



State of New Jersey

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MEMORANDUM

TO: New Jersey Local Government Units

FROM: Office of the State Comptroller

DATE: May 20, 2013

RE: Sandy Federal Reconstruction Funding

On January 29, 2013, President Obama signed into law the Disaster Relief Appropriations Act (Public Law 113-2), which provides \$50.5 billion to recover from the severe damage caused by Superstorm Sandy. New Jersey will receive its share of Sandy-related funds through several federal funding streams that will flow to State departments and local government units.

Governor Christie signed Executive Order No. 125 (the EO) on February 8, 2013, to ensure appropriate oversight concerning Sandy-related expenditures in New Jersey. Among other things, the EO charged the Office of the State Comptroller (OSC), in conjunction with the Governor's Office of Recovery and Rebuilding, with providing information to contracting entities to help ensure accountability, transparency, and the timely expenditure of federal reconstruction resources. The purpose of this document is to provide such information to local government contracting units.

This document is intended to be a general reference guide and does not contain specific guidance regarding particular funding streams or programs. Any specific programmatic questions should be directed to the appropriate State or federal agency. Additionally, this document is not intended to supersede or serve as a substitute for guidance or direction issued by or through the responsible State or federal agency. Local government units are encouraged to maintain a dialogue with the appropriate State and federal officials as they expend Sandy-related funds.

Transparency and Accountability

Transparency and accountability are essential elements of an effective disaster recovery program in which the public can have confidence. In September 2009, President Obama established a long-term disaster recovery working group to make recommendations for improving the nation's approach to disaster recovery. That working group created the National Disaster Recovery Framework (NDRF), which, among other things, sets forth best practices for recovering from a disaster. According to the NDRF, effective disaster recovery requires “[m]easuring and communicating the progress of recovery, [which] increases public confidence in the recovery process by promoting transparency, accountability and efficiency.” The NDRF recommends, for example, that local governments find “opportunities to share public information on the recovery process” because such communication “is important to maintaining community coordination and focus.” The NDRF can be found at: <http://www.fema.gov/pdf/recoveryframework/ndrf.pdf>.

In addition to public information made available at the local government level, Sandy-related expenditure information will be posted on www.USAspending.gov, which provides the public with access to federal award amounts and recipient information. Additionally, the State's Sandy Transparency website, hosted by OSC, will also be posting Sandy-related expenditures. Particularly given the public interest in Sandy-related expenditures, local government units should proactively measure, document and communicate the progress of local recovery efforts.

Local government units also should be aware that given the magnitude of these Sandy relief funds there will be more extensive federal oversight than is typical with federal funding. For example, the Disaster Relief Appropriations Act specifically requires federal agencies to establish additional internal controls to prevent the waste, fraudulent use or abuse of Sandy-related funds. In this regard, the federal Office of Management and Budget (OMB) recently issued a memorandum to federal departments that will support Sandy recovery requiring such additional internal control plans to, at a minimum, reflect the following elements:

- Conducting additional levels of review such as more expansive procedures to scrutinize award decisions and payment transactions;
- Increasing monitoring and oversight of grant recipients, including increased reporting requirements and additional site visits;
- Continuing collaboration with Inspectors General to identify and mitigate potential risk;
- Expediting review and resolution of audit findings and explore the possibility of additional audit activities; and
- Adopting improper payments management protocol, as the Disaster Relief Appropriations Act has deemed all Sandy-related programs and activities as susceptible to significant improper payments.

(OMB Memorandum M-13-07, *Accountability for Funds Provided by the Disaster Relief Appropriations Act*).

In addition to the numerous federal and State officials, auditors and investigators that will be reviewing the use of Sandy-related funds, there are two federal entities that are specifically charged with supporting the oversight of Sandy-related expenditures. The Disaster Relief Appropriations Act directs the Recovery Accountability and Transparency Board (RATB) to detect and remediate waste, fraud and abuse in the obligation and expenditure of Sandy-related funds. Furthermore, the Hurricane Sandy Rebuilding Task Force, established by President Obama in December 2012, will work with RATB and other agencies to ensure that appropriate accountability measures are in place for Sandy rebuilding efforts.

Local government units should be prepared for this enhanced scrutiny. Government units should, for example, document their correspondence with federal officials and employ appropriate document preservation and retention policies.

