimentary over-night mail service of plans available in addition to web based digital review throughout the life of the contract. This along with the availability of our local resources will allow us to respond quickly to the City's needs. Our staff is technically qualified, trained, properly licensed and certified to provide all services to meet your needs, including public or private project plan review, structural plan review, building code compliance review, and building inspections. Our business model will ensure that resources will always be available to the City, thereby ensuring **staff continuity and consistency** at the City.

We pledge the full resources and backing of our firm to assure that the City has the most efficient and cost effective Building Services strategy available. Our proposed team is comprised of highly qualified and customer-service oriented people able to handle all aspects of the City's residential and commercial plan review and inspections process. **CAA** employs only highly qualified licensed and registered professionals with extensive construction experience who are properly licensed by the State of Florida. Our staff is technically qualified, trained, properly licensed and certified to provide all anticipated inspection and plan review services in accordance with FEMA/NFIP Standards, Local Floodplain regulations, and the requirements outlined in the Florida Building Code. Our plan review staff works closely with engineers, architects, and designers, providing greater insight as to the constructability of design and the adherence to State and Federal codes, rules and regulations, Florida Land Development Regulations (LDRs) and acceptable building practices. Our staffing levels ensure that inspections and plan reviews are always conducted in an efficient and courteous manner, both responsive to the City and the public's needs. And when workload demands increase, **CAA** has the ability to add certified and qualified staff to meet that increase in workload.

Most of our plans examiners are cross-trained and also certified as inspectors, providing a very efficient use of personnel and expediting the process for the applicant. All work will be performed under the direction of a **Florida licensed Building Official** who will conduct inspections and review plans for compliance with all applicable codes, regulations, guidelines, and permits as required. We have experience in a full range of different types and sizes of developments, ranging from single family dwellings to rural

properties to master planned communities, mixed use developments, planned unit developments and industrial/commercial business parks.

Key Personnel

Mr. Tim Inglis, CBO, is the project manager selected to work with the City to ensure that our policies, procedures, and manpower will provide the level of service the City desires. He will supervise the project and maintain continuous communication with the City to ensure the City is **100% satisfied** with our staff, our turnaround times, the quality of our work, and the overall teamwork between our staff and yours.


Name and Title: Mr. Tim Inglis, CBO, Director
Phone: (470) 421-0046
Email: timinglis@caaprofessionals.com
Website: www.caaprofessionals.com

The **CAA** professional who will be assigned to the City, **Mr. Bill Golberg**, holds all required standard certifications in the inspection and plan examiner disciplines.

Authorized Signature

Should the City have any questions or require additional information, please contact Tim or myself.

Sincerely,


Rusty R. Reed, President

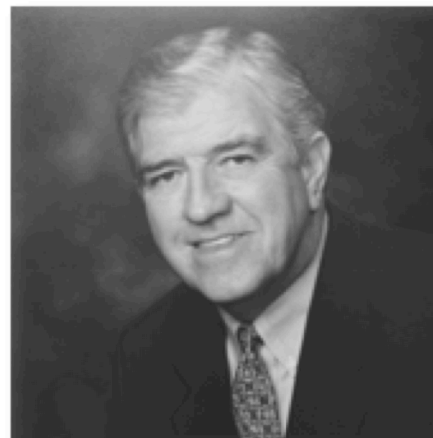
COMPANY PROFILE

“Providing the public sector with unsurpassed quality of service by investing in the development of our employees.”

This was the solid foundation Charles Abbott Associates, Inc. (**CAA**) was built on when its founder Charles Hugh Abbott, Jr. founded the company in 1984. More than 35 years after its launch as a contract service provider to state and local government agencies, CAA has not swayed from this foundation.

Increasingly, state and local governments are looking to leverage the flexibility, competency and efficiency of Public-Private Partnerships or Alternative Service Delivery, and with good reason. Considering that particularly building services often prove to be a major financial drain on budgets due to their inherently fluctuating nature, many cities now choose to outsource these services to a third party service provider like **CAA**. This often results in faster project completions and reduced delays which, combined with the **CAA's** level of expertise, quickly turns into **measurable ROI and efficiencies** for the City.

Over the years, the company has earned a reputation for consistently high standards of service as a direct result of nurturing a team of professionals with an exceptional work attitude, mind-set, experience and skills that are unique to **CAA**. Our staff regularly attends and sponsors training courses, seminars, and conferences to ensure staff is up-to-date on the most relevant issues in the industry. As an example of these advanced industry-training standards, the International Code Council (ICC) has recently recognized **CAA** as a **Preferred Provider**, only the 14th entity in the Country to receive such recognition.

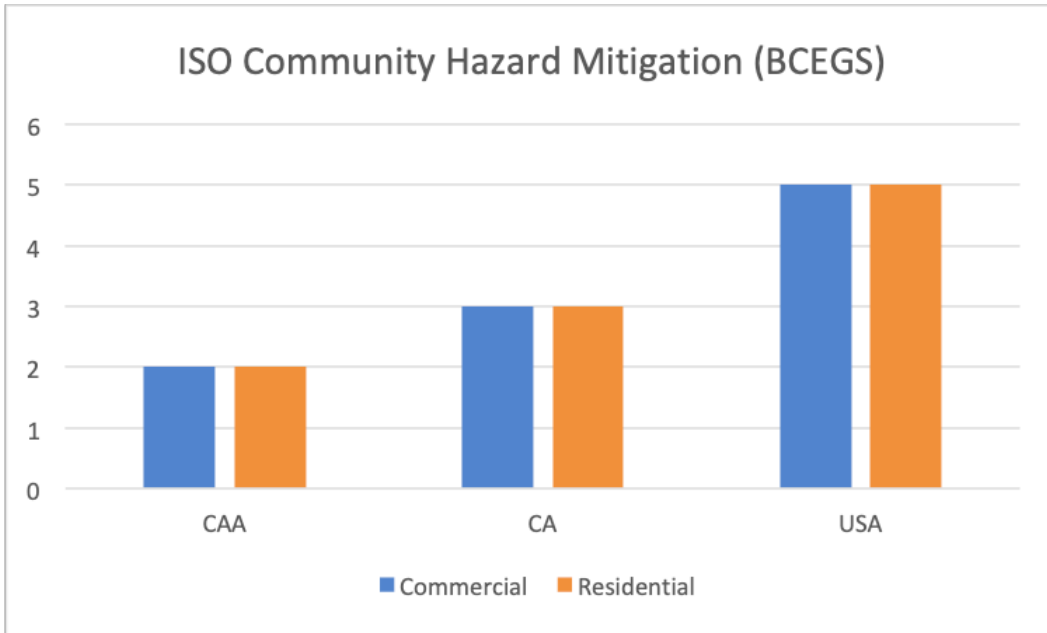


Charles Hugh Abbott, Jr
1941-1999

COMPANY QUICK FACTS

- Over 35 years experience in serving the public sector
- Worked on over 1,000 projects since 1984
- Proven capabilities in building and safety, engineering, public works, environmental and fire protection
- Offices in Florida, California, Nevada, Georgia, Arizona, Texas, Colorado, and South Carolina.
- More than 200 full-time, fully credentialed and trained staff
- Credibility, financial strength and resources of a fully-licensed firm that has been involved with BILLIONS of dollars worth of construction projects
- Projects in over 75 cities and counties

CAA's Certified Building Officials have also assisted jurisdictions in achieving high **Insured Services Office (ISO)** ratings. The ISO assesses each community on a scale of 1 to 10 with regards to the administration and enforcement of the building codes and mitigation of losses from natural hazards. In Georgia, for example, **CAA's** building departments are rated in the **top 1%** of Georgia's ISO ratings, whereas in California, **CAA** received a company rating of **"2"** for all of our California Cities, with "1" being the highest. These ISO ratings illustrate **CAA's** commitment to mitigating losses and enforcing codes to improve safety in our communities.



Legal Name and Information

Company Name:	Charles Abbott Associates, Inc. (CAA)
Date of Incorporation:	1984
Years in Business:	35
Main Office:	27401 Los Altos, #220 Mission Viejo, CA 92691
Local Office:	3001 North Rocky Point Drive East, Suite 200 Tampa, FL 33607
Entity Type:	Corporation
Federal Tax ID:	33-00753899
Number of Employees:	210
Certified Minority Business:	No
Description of Business:	CAA is a professional services consulting firm specializing in providing Building Safety Department, Fire Prevention Services, Engineering and Environmental Services.

Resources:

CAA employs a fully credentialed, cross-trained staff that effectively meets our engineering and building and safety commitments to our clients. Each one of our team members has worked on similar projects and has served the public sector for many years. CAA's proposed staff has many years of experience analyzing and reviewing plans and related submittal documents for compliance with state and local codes and amendments, and is properly licensed through the Florida Department of Business and Professional Regulation. Mr. Golberg will be the dedicated resource to the City, and will be available during designated business hours as needed. He will be supported by Mr. Tim Inglis, CBO, Regional Director, Allen Posey, CBO, MCP, and Steve Ahuna, PE, CBO, as needed.

EXPERIENCE AND SPECIFIC CAPABILITIES

Company History

Since 1984, CAA has been providing a growing number of cities and counties with outstanding Building Services. Over the years, our vast knowledge, experience, and proven ability to satisfy the needs of cities, towns, and counties of all sizes has earned us the reputation of being one of the most qualified firms in the industry. Our Project Team brings many years of related project experience together with an expertise in the development and management of similar services, making CAA exceptionally well qualified to provide the requested services to the City as described in our submittal. We will provide the City with a team of highly experienced, licensed, and certified individuals to support your Building Permitting and Inspection Service needs. Our staff is technically qualified, trained, properly licensed and certified to provide all anticipated services, including permitting, records management, and building inspections as well as plan review. Additionally, we are able to add qualified personnel at any time should workload demands increase.

CAA's concept of delivering high quality service is different than other companies who provide similar functions. CAA will provide on-site staff to bridge the disconnect that can occur between cities and contracted service providers. This method of service delivery has allowed us to retain our first client of 33 years, and we continue to be regularly commended for the staff's commitment to excellent customer service by our other clients, as well.

CAA has grown to a full-time staff of over 200 employees not only comprised of building & safety experts, but also highly trained professionals who are able to balance regulatory requirements, cost effectiveness, political considerations, and practicality when advising our clients. CAA always looks for creative solutions for our clients' needs, and we are committed to cost effectiveness without sacrificing quality. CAA maintains well qualified and educated inspectors and plan checkers who are properly licensed by the Florida Department of Business and Professional Regulation. The staff regularly attends training courses, seminars, and conferences to ensure they are up-to-date on the most relevant issues in the industry.

Qualifications and Experience

CAA employs a fully credentialed, cross-trained staff that effectively meets our engineering and building and safety commitments to our clients. Each one of our team members has worked on similar projects and served the public sector for many years. CAA's proposed staff has many years of experience analyzing and reviewing plans and related submittal documents for compliance with state and local codes and amendments. Our team of highly qualified engineers, inspectors and plan review staff are well trained, experienced and familiar with the adopted codes.

