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FEMA

March 7, 2012

MEMORANDUM FOR: Tonda L. Hadley, Director
Central Regional Office
Office of Inspector General
US Department of Homeland Security

FROM: Joseph Threat, Executive Director (Acting)
Louisiana Recovery Office

A handwritten signature in blue ink, appearing to read "J. Threat", is written over the name of the sender in the "FROM:" field.

SUBJECT: Audit Resolution
Hurricane Katrina Activities, Jesuit High School of New Orleans
Audit Report Number DD-11-21

The Federal Emergency Management Agency (FEMA) has reviewed the Office of Inspector General's (OIG) memorandum of September 26, 2011, concerning public assistance funds awarded to Jesuit High School of New Orleans (Jesuit) for Hurricane Katrina activities. This memorandum provides FEMA's response and corrective actions taken to implement the audit recommendations.

Background

Jesuit High School of New Orleans (Jesuit), a private secondary school for young males, received nearly \$11 million from the Louisiana Governor's Office of Homeland Security and Emergency Preparedness (GOHSEP), a FEMA grantee, for emergency protective measures for water damages and repairs to facilities and buildings in the aftermath of Hurricane Katrina. The OIG's audit focused on nine large project worksheets totaling \$10.8 million and a limited review of thirteen project worksheets. As a private nonprofit organization, Jesuit is eligible for Public Assistance disaster funding under 44 CFR §206.222(b) and 44 CFR §206.221(e)(1).

Audit Recommendations and Actions Required

Recommendation 1: Disallow \$6,131,638 (\$6,131,683 federal share) of improperly contracted costs that were ineligible (finding A).

The OIG audit report states Jesuit did not follow federal procurement regulations in the award of four contracts. The OIG concluded Jesuit failed to comply with 44 CFR § 13.36 (c), which requires applicants to openly compete all contracts involving Federal grant funding. The OIG also concluded that Jesuit's contract for emergency repairs was a cost plus percentage of costs contract, which is prohibited by 44 CFR § 13.36 (f)(4). The OIG noted Jesuit had failed to perform a cost or price analysis, as required by 44 CFR § 13.36 (f), and failed to include contract

provisions required by 44 CFR § 13.36 (i). Based on this, the OIG recommended FEMA de-obligate \$6,131,683 as the net funding from nine large projects. The OIG calculated that amount by subtracting \$4,693,265, which is the subject of Recommendation 2, from Jesuit's incurred contract costs of \$10,824,948. The latter amount represented Jesuit's eligible costs for this work after the subtraction of insurance benefits and a Small Business Administration loan.

GOHSEP and Jesuit disagree with this finding and assert Jesuit procured all contracts in accordance with Federal Public Assistance regulations and these were not prohibited forms of contracts. Both contend the costs incurred were reasonable and necessary to fulfill the intent of the grant.

FEMA Response: FEMA partially agrees with this recommendation.

Jesuit's construction contracts covered both emergency and permanent work. Each is discussed below.

Emergency Work

Jesuit incurred \$2,306,891.63 in contract costs for cleaning, mold remediation, and stabilization of its facilities in the immediate aftermath of Hurricane Katrina. See Exhibit 1 – Gootee Emergency Work Invoice. FEMA obligated ten Category B Emergency Protective Measures project worksheets (PWs) for a total of \$1,882,239 after reductions for insurance benefits. See Exhibit 2 – FEMA Obligated Costs for Construction Contracts. Because the OIG concluded Jesuit had improperly procured this contract and the contract itself was a prohibited cost plus percentage of costs contract, it recommended FEMA de-obligate the total award. FEMA disagrees with that recommendation.

Non-competitive contract

Jesuit's emergency work contract was properly procured. Federal regulations at 44 CFR § 13.36 (d)(4) allow the use of non-competitive contracts when "public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation..." FEMA determined the emergency period for this disaster was August 29, 2005, to January 31, 2006. See Exhibit 3 – FEMA DR 1603 Emergency Period. Consequently, Jesuit's procurement action for this contract occurred within this emergency period.

