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Hurricane Sandy and the Rapid Repairs Program

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HURRICANE SANDY AND THE RAPID REPAIRS PROGRAM

Howard Friedman*

Introduction

As has been widely described, Hurricane Sandy—which hit the Northeast on October 29, 2012—had a tremendous impact on the area, including New York City. The governors of New York, New Jersey, and Connecticut identified, in aid requests to the federal government, a total of $82 billion in damage. See Raymond Hernandez, "Congress Approves $51 Billion in Aid for Hurricane Victims," The New York Times, Jan. 28, 2013. Congress has altogether appropriated approximately $61 billion to address the effects of storm damage in the Northeast. Id.

This paper addresses several topics related to the City's response to Hurricane Sandy. First, it describes the City's emergency contracting process, and the additional considerations that were involved because of the City's intent to seek reimbursement of recovery costs from FEMA. Second, the paper describes the types of contracting the City did in response to Hurricane Sandy, including contracting to address the effects of the storm on City government and to address the storm's effects on the City's residents. Finally, the paper describes the City's Rapid Repairs Program, which was a major example of how the City helped mitigate the effect Hurricane Sandy had on residents.

Emergency Contracting by New York City

As is common for municipalities, see Sandra M. Stevenson, Antieau on Local Government Law, Second Edition, §32.04(1)(c) (Matthew Bender & Co. 2012), the state and local laws governing City procurement allow for an expedited process in the event of emergencies. Under New York City Charter §315, emergency procurements may be made to address "an unforeseen danger to life, safety, property or a necessary service." See also New York State General Municipal Law §103(4). If such a danger is present, a City agency may make an emergency procurement provided it has received the prior approval of the City Comptroller and the Corporation Counsel (the head of the Law Department). With this approval, the agency does not have to issue a publicly advertised invitation for bids or request for proposals, for example, but may instead follow a less formal process, although the procurement must be made "with such competition as is practicable under the circumstances." City Charter §315.

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Consistent with the idea that an emergency is being addressed, City agencies are able to enter into legally binding contracts, after contractors are selected, quickly and with less process. For example, public hearing requirements do not apply to emergency contracts, City Charter §326(b), and emergency contracts (unlike other City procurements) do not have to be first registered with the City's Comptroller in order to become effective. City Charter §328(d)(1).

FEMA Considerations

As the City intended to seek reimbursement from FEMA for the costs of recovering from Hurricane Sandy, it was important that the City also consider FEMA's requirements, even early in response to the storm. From a process point of view, this involved compliance with FEMA's grant administration requirements.

As a general matter, a federal granting agency's requirements may be found in the applicable Notice of Funds Availability issued by the agency and in the grant award itself. In addition, the general requirements are adopted as regulations by the federal agencies. A guide to where in the CFR an agency's grant administration requirements are codified is provided on the federal OMB website at http://www.whitehouse.gov/omb/grants_chart/. FEMA's grant administration regulations are codified at 44 CFR Part 13.

The grant conditions imposed by federal agencies are usually very similar. As explained on the federal OMB website, "On March 12, 1987, the President directed the Federal grantmaking agencies to issue a grants management common rule to adopt governmentwide terms and conditions for grants to States and local governments." However, these requirements are sometimes varied for individual programs. For example, funds received through the Community Development Block Grant Program are subject to the standard grant administration requirements (codified by HUD at 24 CFR Part 85) but with certain exceptions. Specifically, under 24 CFR §570.502 grant recipients such as the City are required to comply with the requirements of Part 85 only to the extent they are listed in Section 570.502.

Procurement is one of the topics addressed in the uniform requirements; for FEMA, procurement is covered by 44 CFR §13.36. As set forth in subdivision (b)(1), grantees and subgrantees "will use their own procurement procedures which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in this section." Thus, for procurements for which the City will seek reimbursement from FEMA, City agencies must follow (1) New York State law and the rules of the City's Procurement Policy Board (as they would for any other City procurement) and (2) the specific requirements set forth in the federal regulations.