CAA has been a professional services consulting firm specializing in providing Building & Safety, Fire Prevention, Engineering and Environmental Services since 1984. Since then, CAA has been fulfilling its mission in helping municipal governments and regional government agencies deliver services more efficiently. Our sole business model is providing supplemental and full-service support to municipal

governments in the form of plan checking, inspections, and building code administration. Our Plan Review Service is provided by full-time and part-time plan reviewers, civil as well as structural and non- structural reviewers. CAA provides electronic plan review as well as daily pick-up and delivery of more complex plans and specifications via a shipping service at no additional cost to the City. Plans will be picked up and logged in the CAA plan review tracking system before being routed to the appropriate plan reviewer for review. The following table lists some of the services we provide to meet the needs of our clients:

SERVICE ROLES	SERVICES
<ul style="list-style-type: none"> • Building Official • Building Inspector • Code Compliance Officer • Public Counter Technician • Public Works Director • City Engineer • Plan Checker • Fire Prevention Specialist/Inspector • Map Check Surveyor • Certified Environmental Trainers • Project/Construction Engineer • Landscape Manager/Supervisor • Landscape Architect • Redevelopment Agency Engineer • Assessment Engineer • Traffic Engineer • CASP Certified Specialist 	<ul style="list-style-type: none"> • Building & Safety Administration • Plan Review • Building Inspections • Accessibility Assessments • Grading and Improvement Review • Environmental Assessments • Municipal NPDES Programs • NPDES Review • Public Works Administrative Services • Public Works Contracting • Work Management and Budgeting Systems • Organizational/Personnel Audits • Evaluation of Fee Structures • Grant/Funding Applications • AB 939 Implementation • Pavement Management • Asset Management

CAA’s concept of delivering high quality service is different than other companies who provide similar functions. CAA will provide on-site staff to bridge the disconnect that can occur between cities and contracted service providers. This method of service delivery has allowed us to retain our first client of 34 years, and we continue to be regularly commended for the staff’s commitment to excellent customer service by our other clients, as well.

Since our incorporation in 1984, CAA has grown to a full-time staff of over 200 employees. Our proposed team is not only comprised of building & safety experts, but also highly trained professionals who are able to balance regulatory requirements, cost effectiveness, political considerations, and practicality when advising our clients. CAA looks for creative solutions for our clients’ needs, and we are committed to assuring cost effectiveness without sacrificing quality.

Unique Strengths

Charles Abbott Associates, Inc. (CAA) has been a national contract service provider to local government agencies since 1984. We were founded to meet the needs of municipalities just like Green Cove Springs, and are highly skilled and experienced at

providing the right services at the right time to ensure the City's building services are operating smoothly and efficiently.

CAA is the most qualified municipal services provider for cities who want services above and beyond the industry standard. Our aim is to excel by providing unsurpassed customer service, and our exceptional customer service has given us the reputation of being one of the best in the industry. For the last 34 years, CAA has been selectively expanding its client base to cost conscious agencies that appreciate consultants who perform better than expected.

Many cities and counties share the problem that they do not have enough construction to justify a full-time staff. Others have a tough time adjusting to peak demand periods without unnecessary and inefficient staffing up. CAA is the answer. Our staff will provide prompt and professional service to the citizens of your community, and we are able to adjust our staffing based on the workload demand of the City.

Service Above and Beyond

CAA employees believe that just doing a "good" job is not always enough for our clients. Our aim is to excel. This means that we do not function simply by the language of our contract with the City, but that we constantly look out for the general good of the City, local neighborhoods, and its residents.

Customer Service

Our employees are passionate about customer service. In performing our duties we are always willing to meet with clients for pre-design meetings, pre-submittal meetings, or as needed to resolve complex code related plan review issues in the most efficient manner possible. In addition, the staff at CAA brings a can-do attitude to their work - always focused on efficiency and project success.

Responsive Project Management

By providing a cooperative work environment with all of the entities responsible for project approval, we form a collaborative working relationship that centers on successful project processing. We have the know-how to work closely with other City departments and outside agencies, resulting in a timely, seamless and efficient development approval process. We minimize surprises that can lead to costly delays due to plan revisions late in the approval process by beginning work early with the project design team involved with major construction projects.

Availability to Meet with the City

If required, CAA staff will be available to meet with City staff, the design team, applicants, and/or contractors at the City's request to discuss and resolve plan review and code related issues. Our staff can be available to meet with the City's staff within 24 hours of notice. Those meetings will be attended by our staff at no additional cost.

Project Staff

CAA's organizational culture empowers our project managers to act on the client's behalf immediately, without interference from a larger organizational structure. Empowering our project managers allows us to provide clients with the individual attention that only a small organization can deliver. At the same time, we maintain the advantages of a larger organization because we have the expertise needed when a situation requires special attention. Every member of the Project Team assigned to work

with the City is licensed in the State of Florida and able to perform the requested work. Bill Golberg, the designated Building Official for the City, is a CBO, CFM, MCP, and MCEP with many years of experience in working with Florida municipalities. He has previously served as Building Official for The Cities of Crystal River, Brooksville and, Weeki Wachee, as well as the Building and Zoning Official for the City of Port Richey.

Innovations in Service Delivery

CAA continuously strives for innovations to improve public services. Government must be more accessible to the citizens, more convenient, timelier in responses, more cost effective, and performance oriented. Accountability in government has never been higher than it is today. We want to be your partner in delivering exceptional public service and promoting the City. We pledge the full resources and backing of our firm to ensure that the City is able to deliver outstanding, cost-effective public service of the highest quality. CAA believes that embracing technology improves efficiency, provides a more comprehensive level of customer service, and is the key for success both now and in the future. As part of that effort, CAA offers to provide the following to the City:

- ✓ Our standard version of 84Works, a customized Permit Issuance and Inspection Tracking tool with a user- friendly software system that allows for an efficient and accountable level of service to be delivered to the City and contractors.
- ✓ Ability to utilize drones for physically difficult inspections
- ✓ Ability to employ electronic plan review to shorten turn around times and improve communication

Technology

CAA believes that embracing new technologies improves efficiency, provides a more comprehensive level of customer service, and is the key for success both now and in the future. Investing in new technology generates excitement, fosters growth and ideas, enhances communication and ultimately lowers the cost of service delivery.

Staff Training

Maintaining high quality services is what has made CAA as successful as we are today. CAA becoming an ICC Preferred Provider underscores our commitment to outstanding quality. We understand that having experienced and qualified personnel is a fundamental requirement of being able to delivery quality service to our clients, and we place considerable effort in attracting and retaining our highly trained staff.

Integration Plan

CAA prides itself on being a “team player” in each municipal service engagement. We train our staff to recognize that citizens of the community, City staff and other consultants are our customers and, as such, deserve our best efforts to respond, assist, support, and work hand-in-hand.

CAA assures you that our team members will learn and keep up to date on City policies and procedures as we commence the engagement. CAA staff will strictly adhere to your policies and procedures regarding confidentiality, public release of information, and communications with media. CAA values each client and our staff conducts themselves in a manner not to bring attention to CAA but rather to always put the City in favorable public light.

Permitting Software

CAA offers to provide the City with a standard version of CityTech Solutions software, our own customized Permit Issuance and Inspection Tracking tool with a user-friendly software system that allows for an efficient and accountable level of service to be delivered to the City and contractors.



Modifications beyond the standard system can be provided at an additional charge, if desired. This standard system will be provided at no cost to the City, and includes:

- Access to Contractor State license records.
- Ability to use iPads or comparable field tablets for technological efficiencies.
- iPads are provided to all inspectors.
- Ability to attach PDF and photos to permit file.
- Searchable database by any field.
- Report types include at minimum:
 - Daily inspection and plan review logs.
 - Inspection/plan review turnaround times.
 - Pass/fail status.
 - Revenue stream by permit type.

Date	Inspector	Permit #	Address	Inspection	Result	AM/PM	Notes	Expired date	Status	Sort
12/14/2018	Danny Oliver	2018-4466	2723 RADLUM SPRINGS RD LOCATION: DOUGHERTY COUNTY	Gas Test				+6 Months Final 6/9/2019	Issued	
12/14/2018	Danny Oliver	2018-2853	2701 OLIVIA ST LOCATION: CITY	Rough Plumbing				+6 Months Final 3/31/2019	Issued	
12/14/2018	Danny Oliver	2018-2854	2713 OLIVIA ST LOCATION: CITY	Rough Plumbing				+6 Months Final 3/31/2019	Issued	
12/14/2018	Jeremy Head	2018-4436	2303 HABERSHAM RD LOCATION: CITY	Final Building	Pass			+6 Months Final	Finalized	
12/14/2018	Jeremy Head	2018-4481	1322 MCKENZIE RD LOCATION: DOUGHERTY COUNTY	Re-Roof Final	Pass			+6 Months Final	Finalized	
12/14/2018	Jeremy Head	2018-3836	3112 WAR EAGLE DR LOCATION: DOUGHERTY COUNTY	Final Building	Pass			+6 Months Final	Finalized	
12/14/2018	Jeremy Head	2018-3836	3112 WAR EAGLE DR LOCATION: DOUGHERTY COUNTY	Final Electrical	Pass			+6 Months Final	Finalized	
12/14/2018	Jeremy Head	2018-4063	2804 W. DOUBLEGATE DR. LOCATION: CITY	Rough Framing			Greg 869.4207	+6 Months Final 5/18/2019	Issued	
12/14/2018	Jeremy Head	2018-4495	125 PINE AVE LOCATION: CITY	Final Building			Larry 344.1611	+6 Months Final 6/10/2019	Issued	
12/14/2018	Danny Oliver	2018-1131	112 PINE AVE LOCATION: CITY	Other		AM	Light test @ shop	+6 Months Final 5/15/2019	Issued	
12/14/2018	Danny Oliver	2018-1336	3512 MOULTRIE RD LOCATION: DOUGHERTY COUNTY	Final Mechanical		PM	2 pm	+6 Months Final 6/12/2019	Issued	
12/14/2018	Danny Oliver	2018-1336	3512 MOULTRIE RD LOCATION: DOUGHERTY COUNTY	Final Plumbing		PM	2 pm	+6 Months Final 6/12/2019	Issued	
12/14/2018	Jeremy Head	2018-1336	3512 MOULTRIE RD LOCATION: DOUGHERTY COUNTY	Final Electrical		PM	2 pm	+6 Months Final 6/12/2019	Issued	
12/14/2018	Jeremy Head	2018-1336	3512 MOULTRIE RD LOCATION: DOUGHERTY COUNTY	Final Building		PM	2 pm	+6 Months Final 6/12/2019	Issued	

Personnel

We have assembled a project team with the skills and qualifications necessary to serve the City successfully. This team of highly qualified and experienced staff has provided similar services to many cities and counties, and brings numerous combined years of related experience to the table.

Rusty R. Reed, P.E

Principal-in-charge/ Chief Executive Officer/President

Years of Experience

42+

Education

B.S., Civil Engineering, University of Illinois

Registration

Civil Engineer in California, Arizona, Florida, Georgia, Texas, Utah, Colorado, and South Carolina

License

General Contractor "A" – California

Mr Reed is the President of Charles Abbott Associates, Inc. He directs the firm's business affairs and oversees all client services. Mr Reed is involved in all aspects of Environmental Services, Building and Safety, City Engineering, Planning, Public Works, Capital Improvement Programs and Redevelopment for CAA's municipal clients. He is directly accessible to all our clients to ensure that performance standards, schedule and budget targets are met.

Previous Project Experience

- Wrote and identified codes, ordinances, and resolutions for implementation.
- Administered city design services for preparation of plans, specifications, and construction; managed and administered engineering and public works permit procedures, inspection services and records.
- Administered the implementation of Public Works Maintenance Contracts.
- Developed short and long-range capital improvement programs, and coordinated and identified methods of funding.
- Served as Town Engineer for the Town of Apple Valley for over 15 years.

