

## **DISASTER PROCUREMENT DURING A PROCLAIMED EMERGENCY OR DISASTER**

### **1. PURPOSE**

This Policy modifies the City's normal purchasing practices (*pursuant to Municipal Code-Title 3 Revenue and Finance-Chapter 3.10 Purchasing*) to assure that, in both emergency and exigent circumstances caused by a proclaimed disaster or emergency, the City is able to acquire the goods and services required to address an immediate threat to life safety, public health, or to eliminate or reduce an immediate threat of significant damage to improved public and private property through cost-effective measures while still maintaining an effective purchasing process and complying with applicable local and state purchasing laws. Where the City is included in a major disaster or emergency declared by the President of the United States, this Policy also assures that City procurements comply with Federal regulations applicable to Federal disaster grant reimbursement as defined in Title 2 of the Code of Federal Regulations, Part 200. (2CFR Part 200)

Notwithstanding the terms of this policy, nothing contained herein shall conflict with Federal procurement regulations as currently defined in 2 CFR Part 200.

### **2. DEFINITIONS**

2.1 "Proclaimed Emergency or Disaster" exists if:

- (a) the Governor has declared a state of emergency for an area which includes the geographic territory of the City; or
- (b) the City Manager, Police Chief, or Public Works Director of the City has declared an emergency in the City;

2.2 "Exigent Circumstances" are situations in which:

- (a) a disaster or emergency has been proclaimed, and
- (b) the public need for goods and services required to address immediate threats to life safety, public health, or to eliminate or reduce an immediate threat of significant damage to improved public and private property through cost-effective measures will not permit competitive solicitation.

2.3 "Purchase(s)" as defined in this policy means the purchase(s), rental(s) or lease(s) of goods or services related to a Proclaimed Emergency or Disaster.

2.4 "Simplified Acquisition Threshold" means the dollar amount below which a non-Federal entity may purchase property or services using small purchase methods, as set forth in Title 2 of the Code of Federal Regulations, Part 200, as it may be amended from time to time.

### **3. DELEGATIONS OF PURCHASING AUTHORITY IN EXIGENT CIRCUMSTANCES**

3.1 City Manager. If the City Manager or his/her designee determines that goods and services must be procured before the Elected governing board is able to assemble and approve purchases, the City Manager has authority, subject to the limitations set forth in sub-paragraphs (3.1)(i) and (3.1)(ii), to approve the immediate rental or purchase of any equipment, supplies, services or other items necessary to respond to an immediate threat to life safety, public health, or to eliminate/reduce an immediate threat of significant damage to improved public and private property through cost-effective measures.

- (a) *Limits of Single Purchase Authority.*  
The City Manager, shall have the authority to make individual purchases up to a maximum of \$500,000 without prior City Council approval.
  - (b) *Limits of Aggregate Purchase Authority.*  
The City Manager shall have the authority to make aggregate purchases up to \$150,000 on his or her signature alone. The City Manager shall have the authority to make purchases up to a maximum of \$1,000,000 without prior City Council approval.
- 3.2 Delegation for purchasing authority to EOC Director. The EOC Director, or the Finance Director, or Purchasing Officer/Agent shall be designees of the City Manager at any time that the City Manager is not available to approve purchases as allowed in this section.
- 3.3 Sub-delegation of Purchasing Authority to Department Heads. If neither the City Manager nor the EOC Director is available, the police department watch commander, duty fire battalion chief, and/or duty public works department manager have authority to rent or purchase from the nearest available source any equipment, supplies, services, or other items necessary for his or her department to respond to an immediate threat to life, public health, or safety, or to eliminate/reduce an immediate threat of significant damage to improved public and private property through cost- effective measures, up to a maximum of \$150,000.
- 3.4 Administrative Procedures/Reporting Requirements.
  - (a) As soon as possible after purchases are made under this section 3, the City Manager, EOC Director, or department head shall submit to the Purchasing Officer a requisition and a notation that the commodity has been ordered on an emergency basis from the vendor designated.
  - (b) If the City Manager/EOC Director is unavailable, and the delay in getting his/her signature would imperil life safety, public health or improved property, the police department watch commander, duty fire battalion chief, and/or duty public works department manager or his/her designee may approve the emergency purchase of \$150,000 thousand dollars or more.
  - (c) The Purchasing Officer shall have the authority to approve all disaster related purchases under \$150,000 thousand dollars.
  - (d) The Purchasing Officer will expedite the verification of funds available and complete the preparation of the purchase order.
- 3.5 Amount Thresholds. The Simplified Acquisition Threshold is the amount up to \$150,000. For purposes of FEMA Public Assistance grants, small purchases are those greater than \$3,500 and less than \$150,000.

The above amount thresholds in this entire Section 3 and throughout this policy include any applicable change orders. For instance, if the change order amount would increase the total contract amount to more than \$150,000, a competitive bidding process is required pursuant to the *City's Municipal Code Title 3 Revenue and Finance-Chapter 3.10 Purchasing* and in accordance with Federal procurement regulations defined in 2 CFR Part 200 (when a proclaimed disaster is in effect).

#### **4. PROCUREMENT PROCEDURES IN EXIGENT CIRCUMSTANCES**

Upon receipt of requisitions under Section 3, the Purchasing Officer shall prepare purchase orders for the emergency equipment, supplies, services or other items in accordance with the requirements of this section.

- 4.1 Exempt Purchases. Purchases up to \$150,000 shall not be required to be formally bid. Purchases greater than \$150,000 may be made following the procedures specified in this section. The signature(s) of the City Manager, Purchasing Officer and/or Department Head are still required as provided in Section 3.