For emergency procurements, FEMA's regulations (as with the law governing City procurements in general) allows less competition in the event of an emergency. 44 CFR §13.36(d)(4)(i)(B) (procurement by "noncompetitive proposals" are allowed where "the public exigency or emergency . . . will not permit a delay resulting from competitive solicitation"). However, the City's experience has been that FEMA expects relatively more competition the further in time a given procurement is from the emergency event. This practice is similar to the City's Charter requirement that the procuring City agency engage in the amount of competition as is practicable under the circumstances to address an emergency. As time goes on, it usually is possible to do relatively more competition, even if the agency is engaging in something less than a full-blown competition with all of the traditional requirements.

Aside from process considerations, FEMA's procurement regulation (24 CFR §13.36) contains other requirements. Subdivision (b) contains general procurement standards, while subdivision (c) contains standards generally applicable to particular procurements. Subdivision (e) contains provisions regarding contracting with small and minority firms and women's business enterprises. Subdivision (f) requires that a price or cost analysis be conducted. Of particular note for the substance of contracts, subdivision (h) contains bonding requirements for construction contracts, while subdivision (i) contains standard terms that must be included in contracts.

Contracting by New York City in Response to Hurricane Sandy

The City entered into contracts worth in total approximately $1 billion to address the effects of Hurricane Sandy. Broadly speaking, the contracts addressed two types of goals: (1) contracts to address the effects of the storm on the functioning of New York City government and on City infrastructure; and (2) contracts to address the effects of the storm on the residents of the City.

Examples of contracts to address Sandy's effect on City government and infrastructure included:

- Computer equipment for affected City agencies (a number of City agencies were displaced by the effects of the storm);
- Heavy duty equipment and vehicle rentals;
- Repair of damage to DOT and NYPD facilities, including police precincts;
- Remediation of a community justice center;
- Repair of traffic signals and highway lighting; and
- Emergency repair of damage to beaches and boardwalks.

Examples of contracts to address Sandy's effect on the City's residents included:

- Purchase of bottled drinking water;
- Towing and storage of vehicles damaged by the storm;
- Emergency medical care; and
- Removal of storm debris.

In addition, the City procured a number of services specifically related to the displacement of residents whose homes were destroyed or otherwise made uninhabitable by Hurricane Sandy. These services included:

- Temporary housing in hotels;
- Purchase of meals ready to eat; and
- Opening of temporary shelters.

The City's Rapid Repairs Program

A major initiative by the City to address the displacement of residents was its Rapid Repairs Program ("RRP"). The goal of RRP was to provide free emergency repairs to residential property owners affected by the storm in order to allow residents to stay in or return to their homes; Hurricane Sandy struck, after all, as winter was approaching. The owners would then be responsible for completion of more permanent repairs. The RRP repairs were limited to permanent or temporary restoration of heat, power and hot water, and other limited repairs necessary to protect a home from further significant damage.

Consistent with the idea that RRP repairs would allow residents to move back into their homes even if certain other repairs were needed, a building was eligible for RRP repairs only if the City's Department of Buildings had determined it to be structurally sound. Otherwise, the building's owner was responsible for making sufficient repairs so that it was structurally sound before it could be considered for the RRP program.

The process of procuring emergency contractors to make the RRP repairs was challenging because of the degree of uncertainty surrounding the amount of work to be done, the conditions that would be faced, and the presumed variations in work that would be necessary among thousands of different, privately-owned, residential properties. Approximately 60,000 residential buildings were located within the surge zone of the storm, and it was anticipated that RRP contractors would end up repairing between 16,000 and 24,000 buildings. In fact, as

discussed below, the RRP program ultimately repaired nearly 12,000 buildings, representing over 20,000 residential units. The City has estimated that the ultimate cost of the RRP program will be approximately $500 million.