KEY QUALIFICATIONS

- Registered Civil Engineer
- Municipal Background
- Hands-on Engineering Experience
- Project Oversight
- Project Commitment

Tim Inglis, CBO

Regional Director

Years of Experience

20+

Education

M.P.A. in Public Administration, Georgia
Southern University
B.S. in Construction Management, Georgia
Southern University

Certifications

ICC Certified Building Official
ICC Certified Building Code Specialist
ICC Certified Zoning Inspector
ICC Certified Building Inspector
ICC Certified Housing Code Official
ICC Certified Building Code Official
ICC/AACE Property Maintenance and Housing Inspector
ICC Certified Residential Combination Inspector
ICC Certified Accessibility Inspector/Plans Examiner
ICC Certified Building Plans Examiner
NAHB Certified Green Professional
AEE Building Analyst Professional

Professional Memberships

National Contract Management Association
International Code Council (ICC)
Association of Energy Engineers
Greater Atlanta Home Builders Association

KEY QUALIFICATIONS

- Extensive Building & Community Development Experience
- Public Works Management Experience
- Very Strong Project and Program Management Capabilities
- Planning/Organizational Development

Mr. Inglis has worked in the building and community development profession for over 20 years. He has been employed in the private sector since 2006, successfully bringing a modern approach to building inspection programs to cities and counties across the State of Georgia. Specifically, he worked to successfully lead the transition of the newly incorporated cities in North Fulton as well as the City of South Fulton from the traditional county model to a more efficient and effective privatized model. During his career, he has been involved with several large projects such as the KIA Manufacturing Plant in WestPoint, the Performing Arts Center in Newnan, the JCB Manufacturing Plant in Pooler, and the Recreation and Athletic Complex in Young Harris.

Ron Grider, PE, CBO, OSD

Regional Director

Certified Building Official/Plans Examiner/Inspector

Years of Experience

35+

Education

B.S., Civil Engineering, California State University, Los Angeles

Professional Licenses

Professional Engineer GA, CA, CO, FL, NV

Certifications

CALBO Certified Building Official
ICC Certified Building Official (0878901-CB)
IAEI Certified Electrical Inspector
ICC Certified Building Inspector (0878901-B5,K1,10)
ICC Certified Electrical Inspector (0878901-K2,E5)
ICC Certified Mechanical Inspector (0878901-M5,K4,44)
ICC Certified Plumbing Inspector (0878901-P5,K3,34)
ICC Certified Plans Examiner (878901-K6)
ICC Certified Combination Inspector (0878901-K8,K4,C8,50)
ICC Certified Combination Dwelling Inspector (0878901-R5,56)
OES/CALEMA DISASTER SERVICE WORKER (61525)
Level II Certified Design Professional

KEY QUALIFICATIONS

- Extensive Project Management Experience
- Registered Civil Engineer in CO, NV, CA, FL, and TX
- Municipal Experience
- Hands-on Public Works Experience
- Extensive Plans Review Experience
- Multiple Certifications

Mr Grider has over 35 years of construction, public works, and building & safety experience. He has held the position of Building Official, County Engineer, Sr. Engineering Manager as well as numerous other key positions in the field. Well known in the public sector as a compassionate leader focused on customer service, he is routinely involved in the presentation of building code, engineering principles and advancing the cause of preventing life loss and protecting property in Georgia, Nevada and California. As Director for CAA, he directs the services CAA provides in building and safety, engineering, and fire prevention. He is also responsible for quality control and evaluation.

Professional Memberships & Affiliations

Services Office (ISO) Compliance Member American Society of Civil Engineer
Member Structural Engineers Association of Southern California (SEAOSC)
Member Structural Engineers Institute (SEI)
Member California Building Officials (CALBO)
Member International Code Council (ICC)
Safety Assessment Emergency Services – State of California SAPC61525

Bill Golberg, CBO, CFM, MCP, MCEP

Inspector/Plans Examiner

Years of Experience

30+

Education

A.A.S in Engineering
Extensive trade and technical schooling

License

Plumbing Contractor (RF0066416)
Florida Standard Inspector (BN3173)
Florida Standard Plans Examiner (PX1387)
Florida Standard Building Code Administrator (BU1685)
GSWCC Levels 1a, 1b and 2 (54550)

Professional Affiliations

ICC, BOAF, FFMA, ASFPM, AACE, FAPMGI

Certifications

ICC Accessibility Inspector/Plans Examiner
ICC Building Inspector
ICC Building Plans Examiner
ICC Certified Building Code Official
ICC Certified Building Official
ICC Certified Housing Code Official
ICC Certified Mechanical Code Official
ICC Certified Plumbing Code Official
ICC Coastal and Floodplain Construction Inspector
ICC Combination Inspector
ICC Commercial Combination Inspector
ICC Commercial Electrical Inspector
ICC Disaster Response Inspector
ICC Electrical Inspector
ICC Residential Energy Inspector/Plans Examiner
ICC Mechanical Inspector
ICC Electrical Plans Examiner
ICC Master Code Professional
CC Electrical Code Official

KEY QUALIFICATIONS

- Multiple Certifications
- Hands-On Contractor Experience
- Plumbing Contractor
- Supervisory Experience
- Extensive knowledge of building codes, regulations and construction industry standards
- Excellent Interpersonal Skills
- Code Enforcement Experience

ICC Combination Plans Examiner
ICC Residential Plans Examiner
ICC Fuel Gas Inspector
ICC Mechanical Plans Examiner
ICC Plumbing Inspector
ICC Plumbing Plans Examiner
ICC Residential Combination Inspector
ICC Residential Electrical Inspector
ICC Residential Energy Inspector/Plans Examiner
ICC/AACE Code Enforcement Officer
ICC/AACE Code Enforcement Administrator
ICC/AACE Master Code Enforcement Professional
ICC/AACE Property Maintenance and Housing Inspector
ICC/AACE Zoning Inspector
FDEP Storm Water Management Inspector (#25939)
Certified Floodplain Manager (US-12-06545)

Mr. Golberg has over 20 years of Building & Safety and contractor experience. In the past, he has supervised the daily operations of the Building, Zoning and Licensing Department as well as performed inspections and plan reviews for multiple cities in Florida. He has extensive experience performing inspections and reviewing plans for all

residential, commercial and industrial buildings and structures. He also has experience with Building and Life Safety Departments, Code Enforcement and Licensing Departments. Additionally, he has conducted inspector training.

Recent Project Experience

- Interim Building Official, Commercial Building Inspector and Plans Reviewer for the City of Forest Park, GA
- Disaster Recovery, Commercial Building Inspector for the City of Wheat Ridge, CO
- Commercial Building Inspector multiple jurisdictions Ventura and Orange County, CA
- Overflow Commercial Plan Reviewer
- Building and Zoning Official for the City of Port Richey, FL
- Building Official for the Cities of Crystal River, Brooksville and Weeki Wachee, FL
- Building Official for the City of Lagrange, GA
- Chief Plumbing Inspector/Examiner for Pasco County, FL
- Plumbing/Combination Inspector/Examiner for Pasco County, FL

Verified Candidate



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Customer Name:

William Golberg

Account Number:

5179424

Certifications:

Expires:

03/28/2022	Combination Plans Examiner
03/28/2022	Electrical Inspector
05/05/2022	Commercial Energy Inspector
03/28/2022	Residential Mechanical Inspector
09/10/2021	Mechanical Plans Examiner
03/28/2022	Plumbing Code Official
03/28/2022	Residential Electrical Inspector
03/28/2022	Combination Inspector
03/28/2022	Commercial Electrical Inspector
03/28/2022	Disaster Response Inspector
09/10/2021	Mechanical Code Official
09/10/2021	Housing Code Official
03/28/2022	Residential Building Inspector
03/28/2022	Electrical Plans Examiner
09/10/2021	Commercial Combination Inspector
03/28/2022	Residential Combination Inspector
03/28/2022	Coastal and Floodplain Construction Inspector
03/28/2022	Fuel Gas Inspector
03/28/2022	Residential Plumbing Inspector
03/28/2022	Mechanical Inspector
03/28/2022	Building Plans Examiner
03/28/2022	Certified Building Official
03/28/2022	Electrical Code Official
09/10/2021	Building Code Official
09/10/2021	Plumbing Inspector
09/10/2021	Building Inspector
09/10/2021	ICC/AACE Code Enforcement Officer
03/28/2022	ICC / AACE Property Maintenance and Housing Inspector
03/28/2022	Residential Energy Inspector/Plans Examiner
03/28/2022	Residential Plans Examiner
03/28/2022	Residential Fire Sprinkler Inspector/Plans Examiner
09/10/2021	ICC/AACE Code Enforcement Administrator
09/10/2021	Zoning Inspector
03/28/2022	Master Code Professional
05/05/2022	Commercial Energy Plans Examiner
03/28/2022	Plumbing Plans Examiner
03/28/2022	Accessibility Inspector/Plans Examiner
05/07/2021	Building Code Specialist
06/12/2021	Plumbing Code Specialist
06/18/2021	Electrical Code Specialist
06/18/2021	Mechanical Code Specialist
08/24/2021	Housing and Zoning Code Specialist

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Licensee Details

Licensee Information

Name: **GOLBERG, WILLIAM JOSEPH (Primary Name)**
 Main Address: ***Private Address* *Private Address***
Private Address
Private Address
Private Address
 License Mailing:
 LicenseLocation:

License Information

License Type: **Standard Inspector**
 Rank: **Inspector**
 License Number: **BN3173**
 Status: **Current,Active**
 Licensure Date: **04/03/1998**
 Expires: **11/30/2019**

Special Qualifications Qualification Effective

Coastal Construction 02/22/2016
Electrical Inspector 04/05/2011
1&2 Family Dw 04/20/2010
Mechanical 04/05/2011
Plumbing

Alternate Names

ALL PLUMBING INC

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Licensee Details

Licensee Information

Name: **GOLBERG, WILLIAM JOSEPH (Primary Name)**
 Main Address: ***Private Address* *Private Address***
Private Address
Private Address
Private Address
 License Mailing:
 LicenseLocation:

License Information

License Type: **Building Code Administrator**
 Rank: **Building Code A**
 License Number: **BU1685**
 Status: **Current,Active**
 Licensure Date: **12/07/2009**
 Expires: **11/30/2019**

Special Qualifications Qualification Effective

Alternate Names

ALL PLUMBING INC

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Licensee Details

Licensee Information	
Name:	GOLBERG, WILLIAM JOSEPH (Primary Name)
Main Address:	*Private Address* *Private Address* *Private Address* *Private Address* *Private Address*
License Mailing:	
LicenseLocation:	*Private Address* *Private Address* *Private Address* *Private Address* *Private Address*

License Information	
License Type:	Standard Plans Examiner
Rank:	Plans Examiner
License Number:	PX1387
Status:	Current,Active
Licensure Date:	04/03/1998
Expires:	11/30/2019

Special Qualifications	Qualification Effective
Mechanical Plumbing	04/05/2011

Alternate Names
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Licensee Details

Licensee Information

Name: **GOLBERG, WILLIAM JOSEPH (Primary Name)**
 Main Address: ***Private Address* *Private Address***
Private Address
Private Address
Private Address

License Mailing:

LicenseLocation:

License Information

License Type: **Standard 1 and 2 Family Dwelling Plans SFP**
 Rank: **Std 1&2 Fam Exa**
 License Number: **SFP261**
 Status: **Current,Active**
 Licensure Date: **02/22/2016**
 Expires: **11/30/2019**

Special Qualifications Qualification Effective

Alternate Names

ALL PLUMBING INC

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Steve Ahuna, PE, CBO

Registered Civil Engineer/Certified Plans Examiner

Years of Experience

30+

Education

M.S., Applied Economics, Santa Clara University, Santa Clara, CA

B.S., Architectural Engineering, California State University, San Luis Obispo

Professional Memberships

ICC, CALBO, SEAOSC

Certifications

ICC Certified Building Official (1036330-CB)

ICC Certified Plans Examiner (1036330-B3)

ICC Certified Plans Examiner UBC (1036330-60)

OES/CALEMA Disaster Service Worker

Registration

Civil Engineer in California (C 34264), Nevada, Florida and Arizona

Mr. Ahuna has over 30 years of experience in architectural and structural review of residential and non-residential plans. He has plan review experience working for both private and municipal entities. Prior to working as a plan checker, he worked for a private consulting structural engineering firm as a design engineer for residential and non-residential buildings. He will oversee the plan review staff in the review of plans and calculations for compliance with adopted codes and any adopted amendments.