- 4.2 Justification of Sole Source or No-bid Contracts. Where exigent circumstances require immediate procurement from the nearest available source,
- (a) The Procurement Officer shall use the *"Justification Form For Emergency Sole Source or No-Bid Purchase."*
  - (b) Procurement should be limited to that portion of the work that must be performed immediately, allowing subsequent procurement by competitive proposals of the remainder of the work.
  - (c) "Sole source" or "no-bid" acquisitions shall be necessary for one of the following reasons: placement of emergency protective measures, procurement of a scarce commodities, goods, or services or acquisition or rental of emergency equipment, emergency consulting services, emergency road clearance or other emergency requirements.
- 4.3 Provision for Alternate Bid Solicitation Procedures. The City's normal requirements for sealed bids shall not apply to acquisitions under Section 3. However, the Procurement Officer shall conduct telephonic or other electronic bid solicitation from potential vendors or suppliers, in an effort to obtain multiple competitive proposals when and if time allows in light of the exigent circumstances; however, all quotations must be fully documented as to the details of the purchase and contain a scope of work if at all possible and a not-to-exceed contract limit.
- 4.4 Locations of Postings for Requests for Proposals or Solicitation of Bids. The Procurement Officer may modify normal requirements for public posting of requests for proposals or solicitation of bids. Notices soliciting bids or requests for proposals shall be posted at the Emergency Operations Center or Alternate Emergency Operations Center, if the Primary Emergency Operations Center is not being used.
- 4.5 Length of Time for Posting Requests for Proposals or Solicitation of Bids. The Procurement Officer may shorten the normal bid period from 14 days to 24 hours as needed to deal with the emergency circumstances and to expedite the award of contracts for emergency equipment, goods, or services. The Procurement Officer should seek to assure that the shortened bid period allows multiple suppliers to submit bids.
- 4.6 Number of Bids Required. Solicited bids that are non-responsive do not count towards the minimum numbers of bids required when there is a declared emergency or disaster in the Jurisdiction." All such no-bids must be documented as to time, date and person or company contacted, with a reason for the no-bid, if possible.

## 5. NOTIFICATION AND RATIFICATION

- 5.1 Posting of Contract Awards. Under this section, all contracts awarded, that exceed the City Council's approval amount threshold pursuant to the City's normal purchasing practices shall be presented to City Council for ratification and thereafter, shall publicly posted within sixty (60) days of the award.
- 5.2 Authority to Cancel Emergency Procurements. As a provision of this ordinance, the City has the absolute authority to rescind a contract for non-performance within 24 hours when a contractor or vendor, once awarded a contract, is unable to perform under the terms of the contract and the resulting delay or non-performance presents an immediate threat to life, public health, or safety, or to eliminate/reduce an immediate threat of significant damage to improved public and private property through cost-effective measures.
- 5.3 Requirement for Separate Invoicing. All purchases or rentals made during proclaimed emergency or disaster conditions shall require separate invoicing from routine (non-disaster related) purchases. All invoices shall state the goods, services or equipment provided and shall specify where the goods or services were delivered. All invoices shall specify the locations where the goods or services were used if at all possible. Any invoice which fails to properly identify the emergency nature of the purchase and provide details as to the dates and locations as appropriate shall not be paid until such errors are

corrected by the vendor and re-submitted in correct form. Any invoice which mixes emergency and non-emergency purchases on the same document shall not be paid until such errors are corrected and resubmitted.

- 5.4 Auditing of Invoices for Debris Clearance Prior to Payment. All invoices for debris clearance and removal shall be audited by the City prior to payment to the vendor. Vendors shall be notified of this requirement prior to the awarding of any contract for debris clearance and/or removal. Audits shall be in accordance with procedures for debris removal monitoring specified in FEMA's Publication 325, Debris Management Guide.
- 5.5 Limitations of Disaster Purchasing Policy. For the purposes of this section, an emergency or disaster shall be deemed to exist when a condition exists that presents an immediate threat to life safety, public health, or to eliminate/reduce an immediate threat of significant damage to improved public and private property through cost-effective measures and a local emergency or disaster has been proclaimed. Any purchases that do not meet the standard of being necessary for responding to an immediate threat to life safety, public health, or to eliminate/reduce an immediate threat of significant damage to improved public and private property through cost-effective measures shall follow the City's regular purchasing provisions.

All purchases for permanent repair and re-construction of City facilities, property and infrastructure shall be made through the City's regular purchasing procedures.

## 6. REQUIREMENTS – CONTRACT CLAUSES

In the event of a Proclaimed Emergency or Disaster, the following purchasing authority is granted and required clauses apply. The following clauses shall supersede any existing, similar clauses stated within the bid document, contract, and/or Terms and Conditions. These are requirements under the Uniform Rules and set forth in 2 C.F.R. § 200.326 and 2 C.F.R. Part 200, Appendix II. The regulations in Title 2 of the Code of Federal Regulations, Part 200, as it may be amended from time to time, are incorporated herein by reference:

### 6.1 Remedies.

- (a) Standard: Contracts for more than the simplified acquisition threshold (\$150,000) shall address administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as appropriate as follows. See 2 C.F.R. Part 200, Appendix II, ¶ A.
- (b) Applicability: This requirement applies to all Federal grant and cooperative agreement programs.
- (c) City Compliance/License: Bidder shall comply with all applicable Federal, State of California, and local laws, rules, and regulations (including labor laws, and the Concord Municipal Code) and shall obtain all applicable licenses and permits for the conduct of its business and the performance of the services, and any provision of equipment and material ("Applicable Law"). All transactions related to any of the Contract Documents shall be governed by the laws of the State of California, and trial of any action brought in connection with the bid or the Contract Documents shall be held exclusively in a state court in the County of Contra Costa, California.

- 6.2 Termination for Cause and Convenience. All contracts in excess of \$10,000 shall address termination for cause and for convenience by the non-Federal entity including the manner by which it will be effected and the basis for settlement as follows. See 2 C.F.R. Part 200, Appendix II, ¶ B.