Expenditure of Federal Reconstruction Resources

Both State and federal laws and regulations will apply to Sandy-related expenditures and programs. While your agency may be familiar with State rules, many of the federal requirements may be new or unfamiliar depending on the amount of federal funds you previously have received. For example, the Disaster Relief Appropriations Act itself sets forth certain requirements concerning the timing of Sandy-related grant fund expenditures. Similarly, recipients of Federal Emergency Management Agency (FEMA) public assistance and hazard mitigation funds are subject to federal regulations such as 44 C.F.R. §13.36, which requires, among other things, that:

- Grantees and subgrantees must maintain a contract administration system that ensures contractors will perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders;
- Grantees and subgrantees must maintain records that document the significant history of the procurement, including, but not limited to, the rationale for the method of procurement, the selection of the contractor, and the basis for the contract price;
- Grantees and subgrantees may use time-and-material-type contracts only if a determination is made that no other contract is suitable and the contract includes a maximum price that the contractor exceeds at its own risk;
- Grantees and subgrantees should conduct all procurement transactions in a manner providing for full and open competition. Noncompetitive procurement methods may be used only under limited and specified circumstances.

FEMA grant recipients may also be subject to other federal standards, including the following:

- Federal cost principles (2 C.F.R. § 225) require that all costs claimed under Federal programs be adequately supported by source documentation; and
- Section 312 of the Stafford Act prohibits grantees and subgrantees from receiving disaster assistance if they are already receiving duplicative assistance under other federal programs, insurance or other sources.

A recent Department of Homeland Security Inspector General report noted that the above standards had been implicated frequently in audit findings. Local government units should review these federal requirements as soon as possible in consultation with counsel.

Best practices have been developed in the areas of contracting and grants management that are designed to further promote transparency and accountability. For example, the United States Government Accountability Office (GAO) has developed a series of “basic principles” to prevent problems that have affected contract spending in other contexts. Local government units should incorporate these best practices in their Sandy-related contracting:

- Have transparent lines of procurement responsibility, authority, and oversight defined and in place;
- Ensure contracts are well structured by establishing clear requirements prior to award;
- Award contracts competitively;
- Use fixed-price contracts to the extent possible;
- Appoint contract surveillance personnel as early on as possible - preferably prior to or as soon as contracts are awarded - and ensure that these personnel have clear guidance and training as to their role and responsibilities and that there is clear responsibility for approving payments; and
- Enforce contractual penalties for companies and individuals that fail to demonstrate acceptable performance, and refer suspected fraud and ethics violations to the appropriate oversight agency promptly.

OSC also has offered the following general advice based on frequently recurring contracting errors:

- Scope-of-services provisions should be specific, detailing the type of work required, the dates or frequency of services required and the result required;

- Document the effort to obtain quotes as well as any quotes received for any Extraordinary Unspecifiable Services contracts. Document how the contract meets legal requirements. Retain the award resolution and the advertisement publishing notice of the award. See N.J.S.A. 40A:11-5, 6.1(b);
- Document the evaluation of proposals or qualifications in “fair and open” procurements under the state’s Pay-to-Play law. Retain the advertisement and the resolution authorizing the award. See N.J.S.A. 19:44A-20.7;
- Document the evaluation of proposals in accordance with applicable criteria when using competitive contracting under N.J.S.A. 40A:11-4.4. Retain the required resolution authorizing the use of competitive contracting, the advertisement, the required reports recommending the award, and the resolution of the governing body awarding the contract;
- Use proprietary specifications only when authorized by law. Retain any resolution authorizing the use of such proprietary specifications;
- Ensure that specifications do not include any unauthorized standards that limit bidders, such as unlawful residency requirements or mandatory pre-bid meetings;
- Explain how the low bidder will be determined if multiple projects or multiple alternates are included in one solicitation, in accordance with N.J.S.A. 40A:11-23.1(d);
- Compare the detailed services performed as per the invoice to the statement of work in the contract before authorizing payment; and
- Change orders may not be used to substantially change the character of the contracted work, which would instead require a new bidding process. See N.J.A.C. 5:30-11.3(a)(7); N.J.A.C. 6A:23A-21.1(d)(2).