KEY QUALIFICATIONS

- Licensed and Certified
- Certified Building Official
- Building Plans Examiner
- PE License CA, NV, FL and AZ
- Municipal Experience
- Structural and Architectural Review
- Extensive Plans Review Experience

Allen Posey, CBO, MCP

Certified Fire Marshall/Building Official/Plans Examiner/Inspector/Master Code Professional

Years of Experience

37+

Education

A.S., Columbus Technical College,
Mechanical Engineering Technology

License

Florida Building Code Administrator
Florida Building Plans Examiner
Florida Electrical Plans Examiner
Florida Mechanical Plans Examiner
Florida Plumbing Plans Examiner

KEY QUALIFICATIONS

- Multiple Certifications
- Municipal Background
- Proven Conflict Resolution Skills
- Hands-On Experience with Design and Construction
- Extensive Knowledge of Codes & Regulations

Professional License

Georgia Electrical Non-Restricted Electrical Contractor
Alabama Electrical Non-Restricted Electrical Contractor
Colorado Electrical Contractor/Master Electrician
Georgia Certified Fire Marshal
Part 107 Licensed Drone Pilot

Instructor Electrical Master and Journeyman Program Independent Electrification Council

Professional Memberships

ICC, IAEI Georgia, IAEI Colorado, ICC Colorado, WGIA Georgia, MIAI Georgia, AEC Georgia

Certifications

Building Inspector
Building Plans Examiner
Building Code Official
Certified Building Official (CBO)
Electrical Code Official
Housing Code Official
Mechanical Code Official
Plumbing Code Official
Combination Inspector
Commercial Combination Inspector
Commercial Electrical Inspector
Electrical Inspector
Electrical Plans Examiner

Fire inspector I
Property Maintenance and Housing Inspector
Zoning Inspector
Master Code Professional
Mechanical Plans Examiner
Mechanical Inspector
Permit Technician
Plumbing Plans Examiner
Plumbing Inspector
Residential Combination Inspector
Residential Electrical Inspector

ICC/AACE Code Enforcement Administrator
 ICC/AACE Code Enforcement Officer
 Fire Inspector II
 Combination Plans Examiner
 Fire Plans Examiner
 Disaster Response Inspector
 AACE Master Code Enforcement Professional
 Commercial Energy Plans Examiner

Residential Energy Inspector/Plans Examiner
 Residential Plans Examiner
 Accessibility Inspector/Plans Examiner
 Residential Building Inspector
 Residential Mechanical Inspector
 Certified Fire Marshall
 Residential Plumbing Inspector
 Soil Erosion Inspector

Mr. Posey has over 37 years of construction, building and safety experience, with 30 years of code administration, problem solving, and material work force management experience. He has held the positions of Chief Electrical Inspector, Plans Examiner, and Building Official. He was responsible for all electrical plans examining, electrical inspections assignments, and all field inspections. Duties also included management of Permitting and Inspection Software System. Allen has inspected and plan reviewed projects including residential, commercial, education and industrial structures. He is also experienced in the implementation and training of CAA's permitting software, CityTech Solutions.

The screenshot shows the Florida DBPR Online Services interface. The header includes the Florida DBPR logo and the text 'DBPR ONLINE SERVICES'. A navigation menu on the left lists various actions like 'Search for a Licensee', 'Apply for a License', and 'File a Complaint'. The main content area is titled 'Licensee Details' and contains the following information:

Licensee Information	
Name:	POSEY, GLENN ALLEN (Primary Name)
Main Address:	*Private Address* *Private Address* *Private Address* *Private Address*
License Mailing:	
License Location:	

License Information	
License Type:	Building Code Administrator
Rank:	Building Code A
License Number:	BU1925
Status:	Current, Active
Licensure Date:	04/06/2016
Expires:	11/30/2019

Special Qualifications	
	Qualification Effective

Alternate Names

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Florida
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AB&T Delinquent
Invoice & Activity
List Search

Licensee Details

Licensee Information	
Name:	POSEY, GLENN ALLEN (Primary Name)
Main Address:	*Private Address* *Private Address* *Private Address* *Private Address* *Private Address*
License Mailing:	
LicenseLocation:	

License Information	
License Type:	Standard Plans Examiner
Rank:	Plans Examiner
License Number:	PX3781
Status:	Current_Active
Licensure Date:	10/26/2016
Expires:	11/30/2019

Special Qualifications	
	Qualification Effective
Building	12/15/2017
Electrical	10/26/2016
Mechanical	04/06/2018
Plumbing	04/07/2018

Alternate Names

[View Related License Information](#)
[View License Complaint](#)

Past Experience

CAA has over 35 years of experience providing contract services to cities and towns. The case studies below illustrate our ability to respond quickly to any increase in workload, whether caused by a spike in building activity or a natural disaster.

City of Wheat Ridge, Colorado

A western suburb of Denver, Wheat Ridge is an expansive community with an interesting mix of old and new. Although primarily a residential city, Wheat Ridge's convenient location and easy access to major thoroughfares has much to offer to the business community. In addition, the City is taking progressive steps to promote its commercial corridors, and already features several retail centers along with a large number of parks and outdoor recreation spaces.

With this growing development activity, the City started looking at alternatives to provide its building department services. In April 2017, CAA was selected to support the City with as-needed inspections to assist with any increase in building activity. Shortly thereafter, the area was hit by Colorado's most destructive hailstorm to date, with hailstones as big as baseballs pelting areas west of the Denver metro area, including Wheat Ridge, and causing a record of \$1.4 billion in damage to vehicles, buildings, and infrastructure.

One of the many advantages of utilizing a private provider for building department services is the ability of those providers to meet any sudden changes in workload with

additional staff. Immediately following the storm, inspections at the City skyrocketed from an average of 30 per day to well over 100 per day, but CAA was able to handle this increase smoothly and efficiently by bringing in up to 7 additional staff members during peak times, minimizing wait times and allowing residents to get back to normal as quickly as possible. "CAA was able to identify necessary resources from as far away as California, Nevada and Georgia so that we could meet the volume of work that was created by the storm", said Ken Johnstone, Community Development Director of the City. "By the end of the year we had issued and inspected over 7,000 residential roofs alone – over half of the single family homes in the City. We are all proud to say that we never stopped our longstanding practice of honoring next day inspections and maintained our best practice of completing mid-roof inspections in addition to final inspections".

One year after the storm, this business model has proven highly beneficial to Wheat Ridge, and CAA was hired to run the City's entire building department. Says Ken Johnstone: "We were able to negotiate an attractive pricing strategy whereby CAA retains only a portion of our various building permit and plan review revenues, and that percentage share back goes down as work volume goes up, which was very attractive to the City. We have now officially been using CAA in this full-service model since early March, 2018 and couldn't be more pleased with how CAAs commitment to customer service and professionalism is delivering on the needs of the City, its citizens and our contractor community!"

City of Albany, GA

Located on the Flint River with a population of approximately 95,000, the City of Albany is the seat of Dougherty County and the eighth-largest city in the State of Georgia. The City prides itself on being a City of Excellence and is known as the "Good Life City." Historically, the City used to provide its own Development Services for both the City and the County. But following the excessive building damage caused by tornadoes in early 2017 and the departure of the City's Building Official, the City found itself backlogged and unable to manage the additional workload effectively. Through an official RFP process, CAA was selected over the competition to provide contract Building and Safety Services to the City and County. CAA now provides the City with a permit technician, three building inspectors, and a Building Official to cover the service area of approximately 300 square miles. CAA also provides the City with its own permit and inspection software, 84Works, which has been customized to fulfill the exact needs of the City.

CAA provided a smooth transition within a matter of days of being selected as the City's contractor, and was able to quickly achieve significant process improvements. In the words of Phil Roberson, Assistant City Manager:

"The City of Albany has been extremely impressed with how quickly CAA was able to step in and provide us with complete Building & Safety Services. Following the January 2017 storms, Albany was left with hundreds of houses in need of repair or rebuilding. CAA was able to bring a CBO and inspectors with years of experience to help Albany and it's citizens in the rebuilding process. One of our major industries, Proctor and Gamble, lost their distribution warehouse as a result of the Jan 22 tornadoes. On the one-year anniversary of the storm, P&G held a ribbon cutting at their new ultra-modern distribution warehouse, which replaced the one destroyed by the tornadoes. At the

ribbon cutting, the CEO of the Albany P&G plant credited the contractors, P&G staff, and the work by the Inspection and Development Services staff of the City (including CAA) for making the one year build out possible. This type of high level recognition is a testament to the benefits derived from the partnership between CAA and the City of Albany.”

Within the first 3 months, CAA has processed 752 permits and conducted 896 inspections for the City of Albany.

Town of Lyons, CO

Lyons, Colorado is nestled in the foothills of the Rocky Mountains, and is well known for its art, music, culture, and natural beauty. Visitors flock to Lyons to attend its annual music festivals, visits its shops and restaurants, and enjoy the numerous parks and amenities.

As a small town, Lyons is no stranger to the concept of public private partnerships and has outsourced its building department services for a number of years. CAA has been the provider of choice since 2017 and operates the Town’s whole building department, including building plan review, building inspections, software system administration, and building official services.

CAA prides itself in bridging the disconnect that often occurs between municipalities and contracted service providers by providing a consistent presence and availability of highly trained personnel. CAA keeps regular office hours at the Town, conducts inspections the very next day, and is always available by phone and email, thus guaranteeing the public crucial access to building services right when they are needed. In addition, CAA provides the Town with its own permit issuance and tracking system.

According to Victoria Simonsen, Town Administrator: “Lyons is still in recovery from a nationally-declared disaster in 2013. CAA was able to address our increased needs and is providing excellent services to our community. The staff have been responsive, timely and have great customer service skills! We are very satisfied with the building inspection and plan review services that we are receiving from them.”

CAA personnel is highly trained and continuously keeps up on current regulations and codes, ensuring quality, compliance and the highest level of safety for residents. As such, CAA is assisting the Town with ordinance and code adoption, as well.

City of Brookhaven, GA

Located in the northeast suburbs of Atlanta in western DeKalb County with a population of approximately 50,000, the City of Brookhaven officially became a city in 2012 and operates Parks & Recreation, Police, Public Works and Community Development Departments.

The City’s economic outlook is fantastic, with lots of building activities currently in progress and on the horizon. One example is the new \$1 billion hospital and pediatric campus of Children’s Healthcare of Atlanta, which is to be built in Brookhaven through 2025. The new campus will include a 446-bed hospital, support buildings, a physical plant, more than 20 acres of green space, as well as a 260,000-square-foot ambulatory care center – making this campus the single largest health-care project in Georgia’s

history. It will create 16,500 construction jobs through 2025 and 3,600 permanent net jobs upon its opening.

As the Building & Safety Services provider for the City, Charles Abbott Associates, Inc. (CAA) will be intimately involved with all phases of the construction of the project. CAA has been providing municipal services for the City since 2015. The services provided include the front permit counter, building plan review, building inspections, code enforcement, software system administration, and arborist services.

Scope of Work

CAA's Services for the City will include the provision of Certified Building Official Services, Plans Review Services, and Building Inspection Services for compliance with Florida Building Code and other applicable statutes. CAA will provide the following services, as outlined by the City:

1. CAA will provide inspection services for commercial, single, as well as multi-family structures. Inspections include mechanical, electrical, plumbing, fire, gas, building, energy, accessibility, and threshold inspections. CAA assures the highest degree of compliance with safety and zoning codes. Our proposed inspector meets the standard certification requirements of Florida Statute Chapter 468, is thoroughly trained on the codes, masters the local amendments of each code, and is able to conduct inspections in accordance with jurisdictional standards.

The inspector assigned to the City will perform periodic construction inspections to verify that the work of construction is in conformance with the approved project plans, as well as identify issues of non-compliance with applicable codes. The inspector will also conduct inspections of alteration, repair, remodeling, or demolition of structures and the installation of building systems, when permitting is required, to ensure compliance with all applicable codes.