- (a) Applicability. This requirement applies to all Federal grant and cooperative agreement programs.

- (b) Termination. CITY may terminate this Agreement for any reason upon ten (10) days written notice to the other party. CITY may terminate this Agreement upon five (5) days written notice if CONTRACTOR breaches this Agreement. In the event of any termination, CONTRACTOR shall promptly deliver to the CITY any and all Work Materials prepared for the CITY prior to the effective date of such termination, all of which shall become CITY's sole property. After receipt of the Work Materials, CITY will pay CONTRACTOR for the services which the CITY determines were satisfactorily performed as of the effective date of the termination.
- (c) Excuses for Non-Performance. Either party shall be absolved from its obligations under this contract when and to the extent that performance is delayed or prevented (and in the City of Concord's case when and to the extent that its need for the articles, materials or work to be supplied hereunder is reduced or eliminated) by reason of acts of God, fire explosion, war riots, strikes, labor disputes, or governmental laws, orders or regulations.
- (d) Default. If Contractor or Subcontractor shall breach any provision hereof or shall become insolvent, enter voluntary or involuntary bankruptcy or receivership proceedings or make an assignment to the benefit of creditors, City of Concord shall have the right (without limiting any other rights or remedies which it may have hereunder or by operation of law) to terminate this contract by written notice to Contractor whereupon City of Concord shall be relieved or all further obligation hereunder except the obligation to pay the reasonable value of Contractor's prior performance (at not exceeding the contract rate), and Contractor shall be liable to City of Concord for all costs incurred by City of Concord in completing or procuring the completion of performance in excess of the contract price herein specified. The City of Concord's right to require strict performance of any obligation hereunder shall not be affected by any previous waiver, forbearance of course of dealing. Time is of the essence thereof.

### 6.3 Equal Employment Opportunity.

- 6.3.1 Standard. Except as otherwise provided under 41 C.F.R. Part 60, all contracts that meet the definition of "Federally assisted construction contract" in 41 C.F.R. § 60-1.3 shall include the equal opportunity clause provided under 41 C.F.R. § 60- 1.4(b), in accordance with Executive Order 11246, *Equal Employment Opportunity* (30 Fed. Reg. 12319, 12935, 3 C.F.R. Part, 1964-1965 Comp., p. 339), as amended by Executive Order 11375, *Amending Executive Order 11246 Relating to Equal Employment Opportunity*, and implementing regulations at 41 C.F.R. Part 60 (Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor) as follows . See also 2 C.F.R. Part 200, Appendix II, ¶ C.

Compliance with Civil Rights. During the performance of this contract, CONTRACTOR agrees as follows:

- A. Equal Employment Opportunity. In connection with the execution of this Agreement, CONTRACTOR shall not discriminate against any employee or applicant for employment because of race, religion, color, sex, or national origin. Such actions shall include, but not be limited to, the following: employment, promotion, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rate of pay or other forms of compensation; and selection for training including apprenticeship.
- B. Nondiscrimination Civil Rights Act of 1964. CONTRACTOR will comply with all Federal regulations relative to nondiscrimination in Federally assisted programs.
- C. Solicitations for Subcontractors including Procurement of Materials and Equipment. In all solicitation, either by competitive bidding or negotiations, made by CONTRACTOR for work to be performed under a subcontract including procurement of

materials or leases of equipment, each potential subcontractor, supplier or lessor shall be notified by CONTRACTOR of CONTRACTOR'S obligation under this Agreement and the regulations relative to nondiscrimination on the grounds of race, religion, color, sex, or national origin.

Please also refer to the '*Equal Opportunity Clause of Executive Order 11246*' document posted on the City's Purchasing website at <http://www.Cityofconcord.org/pdf/business/purchasing/ee.pdf>.

#### 6.4 Key Definitions.

- 6.4.1 Federally Assisted Construction Contract. The regulation at 41 C.F.R. § 60-1.3 defines a "Federally assisted construction contract" as any agreement or modification thereof between any applicant and a person for construction work which is paid for in whole or in part with funds obtained from the Government or borrowed on the credit of the Government pursuant to any Federal program involving a grant, contract, loan, insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, or any application or modification thereof approved by the Government for a grant, contract, loan, insurance, or guarantee under which the applicant itself participates in the construction work.
- 6.4.2 Construction Work. The regulation at 41 C.F.R. § 60-1.3 defines "construction work" as the construction, rehabilitation, alteration, conversion, extension, demolition or repair of buildings, highways, or other changes or improvements to real property, including facilities providing utility services. The term also includes the supervision, inspection, and other onsite functions incidental to the actual construction.
- 6.4.3 Applicability. This requirement applies to all Federal grant and cooperative agreement programs.

#### 6.5 The regulation at 41 C.F.R. Part 60-1.4(b) requires the insertion of the following contract clause:

- 6.5.1 During the performance of this contract, the contractor agrees as follows:

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.

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.

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.

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.

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 City and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

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 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.

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 City 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 City the contractor may request the United States to enter into such litigation to protect the interests of the United States."