In order to achieve a successful procurement despite the uncertainty, the City took an innovative approach to how it structured its emergency solicitation. Rather than seek bids based solely on unit prices—there was concern that it would be infeasible for contractors to bid meaningful unit prices—the City issued a request for expressions of interest by which contractors would be chosen based on capacity, past experience with similarly large projects, experience and qualifications of the management team, and proposed approach for quickly completing the work. As to price, the City determined to offer payment on a time and materials basis as an initial matter and then switch to another method of payment after the City had learned sufficient information to adopt unit prices or an alternative pricing structure. Specifically, the RFEI and accompanying term sheet stated that, in recognition "that the breadth of this program does not readily facilitate the negotiation of unit prices at notice to proceed," the City would pay for at least the first two weeks of work on a time and materials basis, plus 10 percent each for overhead and profit. Then, at a subsequent point, and in consultation with the RRP contractors, the City would establish "an alternative payment and pricing structure," such as unit price. Upon establishment of the alternative pricing structure, each contractor would have the ability to accept those terms or end its participation in RRP.

Despite the speed involved, the RFEI process worked well. The RFEI was released to 18 potential contractors on the evening of November 17, 2012 (a Saturday). Expressions of interest were due Monday morning. Nine expressions of interest were received, interviews were conducted and, by November 21, 2012, the City had made awards to, and received signed term sheets from, six contractors. Subsequently, the City issued two other RFEIs in order to obtain more contractors, so that the work would be completed promptly and on schedule. The City ultimately contracted with 10 construction contractors, as well as a customer service consultant, a project manager, and integrity monitors. The City's Department of Investigation engaged the integrity monitors for the purpose of monitoring the work of the construction contractors and investigating allegations of fraud in connection with the RRP program. The construction contracts listed the powers of the integrity monitors and required the construction contractors to fully cooperate with them.

While the RFEI and term sheet contained the basic structure of the program and business terms (excluding the subsequent alternative payment structure), and while the term sheet was legally binding, the term sheet indicated the parties' intent that it would be superseded by a subsequent written contract with additional terms and conditions. Consistent with that intent, the City provided a draft contract to the RRP contractors in late November and engaged in several rounds of revisions. (The negotiations were with the contractors as a group; the City determined that it would enter into the same contract with all of

the RRP contractors.) As it turned out, negotiations over that subsequent contract focused almost entirely on issues of price and risk. While some of the negotiations addressed details of the initial time and materials terms, most of the price negotiations focused on the alternative payment structure and were informed by the actual experience of the City and the contractors in the early weeks of the program. Negotiations over risk were driven mostly by the contractors' concerns over mold (although mold remediation was not part of the scope of services) and the sheer number of homes involved. Although the City refused to contractually indemnify the contractors, it did agree that the purchase of significant insurance coverage was appropriate and reimbursable under the circumstances.

From the beginning of the RRP program, the City took steps to maximize the likelihood that FEMA would reimburse it for its costs. Substantively, RRP was based on FEMA's Sheltering and Temporary Essential Power (STEP) Pilot Program, designed by FEMA in the aftermath of Hurricane Sandy. The City worked closely with FEMA on the design of the RRP program and, in mid-December, FEMA approved the City's request to implement the RRP program. From a process point of view, the City followed both its own procurement processes and those set forth in 24 CFR §13.36.

The RRP program was successful in making needed repairs. Through December 2012, the program averaged repair of 100 buildings per day, despite labor shortages and limited availability of supplies, plus the need for the City and the RRP contractors to learn the most efficient approaches to making the repairs. In January, an average of 200 buildings per day were repaired, as shortages eased and the subsequently procured contractors got up to speed. By the end of January 2013, 9,000 buildings had been repaired. As of March 8, 2013, repairs to 11,715 buildings had been completed, and only 80 properties enrolled in the program remained incomplete. Of the 11,715 completed buildings, approximately 900 were larger than one- or two-family homes. In total, over 20,000 residential units were repaired.