We assure the City that all inspection turn-around times are met or improved, all inspections are conducted when requested, and emergency response is timely and effective. CAA will perform all inspections called in before 4pm no later than the end of the following business day. In addition, a CAA Building Inspector will be available to conduct urgent building inspections, should they arise.

2. CAA will provide plans review services for commercial and residential projects, including structural, mechanical, electrical, plumbing, fire, gas and building. Plans will be reviewed for conformance to FEMA/NFIP Standards, Local Floodplain regulations, and all other applicable codes and regulations as well as submittal requirements.

CAA thoroughly and promptly checks all plans for compliance with all local ordinances and state and federal laws pertaining to the Florida Building Codes, and for compliance with the adopted Building Code, Plumbing Code, Electrical Code, Mechanical Code, Disabled Access requirements, Energy requirements, and/or Fire Code. CAA will perform most plan reviews at the City Building Department. For plans requiring additional expertise, CAA will take charge of transporting and handling of plans.

Our approach to plan checking ensures that plans submitted to CAA for review are properly tracked and processed. Our system ensures that each plan or permit is assigned, returned, and handled on time and within budget. The status of any plan can easily be determined at any point in time.

Our registered professionals and certified plan examiners check all plans and calculations, thus assuring that the technical components and all code items are thoroughly reviewed. Plan reviews will be performed under the supervision and authority of the building official.

CAA plan reviewers are always willing to meet with clients for pre-design meetings, pre-submittal meetings or as needed to resolve complex code related plan review issues in the most efficient manner possible; this is just part of the facilitative approach to plan review which emphasizes building safety while allowing for innovation to resolve complicated building design issues.

Most of our plans examiners are cross-trained and also certified as inspectors. This provides for a very efficient use of personnel and expedites the process for the applicant. We provide timely turnaround of plan checks and rechecks based on guaranteed turnaround times. Our staff also handles any coordination required as part of the review.

Our staff is well-versed in the Florida Building Code in each of the following categories:

✓ **Architectural**

CAA staff is certified and experienced in all phases of architectural review, including construction types, occupancies, separations, heights, areas, egress means, and fire/life safety. CAA staff will bring many years of experience to the City's review and inspection process with respect to size, shape, and use of buildings with varying complexities. Many of CAA's staff are active in non structural and architectural code promulgation at the state and national level and several sit on International Code Council (ICC) committees.

✓ **Structural**

CAA's plan review structural engineers have reviewed structural plans with varying degrees of construction complexity from single-family homes to high-rise multi-use facilities. CAA's plan review engineers maintain Florida registration with an average experience of over 30 years in structural and design plan review.

✓ **Mechanical**

CAA staff is experienced in plan review and inspection of mechanical installations for compliance with the Florida Building Code, Mechanical, including piping, duct layouts, and sizing for HVAC systems, mechanical equipment approval listings, and mechanical fixture locations, sizing, and counts. CAA staff will bring such knowledge, experience, and understanding to City reviews and inspections.

✓ **Plumbing**

CAA staff is trained to review plans for compliance with all aspects of the Florida Plumbing Code, including piping layouts and isometrics, plumbing fixture locations and approval listings, pipe size calculations, and accessibility details. CAA staff is well knowledgeable and experienced in the review and inspection of plumbing plans and installations, including applications from the simple to the complex. Since many of our

staff has worked in the field, they can draw on their own expertise and experiences as the designer, developer, and inspector.

✓ **Electrical**

CAA staff is experienced in the plan review and the inspection of various electrical installations, both residential and commercial. CAA staff will review plans for compliance with the Florida Electrical Code, including the review of schematics, diagrams, panel schedules, load calculations, fixture approval listings, Title 24 Energy compliance calculations, and accessibility data.

✓ **Floodplain Management**

CAA staff strictly adheres to local floodplain ordinances in the course of our plan review and inspections. Our staff is familiar with the substantial improvement rule and how to regulate major additions and other improvements to buildings in the floodplain, as well as the substantial damage rule and how to regulate reconstruction and repairs to buildings that have been severely damaged.

✓ **Energy**

CAA staff is well versed in Florida Building Code Energy Conservation Codes for Residential and Non-Residential Buildings. CAA staff receives extensive annual training to ensure that each is aware of the specifics of these state programs.

✓ **Accessibility**

CAA staff attends state and locally sponsored training relative to disabled access. CAA staff takes disabled access very seriously and has been proactive on CALBO's Accessibility Compliance Committee. CAA provides CASp staff members in order to meet State accessibility requirements.

✓ **LEED**

CAA recognizes the importance of and pursues environmentally conscious design and development procedures consistent with the U.S. Green Building Council (USGBC), Leadership in Energy & Environmental Design (LEED) certification standards. CAA has staff certified through the LEED process that are available to review development projects that are required to have LEED Certification(s).

✓ **Green Building Code Review**

CAA can and will provide staff that is aware and up to date on Green Building Standards Code revisions. As with LEED certification, CAA seeks to enhance and improve development projects through cooperation and collaboration with stakeholders. CAA has several staff members who are green certified plan examiners and building inspectors.

3. CAA's certified Building Official will be responsible for the administration and enforcement of the City's various codes and ordinances related to building safety while ensuring that the health and safety of the public are maintained through adherence to the requirements established by law for the construction, alteration or use of new and existing buildings. Through cooperation with other City departments, CAA is able to assist in protecting the economic interests of the community with the ultimate goal of ensuring the development of safe and sustainable buildings for subsequent generations.

The Building Official assigned to the City will be responsible for signing off on permits, certificates of occupancy, final inspections, and other related tasks.

- 4.** CAA and its staff are licensed and certified in accordance with all applicable laws and statutes.
- 5.** Our staff maintains a close working relationship with planning, code enforcement and public works personnel, and knows how to work effectively and respectfully with elected officials as well.
- 6.** CAA will ensure smooth inter-agency coordination as needed.
- 7.** CAA will attend City Council, Planning and Zoning Review Board, and Code Enforcement meetings as needed. CAA will present statistics and recommendations to the City Council on a quarterly basis.
- 8.** CAA allows submittals in digital format so they can be made available to the public.
- 9.** CAA will maintain records relating to inspections and work performed under the scope of this project in accordance with local, State, and Federal public records retention requirements.
- 10.** CAA will provide support to CDBG and Code Enforcement as needed.
- 11.** CAA will ensure all work is in compliance with the Florida Building Code.
- 12.** In the event of a local or regional disaster, all on-site CAA assigned staff will be accessible, available and prepared to respond to emergency calls regarding building related issues. We create rotational schedules to service emergencies as they occur, with a calling order to ensure no issues are left unaddressed. CAA provides and ensures disaster service kits are maintained to respond to disasters. CAA employees are required to be Disaster Service Worker certified in within 6 months of hire date.

In addition, CAA will provide additional Building and/or Engineering Staff for emergency situations.
- 13.** CAA will maintain an office within City Hall with regular established agreed upon business hours.
- 14.** CAA will provide all materials, resources, tools and training required for our professionals to perform their assigned duties, including cell phones, iPads, and other technology devices that enhance our service. CAA will also provide and maintain all vehicles and equipment required or necessary to carry out inspections and duties assigned to CAA.
- 15.** CAA staff will be familiar with the City's Comprehensive Plan and Land Development Regulations to ensure decisions are made in accordance with both documents.
- 16.** CAA agrees to comply with all applicable public records law per section 119.0701, Florida Statutes.
- 17.** CAA understands that this bid may be utilized for FEMA projects.

Quality Control

In an effort to provide quality assurance, CAA proposes to use our "best service guarantee" program. This program assures the City that all turn around times are met or improved, all inspections are conducted when requested, and emergency response is timely and effective.

A client's direct communication with corporate and division managers is recommended and encouraged. Through open dialogue and communication, CAA seeks to always improve on its already outstanding services. CAA's Project Manager for this project, Tim Inglis, CBO, Director, will maintain continuous communication with the City. He is an ICC Certified Building Official, and brings over 30 years of experience to this project. He will ensure that the City is 100% satisfied with our staff, our turnaround times, the quality of our work, and the overall teamwork between our staff and yours. Any shortcomings of our staff from the City's perspective will be dealt with promptly.

As part of our services, we assure the following to the City:

- Key personnel will be available to the extent proposed for the duration of the project, and no person designated "key" to the project will be removed or replaced without the prior written consent of the City.
- Should we wish to make any permanent staffing changes, we will discuss these changes with the City at least 30 days in advance; and
- If the City requests staffing changes, we will make them in a timely manner.

Financial Stability

CAA is a privately owned company functioning as an "S" corporation. CAA has been financially stable and viable since its inception in 1984. To respect the page limit of this proposal, audited financial statements will be provided separately upon request. As an indication of financial stability, please find below CAA's gross revenue for the last five fiscal years:

2017 - \$24,570,319

2016 - \$21,677,040

2015 - \$19,556,982

2014 - \$16,961,582

2013 - \$16,050,489

CAA's bank references are as follows:

Jason Pfeiffer
Bank of America
520 Newport Center Dr., Suite 1000
Newport Beach, CA 92660
(949) 413-7358
Jason.pfeiffer@baml.com

Alfred Villalobos
American Business Bank
Vice President & Senior Relationship Manager
970 W. 190th Street, Ste 301
Torrance CA 90502
(310) 808-1200
avillalobos@americanbusinessbank.com

CAA has never filed a petition in bankruptcy, taken any actions with respect to insolvency, reorganization receivership, moratorium, or assignment for the benefit of creditors, or otherwise sought relief from creditors in its 35-year history. CAA has also never had a contract terminated due to the quality of our work or been cited by any governmental agency.

Litigation

The following is a list of cases filed and settled within the last 5 years. There are no filed, pending or threatened claims of litigations that would impede our ability to provide our services to the City.

Ostrow vs. Hidden Hills (City tendered the case to us for defense on 3/17/17) and the case is still pending. Homeowner is suing over a faulty foundation on their remodel.

Top Rank Builders vs. County of Nye, Pahrump, NV settled out of court September 2018

Miller vs. City of Twentynine Palms, CA, case still pending. CAA didn't perform any of the work on the crosswalk that is the basis for the lawsuit, which is most likely going to be dismissed.

Boar Inc. vs. County of Nye, et. al.
Case Reported: 4/22/2010
Case Dismissed: 1/16/2014

Victor Ambrosio and Linda Martinez vs. City of Hawaiian Gardens, CA, et. al.
Case Reported: 12/2/2013
Case Dismissed: 2/9/2016

Schlickman vs. City of Palos Verdes Estates, CA, et. al.
No court case was filed in this matter
Plaintiff's claim was settled on 4/22/2013

Wilson vs. City of Laguna Niguel, CA, et. al.
Case Reported: 2/14/2015
Case against Charles Abbott Associates was dismissed on 1/7/2016

CAA is not debarred, suspended or otherwise declared ineligible to contract with any other federal, state or local public agency.

REFERENCES

CAA is exceptionally well qualified to provide Building Services to the City. We have the experience, organization, and size to ensure success in delivering the highest quality services. Because of our long history serving other similar dynamic cities and our broad-based experience, we fully understand the technical, cultural, and political nature of the services to be performed.

Founded in California in 1984, CAA's business model has been based on the philosophy of providing exceptional service and value. We do this by hiring and training exceptional personnel, and expanding our client base selectively and incrementally to ensure continuous growth while providing the highest levels of service in the industry. In 1998, CAA successfully expanded into the State of Nevada, where we now work with most major municipalities, and in 2012 added the State of Georgia. The key personnel proposed for the City has been an integral part of this growth, and has extensive experience in entering and developing new geographic markets. Upon contract award, this team of highly experienced key personnel will be responsible for commencing the City's Building Services, and will be on-site until all processes and procedures have been implemented successfully. Being new to the State of Florida and having grown the company to one of the biggest and most successful building & safety firms mainly through word of mouth advertising, the City would be a very important customer and, as such, receive the highest level of care and service at the best possible price.