#### 6.6 Davis Bacon Act and Copeland Anti-Kickback Act.

- 6.6.1 Applicability of Davis-Bacon Act. The Davis-Bacon Act only applies to the emergency Management Preparedness Grant Program, Homeland Security Grant Program, Nonprofit Security Grant Program, Tribal Homeland Security Grant Program, Port Security Grant Program, and Transit Security Grant Program. It does not apply to other Federal grant and cooperative agreement programs, including the Public Assistance Program.
- 6.6.2 All prime construction contracts in excess of \$2,000 awarded by non-Federal entities shall include a provision for compliance with the Davis-Bacon Act (40 U.S.C. §§ 3141-3144 and 3146-3148) as supplemented by Department of Labor regulations at 29 C.F.R. Part 5 (Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction)). See 2 C.F.R. Part 200, Appendix II, ¶ D.
- 6.6.3 In accordance with the statute, contractors must be required to pay wages to laborers and mechanics at a rate not less than the prevailing wages specified in a wage determination made by the Secretary of Labor. In addition, contractors must be required to pay wages not less than once a week.
- 6.6.4 The non-Federal entity must place a copy of the current prevailing wage determination issued by the Department of Labor in each solicitation. The decision to award a contract or subcontract must be conditioned upon the acceptance of the wage determination. The non-Federal entity must report all suspected or reported violations to the Federal awarding City.
- 6.6.5 In contracts subject to the Davis-Bacon Act, the contracts must also include a provision for

compliance with the Copeland “Anti-Kickback” Act (40 U.S.C. § 3145), as supplemented by Department of Labor regulations at 29 C.F.R. Part 3 (Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States). The Copeland Anti- Kickback Act provides that each contractor or subrecipient must be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he or she is otherwise entitled. The non-Federal entity must report all suspected or reported violations to FEMA or applicable Federal entity.

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 previous subsection, the Davis-Bacon Act does not apply to Public Assistance recipients and subrecipients. In situations where the Davis-Bacon Act does not apply, neither does the Copeland “Anti-Kickback Act.” However, for purposes of grant programs where both clauses do apply, FEMA or applicable Federal entity requires the following contract clause:

“Compliance with the Copeland “Anti-Kickback” Act.

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.

Subcontracts. The contractor or subcontractor shall insert in any subcontracts the clause above and such other clauses as Federal requirements 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.

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.”

## 6.7 Contract Work Hours and Safety Standards Act.

### 6.7.1 Applicability: This requirement applies to all Federal grant and cooperative agreement programs.

Where applicable (see 40 U.S.C. § 3701), all contracts awarded by the non-Federal entity in excess of \$100,000 that involve the employment of mechanics or laborers must include a provision for compliance with 40 U.S.C. §§ 3702 and 3704, as supplemented by Department of Labor regulations at 29 C.F.R. Part 5. See 2 C.F.R. Part 200, Appendix II, ¶ E.

Under 40 U.S.C. § 3702, each contractor must be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than one and a half times the basic rate of pay for all hours worked in excess of 40 hours in the work week.

The requirements of 40 U.S.C. § 3704 are applicable to construction work and provide that no laborer or mechanic must be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.



- 6.7.2 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.

- (a) 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.
- (b) 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.
- (c) Withholding for unpaid wages and liquidated damages. The City of Concord 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.
- (d) 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.”

6.8 Rights to Inventions Made Under a Contract or Agreement.

- 6.8.1 Stafford Act Disaster Grants. This requirement does not apply to the Public Assistance, Hazard Mitigation Grant Program, Fire Management Assistance Grant Program, Crisis Counseling Assistance and Training Grant Program, Disaster Case Management Grant Program, and Federal Assistance to Individuals and Households – Other Needs Assistance Grant Program, as FEMA or Federal awards under these programs do not meet the definition of “funding agreement.”

If the FEMA or Federal award meets the definition of “funding agreement” under 37 C.F.R. § 401.2(a) and the non-Federal entity wishes to enter into a contract with a small business firm or nonprofit organization regarding the substitution of parties, assignment or performance of experimental, developmental, or research work under that “funding agreement,” the non-

Federal entity must comply with the requirements of 37 C.F.R. Part 401 (Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements), and any implementing regulations issued by FEMA or applicable Federal entity. See 2 C.F.R. Part 200, Appendix II, ¶ F.

The regulation at 37 C.F.R. § 401.2(a) currently defines “funding agreement” as any contract, grant, or cooperative agreement entered into between any Federal City, other than the Tennessee Valley Authority, and any contractor for the performance of experimental, developmental, or research work funded in whole or in part by the Federal government. This term also includes any assignment, substitution of parties, or subcontract of any type entered into for the performance of experimental, developmental, or research work under a funding agreement as defined in the first sentence of this paragraph.

- 6.9 Clean Air Act and the Federal Water Pollution Control Act. Contracts of amounts in excess of \$150,000 must contain a provision that requires the contractor to agree to comply with all applicable standards, orders, or regulations issued pursuant to the Clean Air Act (42 U.S.C. §§ 7401-7671q) and the Federal Water Pollution Control Act as amended (33 U.S.C. §§ 1251-1387). Violations must be reported to FEMA or applicable Federal entity and the Regional Office of the Environmental Protection City. See 2 C.F.R. Part 200, Appendix II, ¶ G.

The following provides a sample contract clause concerning compliance for contracts of amounts in excess of \$150,000:

Clean Air Act

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.

The contractor agrees to report each violation to the (name of the state City or local or Indian tribal government) and understands and agrees that the (name of the state City or local or Indian tribal government) will, in turn, report each violation as required to assure notification to the (name of recipient), Federal Emergency Management City, and the appropriate Environmental Protection City Regional Office.

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 or applicable Federal entity.

Federal Water Pollution Control Act

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.

The contractor agrees to report each violation to the (name of the state City or local or Indian tribal government) and understands and agrees that the (name of the state City or local or Indian tribal government) will, in turn, report each violation as required to assure notification to the (name of recipient), Federal Emergency Management City, and the appropriate Environmental Protection City Regional Office.

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 or applicable Federal entity.”

- 6.10 Debarment and Suspension.

Applicability: This requirement applies to all Federal grant and cooperative agreement

programs.