Best practices similarly have been developed in the area of grants management. For example, a working group chaired by the Comptroller General of the United States has developed a series of general recommendations to aid government officials at the federal, state and local levels in managing grants. Those recommendations include:

- Preparing policies and procedures before issuing grants;
- Consolidating information systems to assist in managing grants;
- Providing grant management training to staff and grantees;
- Preparing work plans to provide a framework for grant accountability;
- Establishing and including clear terms and conditions in grant award documents; and
- Monitoring the financial status of grants.

Local government units should be aware that there may also be available more specific guidance concerning the expenditure of particular federal grant funds. For example, the Department of Homeland Security's Inspector General has recommended the following in connection with administering FEMA grants:

- Ensure that the final claim made for each project is supported by amounts recorded in the accounting system;
- Ensure that each expenditure is recorded in the accounting books and is referenced to supporting source documentation (checks, invoices, *etc.*) that can be readily retrieved; and
- Ensure that expenditures claimed are reasonable and necessary, are authorized under the scope of work, and directly benefit the project.

In implementing these practices, local government units should work with their counsel and engage with their federal counterparts throughout the contracting and grant administration process.

Contract Notification Requirements

Although Sandy-related rebuilding may be time sensitive in nature, local government units should be aware that Sandy-related public contracts continue to be subject to statutory pre-advertising and post-award reporting requirements. Specifically, pursuant to N.J.S.A. 52:15C-10b(1), contracting units must notify OSC of any negotiation or solicitation of a contract that may exceed \$10 million as early as practicable, but no later than 30 days before the advertisement of the contract. Local government units should be aware that they may make a written request for waiver of the 30-day period and that OSC intends to make its best efforts to provide such expedited review of Sandy-related contracts. OSC must also be notified within 20 days after the award of any contract between \$2 and \$10 million under N.J.S.A. 52:15C-10a.

Please find additional information concerning pre-award and post-award public contract reporting requirements at: http://www.nj.gov/comptroller/news/docs/procurement_guidance_letter_01_29_13.pdf.

Integrity Monitors

Governor Christie recently signed legislation concerning the deployment of integrity monitors to further ensure the appropriate oversight of recovery and rebuilding projects (See N.J.S.A. 52:15D-1 *et seq.*). Of particular importance to local government units, the legislation requires that those entities provide to the State Treasurer notice of and other information concerning Sandy-related contracts. Moreover, the legislation requires, subject to the availability of federal funding, the State Treasurer to procure the services of an integrity oversight monitor for the initial implementation of recovery and rebuilding contracts valued at \$5 million or more unless a waiver is issued. The State Treasurer, at his discretion, may further procure integrity oversight monitors for any duration of such a contract under certain circumstances. The State Treasurer may similarly employ an integrity oversight monitor for such contracts worth less than \$5 million if such action is deemed prudent. Local government agencies should review the integrity monitor legislation and may contact David Ridolfino, Associate Deputy State Treasurer, at (609) 633-2826 with any questions.

Additional Guidance

There are several other guidance documents available to assist local government units in their expenditure of Sandy-related funds. For example, OSC has issued general guidance concerning contracting practices, which can be found at: <http://www.nj.gov/comptroller/resources/>. Similarly, the Department of Community Affairs, Division of Local Government Services has issued Local Finance Notices and has compiled other information related to Sandy response and recovery, which can be found at: <http://www.state.nj.us/dca/announcements/sandy.html>. Additional information from the GAO concerning disaster management can be found at: http://www.gao.gov/key_issues/disaster_management. Lastly, other useful information may be found on the State's Sandy Transparency Website, which can be found at: <http://www.nj.gov/comptroller/sandytransparency/index.shtml>.

Reporting Waste, Fraud or Abuse

The ability of the public to report waste, fraud or abuse is essential to ensuring accountability in connection with Sandy-related expenditures. To that end, OSC has established a Sandy Rebuilding and Reconstruction Fraud Prevention Hotline. Any suspicion of fraudulent activity, waste, or unethical or illegal conduct may be reported to:

1-855-OSC-TIPS
or
Comptrollertips@osc.state.nj.us

A printable PDF poster with OSC fraud prevention hotline information is available at: http://www.nj.gov/comptroller/sandytransparency/home/pdf/fraud_poster.pdf. This information

should be displayed in a conspicuous manner at all construction projects involving federal reconstruction resources.

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Thank you for your attention to the information provided in this memorandum.