The following list shows a few related projects for CAA with an outline of services provided to each client, as well as the period of time that we have been performing the referenced service. We are extremely proud of our track record and the length of time we have continuously provided services to our clients. We invite you to contact any of our clients to obtain their opinion of the services we provide for them.

REFERENCES	SERVICES	SINCE
Leon County Doug Maples, Director of Building Plan Review & Inspections (805) 606-1377 435 N. Macomb Street, 2nd Floor, Tallahassee, FL 32301	Plan Review	2019
City of Emerson Todd Heath, Assistant City Manager (770) 382-9819 700 Highway 293, Emerson, GA 30137	Building & Safety	2019
Spalding County Chad Jacobs, Community Development Director (770) 467-4254 119 E. Solomon Street, Griffin, GA 30223	Building & Safety	2019
City of Conroe Paul Virgadamo, City Manager (936) 522-3003 505 West Davis Street, Conroe TX 77305	Engineering Plan Review	2018

City of Covington Scott Gaither, Planning & Zoning Director (770) 385-2178 2116 Stallings Street, Covington, GA 30014	Building & Safety	2018
City of Albany/Daugherty County Paul Forgey, Director Planning, Development Services & Code Enforcement (229) 438-3901 240 Pine Avenue, Suite 300, Albany, GA 31702	Building & Safety	2017
Town of Bennett Deb Merkle, Community Development Manager (303) 644-3249 401 S First Street, Bennett, CO 80102	Building & Safety Electrical Inspection	2017 2018
City of Jackson Kay Pippin, Mayor (770) 775-7535 134 South Oak Street, Jackson, GA 30233	Building & Safety	2017
City of Peachtree City Dave Borkowski, City Engineer (770) 631-2538 153 Willowbend Rd., Peachtree City, GA 30269	City Engineering Plan Review	2017
City of Stockbridge Camilla J. Moore, Community Development Director (678) 833-3354 4640 North Henry Boulevard, Stockbridge, GA 30281	Building & Safety	2017
City of South Fulton Shayla Reed, Community Development Director (470) 809-7700 Industrial Blvd. Atlanta, GA 30336	Building & Safety	2017
City of Wheat Ridge Kenneth Johnstone, Community Development Director (303) 235-2844 7500 W. 29 th Ave., Wheat Ridge, CO 80033	Building & Safety	2016
Town of Lyons Victoria Simonsen, Town Administrator (303) 823-6622 432 5th Avenue, Lyons, CO 80540	Building & Safety	2016
City of Ojai Steve McClary, City Manager (805) 646-5581 401 S. Ventura Street, Ojai, CA 93023	Building & Safety Code Enforcement	2016
City of Cleveland Connie Tracas, City Administrator (706) 865-2017 85 South Main Street, Cleveland, GA 30528	Building & Safety	2016
City of Dahlonega Bill Schmid, City Manager (706) 864-6133 465 Riley Road, Dahlonega, GA 30533	Building & Safety	2016

City of Rancho Palos Verdes Lauren Ramezani, Sr. Administrative Analyst- Public Works (310) 544-5245 30940 Hawthorne Blvd., Rancho Palos Verdes, CA 90275	Building Plan Check Environmental/NPDES	1984 2016
City of Lake Forest Angela Redding, City Manager (949) 461-3575 25550 Commercentre Drive, Suite 100 Lake Forest, CA 92630	Street Maintenance	2016
City of Hogansville Lisa Kelly, City Clerk (706) 637-8629 400 East Main Street, Hogansville, GA 30230	Building & Safety	2016
City of Avalon Jordan Monroe, Management Aide (310) 510-0220 x 128 410 Avalon Canyon Rd., Avalon, CA 90704	Environmental/NPDES	2015
City of Banning Patty Nevins, Community Development Director (951) 922-3120 99 E. Ramsey St., Banning, CA 92220	Building & Safety City Engineering As Needed	2015
City of Brookhaven Patrice Ruffin, Director of Community Development (404) 637-0500 4362 Peachtree Road, Brookhaven, GA 30319	Building & Safety Code Enforcement	2015
City of Moreno Valley Ahmad Ansari, Director of Public Works (951) 413-3000 14177 Frederick Street, Moreno Valley, CA 92552	Environmental/NPDES	2014
City of Pico Rivera Gladis Deras, Associate Engineer (562) 801-4332 6615 Passons Boulevard, Pico Rivera, CA 90660	Environmental/NPDES	2014
City of Calimesa Bonnie Johnson, City Manager (909) 795-9801 908 Park Avenue, Calimesa, CA 92320	Building & Safety Full Service Planning Public Works Code Enforcement	2014
City of Carson City Lee Plemel, Director Community Development (775) 283-7075 108 E. Proctor St., Carson City, NV 89701	Building & Safety Full Service	2014
City of San Dimas Krishna Patel, Community Dev. Director (909) 394-6200 245 E Bonita Ave, San Dimas, CA 91773	Environmental/NPDES	2014

City of Forest Park Angela Redding, City Manager (404) 608-2300 785 Forest Parkway, Forest Park, GA 30297	Building & Safety	2014
City of Manchester Doug Westberry, City Manager (706) 846-3141 P.O. Box 366, Manchester, GA 31816	Building & Safety Code Enforcement	2014
City of Griffin Kenny Smith, City Manager (770) 229-6406 100 South Hill Street, Griffin, GA 30223	Building & Safety	2014
City of Duarte Craig Hensley, Community Dev. Director (626) 386-6835 1600 Huntington Dr, Duarte, CA 91010	Building & Safety Inspection & Plan Check, Code Administration	2013
City of Redondo Beach Geraldine Trivedi, Project Manager (310) 372-1171 415 Diamond Street Redondo Beach, CA 135277	Environmental/NPDES	2013
City of Riverdale Scott Wood, City Manager (770) 909-5480 971 Wilson Road, Riverdale, GA 30296	Building & Safety City Engineering Public Works	2012
City of Palmetto William Shell, City Administrator (770) 463-3377 509 Toombs Street, Palmetto, GA 30268	Building & Safety City Engineering	2012
City of La Palma Laurie Murray, City Manager (714) 690-3334 7822 Walker Street, La Palma, CA 90623	Building & Safety Environmental/NPDES	2012
City of Laguna Hills Ken Rosenfield, Assist. City Manager (949) 707-2655 24035 El Toro Road, Laguna Hills, CA 92653	Street Maintenance	2012
City of Laguna Woods Chris Macon, City Manager (949) 639-0500 24264 El Toro Road, Laguna Woods, CA 92637	Environmental/NPDES	2010
City of Los Alamitos Les Johnson, Community Dev. Director (562) 431-3538 3191 Katella Avenue, Los Alamitos, CA 90270	Building & Safety Environmental/NPDES	2010
City of Pomona Julie Carver Environmental Programs Supervisor (909) 620-2261 505 South Garey Ave, Pomona, CA 91766	Environmental/NPDES	2010

City of Cypress Douglas Dancs, Director of Public Works (714) 229-6752 5257 Orange Avenue, Cypress, CA 90630	Plan Check Building Inspection NPDES Inspection and Plan Review	2008
City of Rancho Santa Margarita Cheryl Kuta, Development Services Director (949) 635-1800, ext. 6707 22122 El Paseo, Rancho Santa Margarita, CA 92688	Building & Safety Environmental Public Works Code Enforcement	2007
City of Fountain Valley Brian James, Planning & Building Director (714) 593-4426 10200 Slater Ave. Fountain Valley, CA 92708	Building & Safety	2004
City of Stanton Kelly Hart, Community Dev. Director (714) 890-4213 7800 Katella Avenue, Stanton, CA 90680	Building & Safety	2004
City of Aliso Viejo David Doyle, City Manager (949) 425-2500 12 Journey, Suite 100, Aliso Viejo, CA 92656	Building & Safety Engineering Support Code Enforcement Environmental	2002
Town of Pahrump Pam Webster, County Manager (775) 751-7075 400 N. Highway 160, Pahrump, NV 89060	Building & Safety Environmental County Engineering	1998
City of Mission Viejo Elaine Lister, Community Dev. Director (949) 470-3000 200 Civic Center, Mission Viejo, CA 92691	Building & Safety Public Works Plan Check Public Works Inspection	1995
City of Camarillo Dave Norman, City Manager (805) 388-5307 601 Carmen Drive, Camarillo, CA 93010	Building & Safety Public Works Inspections Environmental/NPDES	1994
City of Yucaipa Ray Casey, City Manager (909) 797-2489 34272 Yucaipa Boulevard, Yucaipa, CA 92399	Building & Safety Engineering Support Fire Marshall Services	1993
City of Twentynine Palms Frank Luckino, City Manager (760) 367-6799 6136 Adobe Road, Twentynine Palms, CA 92277	Building & Safety City Engineering Traffic Engineering	1993
Town of Yucca Valley Shane Steuckle, Community Dev. Director (760) 369-7207 57090 Twentynine Palms Highway, Yucca Valley, CA 92284	Building & Safety	1992
Town of Apple Valley	Building & Safety	1990

Lori Lamson, Assistant Town Manager (760) 240-7000 14955 Dale Evans Parkway, Apple Valley, CA 92307	Public Work Administration Town Engineering	
City of Hidden Hills Kerry Kallman, City Manager (818) 888-9281 6165 Spring Valley Road, Hidden Hills, CA 91302	Building & Safety City Engineering	1990
City of Moorpark Troy Brown, City Manager (805) 517-6221 799 Moorpark Avenue, Moorpark, CA 93021	Building & Safety Environmental/NPDES	1988



CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YYYY)

3/18/2019

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 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 Dealey, Renton & Associates License #0020739 600 Anton Blvd., #100 Costa Mesa CA 92626	CONTACT NAME: Dani Schulze PHONE (A/C. No. Ext): 714-427-6810 E-MAIL ADDRESS:		FAX (A/C. No.): 714-427-6818
	INSURER(S) AFFORDING COVERAGE		
INSURED CHARLABBO Charles Abbott Associates, Inc. 27401 Los Altos Suite 220 Mission Viejo CA 92691	INSURER A : Travelers Casualty & Surety Co. America		31194
	INSURER B : Hartford Fire Ins. Co.		19682
	INSURER C : Twin City Fire Ins. Co.		29459
	INSURER D : Hartford Casualty Insurance Co.		29424
	INSURER E :		
	INSURER F :		

COVERAGES

CERTIFICATE NUMBER: 183452665

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
B	<input checked="" type="checkbox"/> COMMERCIAL GENERAL LIABILITY <input type="checkbox"/> CLAIMS-MADE <input checked="" type="checkbox"/> OCCUR GEN'L AGGREGATE LIMIT APPLIES PER: <input type="checkbox"/> POLICY <input checked="" type="checkbox"/> PRO-JECT <input type="checkbox"/> LOC <input type="checkbox"/> OTHER:	Y	Y	57UUNFM3479	3/31/2019	3/31/2020	EACH OCCURRENCE \$ 1,000,000 DAMAGE TO RENTED PREMISES (Ea occurrence) \$ 300,000 MED EXP (Any one person) \$ 5,000 PERSONAL & ADV INJURY \$ 1,000,000 GENERAL AGGREGATE \$ 2,000,000 PRODUCTS - COMP/OP AGG \$ 2,000,000 \$
B	<input checked="" type="checkbox"/> AUTOMOBILE LIABILITY <input checked="" type="checkbox"/> ANY AUTO <input type="checkbox"/> ALL OWNED AUTOS <input type="checkbox"/> SCHEDULED AUTOS <input checked="" type="checkbox"/> HIRED AUTOS <input checked="" type="checkbox"/> NON-OWNED AUTOS	Y	Y	57UUNFM3479	3/31/2019	3/31/2020	COMBINED SINGLE LIMIT (Ea accident) \$ 1,000,000 BODILY INJURY (Per person) \$ BODILY INJURY (Per accident) \$ PROPERTY DAMAGE (Per accident) \$ \$
D	<input checked="" type="checkbox"/> UMBRELLA LIAB <input checked="" type="checkbox"/> OCCUR <input type="checkbox"/> EXCESS LIAB <input type="checkbox"/> CLAIMS-MADE DED RETENTION \$	Y	Y	57XHUFM3069	3/31/2019	3/31/2020	EACH OCCURRENCE \$ 1,000,000 AGGREGATE \$ 1,000,000 \$
C	WORKERS COMPENSATION AND EMPLOYERS' LIABILITY ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? (Mandatory in NH) If yes, describe under DESCRIPTION OF OPERATIONS below	Y/N	N/A	57WERT0674	3/31/2019	3/31/2020	<input checked="" type="checkbox"/> PER STATUTE <input type="checkbox"/> OTH-ER E.L. EACH ACCIDENT \$ 1,000,000 E.L. DISEASE - EA EMPLOYEE \$ 1,000,000 E.L. DISEASE - POLICY LIMIT \$ 1,000,000
A	Professional Liability Claims Made			106484363	3/31/2019	3/31/2020	\$1,000,000 per claim \$1,000,000 annl aggr.