Non-Federal entities and contractors are subject to the debarment and suspension regulations implementing Executive Order 12549, *Debarment and Suspension* (1986) and Executive Order 12689, *Debarment and Suspension* (1989) at 2 C.F.R. Part 180 and the Department of Homeland Security's regulations at 2 C.F.R. Part 3000 (Nonprocurement Debarment and Suspension).

These regulations restrict awards, subawards, and contracts with certain parties that are debarred, suspended, or otherwise excluded from or ineligible for participation in Federal assistance programs and activities. See 2 C.F.R. Part 200, Appendix II, ¶ I; and Chapter IV, ¶ 6.d and Appendix C, ¶ 2. A contract award must not be made to parties listed in the SAM Exclusions. SAM Exclusions is the list maintained by the General Services Administration that contains the names of parties debarred, suspended, or otherwise excluded by agencies, as well as parties declared ineligible under statutory or regulatory authority other than Executive Order 12549. SAM exclusions can be accessed at [www.sam.gov](http://www.sam.gov). See 2 C.F.R. § 180.530; Chapter IV, ¶ 6.d and Appendix C, ¶ 2.

In general, an "excluded" party cannot receive a Federal grant award or a contract within the meaning of a "covered transaction," to include subawards and subcontracts. This includes parties that receive Federal funding indirectly, such as contractors to recipients and subrecipients. The key to the exclusion is whether there is a "covered transaction," which is any nonprocurement transaction (unless excepted) at either a "primary" or "secondary" tier. Although "covered transactions" do not include contracts awarded by the Federal Government for purposes of the nonprocurement common rule and DHS's implementing regulations, it does include some contracts awarded by recipients and subrecipient.

Specifically, a covered transaction includes the following contracts for goods or services:

The contract is awarded by a recipient or subrecipient in the amount of at least \$25,000.

The contract requires the approval of FEMA or applicable Federal entity, regardless of amount.

The contract is for Federally-required audit services.

A subcontract is also a covered transaction if it is awarded by the contractor of a recipient or subrecipient and requires either the approval of FEMA or applicable Federal entity or is in excess of \$25,000.

The following provides a debarment and suspension clause. It incorporates a method of verifying that contractors are not excluded or disqualified:

For maximum protection, provide a print or electronic document for every prime and subcontractor, from [www.sam.gov](http://www.sam.gov) in order to ensure that they are not debarred, suspended, or otherwise excluded from or ineligible for participation in Federal assistance programs and activities.

This contract is a covered transaction for purposes of 2 C.F.R. pt. 180 and 2 C.F.R. pt. 3000. As such the contractor is required to verify that none of the contractor, its principals (defined at 2 C.F.R. § 180.995), or its affiliates (defined at 2 C.F.R. § 180.905) are excluded (defined at 2 C.F.R. § 180.940) or disqualified (defined at 2 C.F.R. § 180.935).

The contractor must comply with 2 C.F.R. pt. 180, subpart C and 2 C.F.R. pt. 3000, subpart C and must include a requirement to comply with these regulations in any lower tier covered transaction it enters into.

This certification is a material representation of fact relied upon by (insert name of subrecipient). If it is later determined that the contractor did not comply with 2 C.F.R. pt. 180, subpart C and 2

C.F.R. pt. 3000, subpart C, in addition to remedies available to (name of state City serving as recipient and name of subrecipient), the Federal Government may pursue available remedies, including but not limited to suspension and/or debarment.

The bidder or proposer agrees to comply with the requirements of 2 C.F.R. pt. 180, subpart C and 2 C.F.R. pt. 3000, subpart C while this offer is valid and throughout the period of any contract that may arise from this offer. The bidder or proposer further agrees to include a provision requiring such compliance in its lower tier covered transactions.

#### 6.11 Byrd Anti-Lobbying Amendment.

Applicability: This requirement applies to all Federal grant and cooperative agreement programs.

Contractors that apply or bid for an award of \$100,000 or more must file the required certification. See 2 C.F.R. Part 200, Appendix II, ¶ J; 44 C.F.R. Part 18; Chapter IV, 6.c; Appendix C, ¶ 4. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any City, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. § 1352. Each tier must also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the non-Federal award. See Chapter IV, ¶ 6.c and Appendix C, ¶ 4.

The following provides a Byrd Anti-Lobbying contract clause:

##### Byrd Anti-Lobbying Amendment, 31 U.S.C. § 1352 (as amended)

Contractors who apply or bid for an award of \$100,000 or more shall file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any City, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant, or any other award covered by 31 U.S.C. § 1352. Each tier shall also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the recipient.

##### APPENDIX A, 44 C.F.R. PART 18 – CERTIFICATION REGARDING LOBBYING

Certification for Contracts, Grants, Loans, and Cooperative Agreements (To be submitted with each bid or offer exceeding \$100,000)

#### 6.12 Procurement of Recovered Materials.

Applicability: This requirement applies to all Federal grant and cooperative agreement programs.

A non-Federal entity that is a state City or City of a political subdivision of a state and its contractors must comply with Section 6002 of the Solid Waste Disposal Act, Pub. L. No. 89-272 (1965) (codified as amended by the Resource Conservation and Recovery Act at 42 U.S.C. § 6962). See 2 C.F.R. Part 200, Appendix II, ¶ K; 2 C.F.R. § 200.322; Chapter V, ¶ 7.

The requirements of Section 6002 include procuring only items designated in guidelines of the EPA at 40 C.F.R. Part 247 that contain the highest percentage of recovered materials practicable,

consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds \$10,000 or the value of the quantity acquired by the preceding fiscal year exceeded \$10,000; procuring solid waste management services in a manner that maximizes energy and resource recovery; and establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines.

The following provides the clause that a state City or City of a political subdivision of a state and its contractors can include in contracts meeting the above contract thresholds:

“(1) In the performance of this contract, the Contractor shall make maximum use of products containing recovered materials that are EPA- designated items unless the product cannot be acquired—

- (i) Competitively within a timeframe providing for compliance with the contract performance schedule;
- (ii) Meeting contract performance requirements; or
- (iii) At a reasonable price.

(2) Information about this requirement is available at EPA’s Comprehensive Procurement Guidelines web site, <http://www.epa.gov/cpg/>. The list of EPA-designate items is available at <http://www.epa.gov/cpg/products.htm>.”

- 6.13 Additional FEMA or applicable Federal Requirements. The Uniform Rules authorize FEMA or applicable Federal entity to require additional provisions for non- Federal entity contracts. Federal requirements, pursuant to this authority, requires or recommends the following:

Changes. To be eligible for FEMA assistance under the non-Federal entity’s Federal grant or cooperative agreement, the cost of the change, modification, change order, or constructive change must be allowable, allocable, within the scope of its grant or cooperative agreement, and reasonable for the completion of project scope. FEMA or applicable Federal entity recommends, therefore, that a non-Federal entity include a changes clause in its contract that describes how, if at all, changes can be made by either party to alter the method, price, or schedule of the work without breaching the contract. The language of the clause may differ depending on the nature of the contract and the end-item procured.

Access to Records. All non-Federal entities must place into their contracts a provision that all contractors and their successors, transferees, assignees, and subcontractors acknowledge and agree to comply with applicable provisions governing Department and FEMA or applicable Federal entity access to records, accounts, documents, information, facilities, and staff. See DHS Standard Terms and Conditions, v 3.0, ¶ XXVI (2013).

The following provides a contract clause regarding access to records:

“Access to Records. The following access to records requirements apply to this contract:

The contractor agrees to provide the City of Concord, the FEMA or applicable Federal 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.

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.

The contractor agrees to provide the FEMA or applicable Federal Administrator or his authorized representatives access to construction or other work sites pertaining to the work being completed under the contract.”

#### 6.14 DHS Seal, Logo, and Flags.

All non-Federal entities must place in their contracts a provision that a contractor shall not use the DHS seal(s), logos, crests, or reproductions of flags or likenesses of DHS City officials without specific FEMA or applicable Federal entity pre-approval. See DHS Standard Terms and Conditions, v 3.0, ¶ XXV (2013).

The following provides a contract clause regarding DHS Seal, Logo, and Flags: “The contractor shall not use the DHS seal(s), logos, crests, or reproductions of flags or likenesses of DHS City officials without specific FEMA or applicable Federal entity pre- approval.”

#### 6.15 Compliance with Federal Law, Regulations, and Executive Orders.

All non-Federal entities must place into their contracts an acknowledgement that FEMA or applicable Federal financial assistance will be used to fund the contract along with the requirement that the contractor will comply with all applicable Federal law, regulations, executive orders, and FEMA or applicable Federal policies, procedures, and directives.

The following provides a contract clause regarding Compliance with Federal Law, Regulations, and Executive Orders: “This is an acknowledgement that Federal financial assistance will be used to fund the contract only. The contractor will comply will all applicable Federal law, regulations, executive orders, FEMA or applicable Federal policies, procedures, and directives.”

#### 6.16 No Obligation by Federal Government.

The non-Federal entity must include a provision in its contract that states that the Federal Government is not a party to the contract and is not subject to any obligations or liabilities to the non-Federal entity, contractor, or any other party pertaining to any matter resulting from the contract.

The following provides a contract clause regarding no obligation by the Federal Government: “The Federal Government is not a party to this contract and is not subject to any obligations or liabilities to the non-Federal entity, contractor, or any other party pertaining to any matter resulting from the contract.”

#### 6.17 Program Fraud and False or Fraudulent Statements or Related Acts.

The non-Federal entity must include a provision in its contract that the contractor acknowledges that 31 U.S.C. Chap. 38 (Administrative Remedies for False Claims and Statements) applies to its actions pertaining to the contract.

The following provides a contract clause regarding Fraud and False or Fraudulent or Related Acts: “The contractor acknowledges that 31 U.S.C. Chap. 38 (Administrative Remedies for False Claims and Statements) applies to the contractor’s actions pertaining to this contract.”

#### 6.18 For all contracts with Federal funding, we need to add language to comply with 2 CFR, Part 200 including sections:

**200.318 (c)(1)** The City must maintain written standards of conduct covering conflicts of interest and governing the performance of its employees engaged in the selection, award and

administration of contracts. No employee, officer, or agent must participate in the selection, award, or administration of a contract supported by a Federal award if he or she has a real or apparent conflict of interest. Such a conflict of interest would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in or a tangible personal benefit from a firm considered for a contract. The officers, employees, and agents of the City must neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or parties to subcontracts. However, non-Federal entities may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value. The standards of conduct must provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the City.

**200.318 (d)** The City's procedures must avoid acquisition of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.

**§ 200.321 Contracting with small and minority businesses, women's business enterprises, and labor surplus area firms.**

(a) The City must take all necessary affirmative steps to assure that minority businesses, women's business enterprises, and labor surplus area firms are used when possible.

(b) Affirmative steps must include:

(1) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;

(2) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;

(3) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority businesses, and women's business enterprises;

(4) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority businesses, and women's business enterprises;

(5) Using the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Minority Business Development City of the Department of Commerce; and

(6) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (1) through (5) of this section.

The following provides a method of showing good faith efforts in the solicitation of small and minority businesses, women's business enterprises, and labor surplus area firms:

The City shall solicit small and minority businesses, women's business enterprises, and labor surplus area firms through collaboration with similar goals such as the U.S Department of Commerce, Minority Business Development Agency ([www.mdba.gov](http://www.mdba.gov)).