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (ACORD 101, Additional Remarks Schedule, may be attached if more space is required)

Umbrella policy is a follow-form to underlying General Liability/Auto Liability/Employers Liability
 Re: Procurement Agreement #10381-103817114401 - 10381-CH2M Hill Engineers, Inc. and Client are named as additional insureds as respects general and auto liability for claims arising from the operations of the named insured as required per written contract or agreement. Coverage afforded the additional insured is primary and non-contributory as respects to general liability coverage. Coverage afforded the additional insured is primary as respects to auto liability coverage. Insurance coverage includes waiver of subrogation per the attached endorsement(s). SEE CANCELLATION SECTION of Certificate for 30 Day Notice of Cancellation /10 Day for Non-Payment of Premium. Primary and Non-Contributing coverage applies to Auto Liability as required by written contract

CERTIFICATE HOLDER**CANCELLATION 30 Day Notice of Cancellation**

For Proposal Use Only

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

Karin Thorp

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REQUIRED FORMS

Please find below the required forms as outlined in the City's RFP.

Conflict of Interest

CAA certifies that to the best of its knowledge, no circumstances exist which shall cause a conflict of interest in performing services for the City of Green Cove Springs, and that no company or person other than bona fide employees working solely for our firm has been employed or retained to solicit or secure a contract resulting from this Request for Proposals.

XII. ANTI-COLLUSION REQUIREMENT:

Under no circumstances shall any prospective proposer, or any person or persons acting for or on behalf of any said prospective proposer, seek to influence or gain the support of any member of the City Council or the City Staff favorable to the interest of any prospective proposer or seek to influence or gain the support of any member of the City Council or City Staff against the interest of any prospective proposer. Any such activities shall result in the exclusion of the prospective proposer from consideration by the City.

XIII. PUBLIC ENTITY CRIMES REQUIREMENT:

A person or affiliate who has been placed on the convicted vendor list following a conviction for a public entity crime may not submit a bid or a proposal on a contract with a public entity for the construction or repair of a public building or public work, may not submit bids on leases of real property to a public entity, and may not transact business with any public entity in excess of the threshold amount provided in SECTION 287.017, for CATEGORY TWO for a period of 36 months from the date of being placed on the convicted vendor list.

**SWORN STATEMENT PURSUANT TO SECTION 287.133(3)(a),
FLORIDA STATUTES, ON ENTITY CRIMES**

1. This sworn statement is submitted to City of Green Cove Springs
(print name of the public entity)

by Rusty R. Reed, President
(print individual's name and title)

for Charles Abbott Associates, Inc. (CAA)
(print name of entity submitting sworn statement)

whose business address is
27401 Los Altos #220
Mission Viejo, CA 92691

and (if applicable) its Federal Employer Identification Number (FEIN) is:
33-0053899

(If the entity has no FEIN, include the Social Security Number of the Individual signing this sworn statement: _____)

2. I understand that a "public entity crime" as defined in Paragraph 287.133(1)(g),

Florida Statutes, means a violation of any state or federal law by a person with respect to and directly related to the transaction of business with any public entity or with an agency or political subdivision of any other state or of the United States, including, but not limited to, any bid or contract for goods or services to be provided to any public entity or an agency or political subdivision or any other state or of the United States and involving antitrust, fraud, theft, bribery, collusion, racketeering, conspiracy, or material misrepresentation.

3. I understand that "convicted" or "conviction" as defined in Paragraph 287.133(1)(b), **Florida Statutes**, means a finding of guilt or a conviction of a public entity crime, with or without an adjudication of guilt, in any federal or state trial court of record relating to charges brought by indictment or information after July 1, 1989, as a result of jury verdict, nonjury trial, or entry of a plea of guilty or nolo contendere.

4. I understand that an "affiliate" as defined in Paragraph 287.133(1)(a), **Florida Statutes**, means:

a. A predecessor or successor of a person convicted of a public entity crime; or
b. An entity under the control any natural person who is active in the management of the entity and who has been convicted of a public entity crime. The term "affiliate" includes those officers, directors, executives, partners, shareholders, employees, members, and agents who are active in the management of an affiliate. The ownership by one person of shares constituting a controlling interest in another person or a pooling of equipment or income among persons when not for fair market value under an arm's length agreement, shall be a prima facie case that one person controls another person. A person who knowingly enters into a joint venture with a person who has been convicted of a public entity crime in Florida during the preceding 36 months shall be considered an affiliate.

c. I understand that a "person" as defined in Paragraph 287.133(1)(e), **Florida Statutes**, means any natural person or entity organized under the laws of any state or of the United States with the legal power to enter into binding contract and which bids or applies to bid on contracts for the provision of goods or services let by a public entity, or which otherwise transacts or applies to transact business with a public entity. The term "person" includes those officers, directors, executives, partners, shareholders, employees, members, and agents who are active in management of an entity.
d. Based on information and belief, the statement which I have marked below is true in relation to the entity submitting this sworn statement. **(indicate which statement applies.)**

X Neither the entity submitting this sworn statement, nor any of its officers, directors, executives, partners, shareholders, employees, members, or agents who are active in the management of the entity, nor any affiliate of the entity has been charged with and convicted of a public entity crime subsequent to July 1, 1989.

 The entity submitting this sworn statement, or one or more of its officers, directors, executives, partners, shareholders, employees, members, or agents who are active in the management of the entity or an affiliate of the entity has been charged with and convicted of a public entity crime subsequent to July 1, 1989.

 The entity submitting this sworn statement, or one or more of its officers, directors, executives, partners, shareholders, employees, members, or agents who are active in the management of the entity, or an affiliate of the entity has been charged with and convicted of a public entity crime subsequent to July 1, 1989. However, there has been a subsequent proceeding before a Hearing Officer of the State of Florida, Division of Administrative Hearings and the Final Order entered by the Hearing Officer determined that it was not in the public interest to place the entity submitting this sworn statement on the convicted vendor list. **(attach a copy of the final order)**

I UNDERSTAND THAT THE SUBMISSION OF THIS FORM TO THE CONTRACTING OFFICER FOR THE PUBLIC ENTITY IDENTIFIED IN PARAGRAPH 1 (ONE) ABOVE IS FOR THAT PUBLIC ENTITY ONLY AND, THAT HIS FORM IS VALID THOROUGH DECEMBER 31 OF THE CALENDAR YEAR IN WHICH IT IS FILED. I ALSO UNDERSTAND THAT I AM REQUIRED TO INFORM THE PUBLIC ENTITY PRIOR TO ENTERING INTO A CONTRACT IN EXCESS OF THE THRESHOLD AMOUNT PROVIDED IN SECTION 287.017, FLORIDA STATUTES FOR CATEGORY TWO OF ANY CHANGE IN THE INFORMATION CONTAINED IN THIS FORM.



(Signature)

Sworn to an subscribed before me this 10 day of July , 20 19

Personally known _____

OR produced identification _____ Notary Public - State of _____

(Type of identification) My commission expires _____

(Printed typed or stamped commissioned name of notary public)

CALIFORNIA JURAT WITH AFFIANT STATEMENT

GOVERNMENT CODE § 8202

- See Attached Document (Notary to cross out lines 1-6 below)
- See Statement Below (Lines 1-6 to be completed only by document signer[s], *not* Notary)

1 _____

2 _____

3 _____

4 _____

5 _____

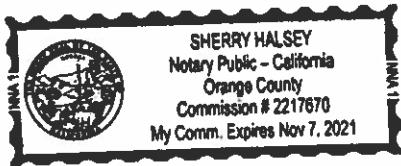
6 _____

Signature of Document Signer No. 1 *Signature of Document Signer No. 2 (if any)*

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California
 County of Orange

Subscribed and sworn to (or affirmed) before me
 on this 10th day of July, 2019.
Date Month Year
 by (1) Rusty R. Beed
 (and (2) NA),
Name(s) of Signer(s)



proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.

Signature Sherry Halsey
Signature of Notary Public

Place Notary Seal Above

OPTIONAL

Though this section is optional, completing this information can deter alteration of the document or fraudulent reattachment of this form to an unintended document.

Description of Attached Document

Title or Type of Document: City of Greencove Springs Agreement Document Date: July 10th 2019

Number of Pages: _____ Signer(s) Other Than Named Above: NA

DRUG-FREE WORKPLACE COMPLIANCE FORM

In order to have a drug-free workplace program, a business shall abide as follows:

The undersigned vendor/contractor in accordance with Florida Statute 287.087 hereby certifies

that Charles Abbott Associates, Inc. (CAA) (name of business) does:

- 1. Publish a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the workplace and specifying the actions that will be taken against employees for violations of such prohibition.
- 2. Inform employees about the dangers of drug abuse in the workplace, the company’s policy of maintaining a drug-free workplace, any available drug counseling, rehabilitation, and employee assistance programs, and the penalties that may be imposed upon employees or drug abuse violations.
- 3. Give each employee engaged in providing the commodities or contractual services that are under proposal a copy of the statement specified in item 1, above.
- 4. In the statement specified in item 1, notify the employees that as a condition of working on the commodities or contractual services which are under proposal, the employee will abide by the terms of the statement and will notify the employer of any conviction of, or plea of guilty or nolo contendere to any violation of Chapter 1893 or of any controlled substance law of the United States or any state, for a violation occurring in the workplace no later than five (5) days after such conviction.
- 5. Impose a sanction on, or require the satisfactory participation in a drug abuse assistance or rehabilitation program if such is available in the employee’s community, by any employee who is convicted.
- 6. Make a good faith effort to continue to maintain a drug-free workplace through implementation of this section.

As the person authorized to sign the statement, I certify that, _____

Charles Abbott Associates, Inc. (CAA) (name of business) **fully complies/** does not comply with the above requirements.

Rusty Q. Reed
Vendor/Contractor Signature

07/10/2019
Date

STANDARD ADDENDUM

TO ALL

CITY CONTRACTS AND AGREEMENTS

Any other provisions of the Contract or Agreement to which this Standard Addendum is attached to the contrary notwithstanding, the parties specifically agree that the provisions hereinafter set forth will apply exclusively with respect to the matters addressed, whether addressed in said Contract or Agreement or not, and shall be deemed an integral part of said Contract or Agreement as if duly set out therein, having a force and effect of equal or superior dignity, as applicable, with the provisions thereof; provided, that if the provisions of the Contract or Agreement address a particular matter in a manner which results in a lower cost to the City than this Standard Addendum, then such provisions of the Contract or Agreement shall control and supersede the applicable provisions hereof (as used herein, the term "Contractor" means the vendor or other party in the Contract or Agreement providing construction, labor, materials, professional services, and/or equipment to the City thereunder; the term "City" means Green Cove Springs, a municipal corporation of the State of Florida, its City Council, or any other name or label set forth in the Contract or Agreement indentifying such entity).