**§ 200.322 Procurement of recovered materials.**

The City that and its contractors must comply with section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act. The requirements of Section 6002 include procuring only items designated in guidelines of the Environmental Protection City (EPA) at 40 CFR Part 247 that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds \$10,000 or the value of the quantity acquired by the preceding fiscal year exceeded \$10,000; procuring solid waste management services in a manner that maximizes energy and resource recovery; and establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines.

**§ 200.323 Contract cost and price.**

(a) The City shall perform a cost or price analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, the City must make independent estimates before receiving bids or proposals.

(b) The City must negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration must be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.



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early notification about the requirements allows the potential applicant to decide not to apply or to take needed actions before receiving the Federal award. The announcement need not include all of the terms and conditions of the Federal award, but may refer to a document (with information about how to obtain it) or Internet site where applicants can see the terms and conditions. If this funding opportunity will lead to Federal awards with some special terms and conditions that differ from the Federal awarding agency's usual (sometimes called "general") terms and conditions, this section should highlight those special terms and conditions. Doing so will alert applicants that have received Federal awards from the Federal awarding agency previously and might not otherwise expect different terms and conditions. For the same reason, the announcement should inform potential applicants about special requirements that could apply to particular Federal awards after the review of applications and other information, based on the particular circumstances of the effort to be supported (e.g., if human subjects were to be involved or if some situations may justify special terms on intellectual property, data sharing or security requirements).

3. *Reporting—Required.* This section must include general information about the type (e.g., financial or performance), frequency, and means of submission (paper or electronic) of post-Federal award reporting requirements. Highlight any special reporting requirements for Federal awards under this funding opportunity that differ (e.g., by report type, frequency, form/format, or circumstances for use) from what the Federal awarding agency's Federal awards usually require.

#### G. FEDERAL AWARDING AGENCY CONTACT(S)—REQUIRED

The announcement must give potential applicants a point(s) of contact for answering questions or helping with problems while the funding opportunity is open. The intent of this requirement is to be as helpful as possible to potential applicants, so the Federal awarding agency should consider approaches such as giving:

- i. Points of contact who may be reached in multiple ways (e.g., by telephone, FAX, and/or email, as well as regular mail).
- ii. A fax or email address that multiple people access, so that someone will respond even if others are unexpectedly absent during critical periods.
- iii. Different contacts for distinct kinds of help (e.g., one for questions of programmatic content and a second for administrative questions).

#### H. OTHER INFORMATION—OPTIONAL

This section may include any additional information that will assist a potential applicant. For example, the section might:

- i. Indicate whether this is a new program or a one-time initiative.
- ii. Mention related programs or other upcoming or ongoing Federal awarding agency funding opportunities for similar activities.
- iii. Include current Internet addresses for Federal awarding agency Web sites that may be useful to an applicant in understanding the program.
- iv. Alert applicants to the need to identify proprietary information and inform them about the way the Federal awarding agency will handle it.
- v. Include certain routine notices to applicants (e.g., that the Federal government is not obligated to make any Federal award as a result of the announcement or that only grants officers can bind the Federal government to the expenditure of funds).

#### APPENDIX II TO PART 200—CONTRACT PROVISIONS FOR NON-FEDERAL ENTITY CONTRACTS UNDER FEDERAL AWARDS

In addition to other provisions required by the Federal agency or non-Federal entity, all contracts made by the non-Federal entity under the Federal award must contain provisions covering the following, as applicable.

(A) Contracts for more than the simplified acquisition threshold currently set at \$150,000, which is the inflation adjusted amount determined by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) as authorized by 41 U.S.C. 1908, must address administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as appropriate.

(B) All contracts in excess of \$10,000 must address termination for cause and for convenience by the non-Federal entity including the manner by which it will be effected and the basis for settlement.

(C) Equal Employment Opportunity. Except as otherwise provided under 41 CFR Part 60, all contracts that meet the definition of "federally assisted construction contract" in 41 CFR Part 60-1.3 must include the equal opportunity clause provided under 41 CFR 60-1.4(b), in accordance with Executive Order 11246, "Equal Employment Opportunity" (30 FR 12319, 12935, 3 CFR Part, 1964-1965 Comp., p. 339), as amended by Executive Order 11375, "Amending Executive Order 11246 Relating to Equal Employment Opportunity," and implementing regulations at 41 CFR part 60, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor."

<-- Appendix II starts here.

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### OMB Guidance

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(D) Davis-Bacon Act, as amended (40 U.S.C. 3141-3148). When required by Federal program legislation, all prime construction contracts in excess of \$2,000 awarded by non-Federal entities must include a provision for compliance with the Davis-Bacon Act (40 U.S.C. 3141-3144, and 3146-3148) as supplemented by Department of Labor regulations (29 CFR Part 5, "Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction"). In accordance with the statute, contractors must be required to pay wages to laborers and mechanics at a rate not less than the prevailing wages specified in a wage determination made by the Secretary of Labor. In addition, contractors must be required to pay wages not less than once a week. The non-Federal entity must place a copy of the current prevailing wage determination issued by the Department of Labor in each solicitation. The decision to award a contract or subcontract must be conditioned upon the acceptance of the wage determination. The non-Federal entity must report all suspected or reported violations to the Federal awarding agency. The contracts must also include a provision for compliance with the Copeland "Anti-Kickback" Act (40 U.S.C. 3145), as supplemented by Department of Labor regulations (29 CFR Part 3, "Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States"). The Act provides that each contractor or subrecipient must be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he or she is otherwise entitled. The non-Federal entity must report all suspected or reported violations to the Federal awarding agency.