1. All payments for services rendered, or supplies, materials, equipment and the like constructed, delivered or installed under the Contract or Agreement (the Work) shall be made by the City in accordance with the Local Government Prompt Payment Act (the Act). Upon receipt of a proper statement, invoice or draw request, the City shall have the number of days provided in the Act in which to make payment.
2. Any work or professional services sub-contracted for by the Contractor for which the City has agreed to reimburse the Contractor shall not be marked up, but shall be payable by the City only in the exact amount reasonably incurred by the Contractor. No other such sub-contracted services shall be reimbursed.
3. In the event the Contract or Agreement is for professional services, charged on a time basis, the City shall not be billed or invoiced for time spent traveling to and from the Contractor's offices or other points of dispatch of its sub-contractors, employees, officers, or agents in connection with the services being rendered.
4. The City shall not be liable to reimburse the Contractor for any courier service, telephone, facsimile, or postage charges incurred by the Contractor, except as follows, and then only in the exact amount incurred by the Contractor [if the space below is left blank, then "NONE" is deemed to have been inserted therein]:
5. The City shall not be liable to reimburse the Contractor for any copying expenses incurred by the Contractor, except as follows, and then only at \$0.05 per page [if the space below is left blank, then "NONE" is deemed to have been inserted therein]:
6. If and only if travel and per diem expenses are addressed in the Contract or Agreement in a manner which expressly provides for the City to reimburse the Contractor for the same, then the City shall reimburse the Contractor only for those travel and per diem expenses reasonably incurred and only in accordance with the provisions of Section 112.061, Florida Statutes or as otherwise limited by Florida law. In the event the Contractor has need to utilize hotel accommodations or common carrier services,

the City shall reimburse the Contractor for his, her, or its reasonable expense incurred thereby provided prior written approval of the City Manager of the City or his or her designee is obtained.

7. With respect to drawings and/or plans prepared on behalf of the City by the Contractor under the Contract or Agreement, unless specifically provided otherwise therein, complete sets of such drawings and/or plans shall be reproduced by the Contractor without cost to the City for all bidders requesting the same, and five (5) complete sets of such drawings and/or plans shall be reproduced and delivered to the City without cost.
8. With respect to any indemnification by the City provided under the Contract or Agreement, any such indemnification shall be subject to and within the limits set forth in Section 768.28, Florida Statutes, and shall otherwise be limited as provided by law.
9. In that the City is a governmental agency exempt from sales tax, the City shall pay no such taxes, any other provisions of the Contract or Agreement to the contrary notwithstanding. The City shall provide proof of its exempt status upon reasonable request.
10. Any pre-printed provisions of the Contract or Agreement to the contrary notwithstanding, the same shall not automatically be renewed but shall be renewed only upon subsequent agreement of the parties.
11. The Contractor acknowledges that in the budget for each fiscal year of the City during which the term of the Contract or Agreement is in effect, a limited amount of funds are appropriated which are available to make payments arising under the Contract or Agreement. Any other provisions of the Contract or Agreement to the contrary notwithstanding, and pursuant to applicable Florida Statutes, the maximum payment that the City is obligated to make under the Contract or Agreement from the budget of any fiscal year shall not exceed the appropriation for said fiscal year.
12. The Contractor shall comply with applicable provisions of Section 119.0701, Florida Statutes and any contract between the parties shall fully comply with such section.

CITY OF GREEN COVE SPRINGS

CONTRACTOR/FIRM/INDIVIDUAL

By: _____
Steven Kelley, Mayor

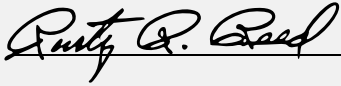
By: Rusty R. Reed
(Printed Name and Title)
Rusty R. Reed, President

ATTEST:

By: _____
Erin West, City Clerk

ACKNOWLEDGEMENT OF ADDENDUM

I acknowledge the receipt of 1 Addendums to the original RFP.

A handwritten signature in cursive script, appearing to read "Rusty Q. Reed".

Company Representative Signature

CERTIFICATION REGARDING LOBBYING

Certification for Contracts, Grants, Loans, and Cooperative Agreements

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 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.

NAME OF FIRM: Charles Abbott Associates, Inc. (CAA)


Signature of Contractor's Authorized Official

Rusty R. Reed, President
Name and Title of Contractor's Authorized Official

July 10, 2019
Date

**Certification Regarding
Debarment, Suspension,
Ineligibility and Voluntary
Exclusion**

Contractor Covered Transactions

- (1) The prospective contractor of the Recipient, Charles Abbott Associates, Inc. (CAA) certifies, by submission of this document, that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible or voluntarily excluded from participation in this transaction by any Federal department or agency.

- (2) Where the Recipient's contractor is unable to certify to the above statement, the prospective contractor shall attach an explanation to this form.

CONTRACTOR NAME: Charles Abbott Associates, Inc. (CAA)

By: Rusty R. Reed
Printed Name


Signature

Date: July 10, 2019

Title: President

27401 Los Altos #220
Mission Viejo, CA 92691

Street Address, City, State, Zip

Recipient's Name

Division Contract Number

FEMA Project Number

ANTI-COLLUSION CLAUSE

Firm certifies that their response is made without prior understanding, agreement or connection with any Corporation, Firm or person submitting a response for the same services and is in all respects fair and without collusion or fraud.

Name of Firm: Charles Abbott Associates, Inc. (CAA)

Authorized Signature: *Rusty R. Reed*

Printed Name: Rusty R. Reed

Title: President

Date: July 10, 2019

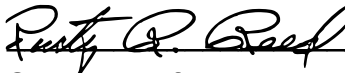
NON-COLLUSION AFFIDAVIT

The undersigned declares, states and certifies that:

1. This Proposal is not made in the interest of, or on behalf of any undisclosed person, partnership, company, association, organization or corporation.
2. This Proposal is genuine and not collusive or sham.
3. I have not directly or indirectly induced or solicited any other Proposer to put in a false or sham proposal and I have not directly or indirectly colluded, conspired, connived, or agreed with any other Proposer or anyone else to put in sham proposal or to refrain from submitting to this RFP.
4. I have not in any manner, directly or indirectly, sought by agreement, communication, or conference with anyone to fix the proposal price or to fix any overhead, profit or cost element of the proposal price or to secure any advantage against the City _____ or of anyone interested in the proposed contract.
5. All statements contained in the Proposal and related documents are true.
6. I have not directly or indirectly submitted the proposal 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 person, corporation, partnership, company, association, organization, RFP depository, or to any member or agent thereof to effectuate a collusive or sham proposal.
7. I have not entered into any arrangement or agreement with any City _____ public officer in connection with this proposal.
8. I understand collusive bidding is a violation of State and Federal law and can result in fines, prison sentences, and civil damage awards.

I declare under penalty of perjury pursuant to the laws of the State of Florida and the United States that the foregoing facts are true and correct.

Executed this 10 day of July, 2019, at Mission Viejo California.



Signature of Authorized Representative

Rusty R. Reed

Name of Authorized Representative

President

Title of Authorized Representative

TURNAROUND TIME FOR PLAN CHECKS

CAA will provide the appropriate personnel and back-up staff as needed to perform the services based on the workload of the City. All of CAA's employees are cross-trained and able to perform multiple functions, which is cost effective to the City

The assigned Building Official, Mr. Bill Golberg, will perform all Building Official services as well as plans review and inspections. For structural plans review or review requiring additional expertise, CAA will take charge of transportation and handling of plans to the corporate office, where Mr. Steve Ahuna as well as numerous additional resources will be available to the City. All initial reviews will be returned within 5 business days for single family residential, small and large commercial projects, and improvement plans. Rechecks will be returned within 5 working days. These are maximum times, and we typically are able to turn around simple plan checks in less than half the time. CAA provides accelerated plan review for an additional cost. Plans are turned around in 48 hours for first plan check and rechecks from day of submittal.

Type of Job	Turnaround Time First Check	Turnaround Time Re-Check
Residential		
New Construction	10 working days or less	5 working days or less
Addition	5 working days or less	5 working days or less
Remodel	5 working days or less	5 working days or less




Type of Job	Turnaround Time First Check	Turnaround Time Re-Check
Non-Residential		
New Construction	10 working days or less	5 working days or less
Addition	5 working days or less	5 working days or less
Remodel	5 working days or less	5 working days or less

Inspections will be performed the following business day, if notification is received by 4pm.

FEE STRUCTURE

CAA offers to provide full-service department functions for a percentage of the cost of the construction work to be performed, i.e. the fees collected for permits by the City.

Fee Model Comparison

 Hourly Fee	 Percentage of Fee	 Fixed Fee
<p>Features</p> <ul style="list-style-type: none"> ▶ Cost difficult to predict ▶ Cost may exceed revenue ▶ Possibility of budget creep ▶ Minimum hours may apply ▶ Moderate flexibility in staffing ▶ Low risk of economic fluctuations ▶ Good for project based work 	<p>Features</p> <ul style="list-style-type: none"> ▶ No need to predict cost ▶ Cost never exceeds revenue ▶ No budget creep ▶ No minimum fees ▶ Maximum staffing flexibility ▶ No risk of economic fluctuation ▶ Fully integrated & devoted staff ▶ Fee transparency ▶ Access to specialized personnel 	<p>Features</p> <ul style="list-style-type: none"> ▶ Predictable cost ▶ Cost may exceed revenue ▶ No staffing flexibility ▶ Similar to in-house staff ▶ No outsourcing advantages

In the percentage of fees model, the percentage itself varies from contract to contract based on the services provided, the City's existing fee schedule, and the amount of resources required to meet the service needs adequately. As construction activity increases and there is more work to be performed, the amount collected by CAA only increases as the revenue to the City increases also. Conversely, the amount collected by CAA decreases when the amount of work drops and the City collects less permit fees as a result. This minimizes the financial risk for the City and shifts the responsibility for economic fluctuations and construction activity entirely to CAA.

By using the percentage of the fee model, CAA helps customers reduces fixed costs and overhead, and ensures that building department costs will not exceed revenues. And by sharing in the City's revenue, CAA has a vested interest in becoming an integrated part of the City's community, as well as improving operational systems and processes where needed to serve the City as efficiently as possible.

Additionally, it has become increasingly hard to find qualified building staff, and CAA can help eliminate the recruiting challenges for these vitally important positions. At the same

time, CAA is able to quickly increase staffing as needed when there are changes in workload.



CAA proposes to provide the following services:

- Act as City Building Official
- Conduct all plan reviews
- Conduct all inspections the next business day
- Provide Building Code related code enforcement
- Consult with office staff on building department and permit issues
- Consult with residents and contractors as needed for permit, submittal and building code requirement needs

Fees below are inclusive of all costs, including general and administrative, training, materials, supplies, and other items necessary to complete the project.

Option A: Percentage of Fees

CAA will provide highly qualified staff to perform the duties of Building Official, Plan Reviewer, and Building Inspector outlined in this proposal. The proposed staff will be at the City as needed. Fees listed are inclusive of all costs, including general and administrative, travel, per diem, training, materials, supplies, and other items necessary to fulfill the scope of work outlined in this proposal.

Based on the information provided by the City, CAA will provide building official services, inspection services and plan review services for the following percentage of building permit and plan check fees collected:

Monthly Fees Collected*	CAA's % of Fees
Permit and Plan Check Fees Collected	69%

* cumulative

Option B: Hourly Rate Fee

Optionally, CAA offers to provide these services for the following all-inclusive hourly rate fees:

Proposed Service	Hourly Rate
Building Official	\$89
Plan Reviewer	\$79
Inspector	\$69