(E) Contract Work Hours and Safety Standards Act (40 U.S.C. 3701-3708). Where applicable, all contracts awarded by the non-Federal entity in excess of \$100,000 that involve the employment of mechanics or laborers must include a provision for compliance with 40 U.S.C. 3702 and 3704, as supplemented by Department of Labor regulations (29 CFR Part 5). Under 40 U.S.C. 3702 of the Act, each contractor must be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than one and a half times the basic rate of pay for all hours worked in excess of 40 hours in the work week. The requirements of 40 U.S.C. 3704 are applicable to construction work and provide that no laborer or mechanic must be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of supplies or

materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.

(F) Rights to Inventions Made Under a Contract or Agreement. If the Federal award meets the definition of "funding agreement" under 37 CFR §401.2 (a) and the recipient or subrecipient wishes to enter into a contract with a small business firm or nonprofit organization regarding the substitution of parties, assignment or performance of experimental, developmental, or research work under that "funding agreement," the recipient or subrecipient must comply with the requirements of 37 CFR Part 401, "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements," and any implementing regulations issued by the awarding agency.

(G) Clean Air Act (42 U.S.C. 7401-7671q.) and the Federal Water Pollution Control Act (33 U.S.C. 1251-1387), as amended—Contracts and subgrants of amounts in excess of \$150,000 must contain a provision that requires the non-Federal award to agree to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401-7671q) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251-1387). Violations must be reported to the Federal awarding agency and the Regional Office of the Environmental Protection Agency (EPA).

(H) 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 (42 U.S.C. 6201).

(I) Debarment and Suspension (Executive Orders 12549 and 12689)—A contract award (see 2 CFR 180.220) must not be made to parties listed on the governmentwide Excluded Parties List System in the System for Award Management (SAM), in accordance with the OMB guidelines at 2 CFR 180 that implement Executive Orders 12549 (3 CFR Part 1986 Comp., p. 189) and 12689 (3 CFR Part 1989 Comp., p. 235), "Debarment and Suspension." The Excluded Parties List System in SAM contains the names of parties debarred, suspended, or otherwise excluded by agencies, as well as parties declared ineligible under statutory or regulatory authority other than Executive Order 12549.

(J) Byrd Anti-Lobbying Amendment (31 U.S.C. 1352)—Contractors that apply or bid for an award of \$100,000 or more must file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any

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other award covered by 31 U.S.C. 1352. Each tier must also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the non-Federal award.

(K) See §200.322 Procurement of recovered materials.

#### APPENDIX III TO PART 200—INDIRECT (F&A) COSTS IDENTIFICATION AND ASSIGNMENT, AND RATE DETERMINATION FOR INSTITUTIONS OF HIGHER EDUCATION (IHEs)

##### A. GENERAL

This appendix provides criteria for identifying and computing indirect (or indirect (F&A)) rates at IHEs (institutions). Indirect (F&A) costs are those that are incurred for common or joint objectives and therefore cannot be identified readily and specifically with a particular sponsored project, an instructional activity, or any other institutional activity. See subsection B.1, Definition of Facilities and Administration, for a discussion of the components of indirect (F&A) costs.

##### 1. Major Functions of an Institution

Refers to instruction, organized research, other sponsored activities and other institutional activities as defined in this section:

a. *Instruction* means the teaching and training activities of an institution. Except for research training as provided in subsection b, this term includes all teaching and training activities, whether they are offered for credits toward a degree or certificate or on a non-credit basis, and whether they are offered through regular academic departments or separate divisions, such as a summer school division or an extension division. Also considered part of this major function are departmental research, and, where agreed to, university research.

(1) *Sponsored instruction and training* means specific instructional or training activity established by grant, contract, or cooperative agreement. For purposes of the cost principles, this activity may be considered a major function even though an institution's accounting treatment may include it in the instruction function.

(2) *Departmental research* means research, development and scholarly activities that are not organized research and, consequently, are not separately budgeted and accounted for. Departmental research, for purposes of this document, is not considered as a major function, but as a part of the instruction function of the institution.

b. *Organized research* means all research and development activities of an institution that are separately budgeted and accounted for. It includes:

(1) *Sponsored research* means all research and development activities that are sponsored by Federal and non-Federal agencies and organizations. This term includes activities involving the training of individuals in research techniques (commonly called research training) where such activities utilize the same facilities as other research and development activities and where such activities are not included in the instruction function.

(2) *University research* means all research and development activities that are separately budgeted and accounted for by the institution under an internal application of institutional funds. University research, for purposes of this document, must be combined with sponsored research under the function of organized research.

c. *Other sponsored activities* means programs and projects financed by Federal and non-Federal agencies and organizations which involve the performance of work other than instruction and organized research. Examples of such programs and projects are health service projects and community service programs. However, when any of these activities are undertaken by the institution without outside support, they may be classified as other institutional activities.

d. *Other institutional activities* means all activities of an institution except for instruction, departmental research, organized research, and other sponsored activities, as defined in this section; indirect (F&A) cost activities identified in this Appendix paragraph B, Identification and assignment of indirect (F&A) costs; and specialized services facilities described in §200.468 Specialized service facilities of this Part.

Examples of other institutional activities include operation of residence halls, dining halls, hospitals and clinics, student unions, intercollegiate athletics, bookstores, faculty housing, student apartments, guest houses, chapels, theaters, public museums, and other similar auxiliary enterprises. This definition also includes any other categories of activities, costs of which are "unallowable" to Federal awards, unless otherwise indicated in an award.

##### 2. Criteria for Distribution

a. *Base period.* A base period for distribution of indirect (F&A) costs is the period during which the costs are incurred. The base period normally should coincide with the fiscal year established by the institution, but in any event the base period should be so selected as to avoid inequities in the distribution of costs.

b. *Need for cost groupings.* The overall objective of the indirect (F&A) cost allocation process is to distribute the indirect (F&A) costs described in Section B, Identification and assignment of indirect (F&A) costs, to