The Stafford Act at Section 403 (42 USC § 5170b) authorizes Public Assistance for work and services to save lives and protect and preserve property, public health and safety. Jesuit's facilities were submerged in up to five feet of contaminated floodwaters. The facilities also suffered roofing damage, which permitted wind-driven rain to penetrate the upper floors. The floodwaters were still standing in the facilities when Jesuit personnel first reentered the facility in early September 2005. Environmental controls in the facilities had failed and the resulting high humidity and lack of ventilation caused the rapid spread of mold.

Jesuit officials set out immediately to clean and stabilize the facility and provide temporary roofing repairs to prevent further loss and deterioration to improved property. This work

consisted of cleaning, debris and sludge removal, and mold remediation. It was essential, time sensitive, and represented a necessary response in the aftermath of a major disaster.

Jesuit concluded it needed a general contractor to manage the cleanup effort and to procure the services of qualified subcontractors. Jesuit officials have related their difficulties in locating reliable contractors in the area to support the facility stabilization effort. See Exhibit 4 – Applicant’s Response, October 24, 2011, pp 3-4. However, Jesuit was executing a major renovation project at the time of the disaster and hired the contractor – Ryan Gootee General Contractors, LLC (Gootee, LLC) to provide these services. Jesuit had prior experience with Gootee LLC; this contractor was mobilized, had a field office already present on the Jesuit campus and was well known to Jesuit officials.

Jesuit signed a contract with Gootee, LLC, on October 4, 2005, and the work was finished in time to reopen classes by late November 2005. Consequently, Jesuit’s use of a sole-source contract was justified by the exigent circumstances prevailing in the area at that time in accordance with 44 CFR § 13.36 (d)(4).

Cost plus percentage of cost contract

The OIG’s recommendation was also based on its conclusion that Jesuit’s contract with Gootee, LLC, was a cost plus percentage of costs contract, which is prohibited by 44 CFR § 13.36 (f)(4).

On October 4, 2005, Jesuit entered into a COST OF THE WORK PLUS A FEE contract with a negotiated Guaranteed Maximum Price with Gootee, LLC. See Exhibit 5 - Jesuit-Gootee Contract, October 4, 2005. The maximum not-to-exceed price specified in the contract was \$2,859,067 with fees of 10 percent for overhead plus a 10 percent profit. As the contract terms stipulated fees would be based on a percentage of the contract costs, FEMA concurs that this was a cost plus a percentage of cost contract, which is a prohibited type of cost reimbursable contract.

However, pursuant to 44 CFR §13.43, FEMA may allow or disallow all or part of the cost of the action not in compliance. FEMA is required under 44 CFR §13.22 to evaluate allowable costs using reasonable cost principles. As such, FEMA may reimburse for reasonable costs.

Applicable cost principles for allowable costs in the use of grant funds are governed by 44 CFR. § 13.22 (b). FEMA has determined Jesuit’s incurred costs for the emergency work are reasonable and allowable under OMB Circular A-122, Cost Principles for Non-Profit Organizations.¹ There, reasonable costs are defined, in significant part:

A cost is reasonable if, in its nature or amount, it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the costs. (emphasis added)²

¹ 2 CFR § 230.

² 2 CFR § 230, Appendix A to Part 230—General Principles

FEMA's Cost Estimating Center (CEC) reviewed Gootee's scope of work in the emergency work contract and its invoices and concluded the Category B PWs' eligible scopes of work were consistent with actual contract costs. The CEC then applied RS Means Cost Works 2006 to the scope of work for emergency repairs and determined reasonable costs for this work would total \$2,662,960.50. Jesuit's actual costs were \$2,306,891.63. These were determined to be reasonable costs for eligible work and, therefore, allowable under Federal regulations and FEMA policies. See Exhibit 6 – FEMA CEC Emergency Work Cost Analysis, December 12, 2011.

Permanent Work

Jesuit established three contracts to execute its permanent repairs and restoration work program – one construction contract, one for architecture and engineering (A&E) services, and one for engineering services necessitated by repairs to the parking lot and drainage system. FEMA obligated \$8.9 million in allowable costs for this work including A&E fees, after reductions for insurance proceeds and SBA loans. See Exhibit 2. The OIG recommended FEMA disallow these costs because these contracts were improperly procured.

Non-competitive contract

On November 15, 2005, Jesuit retained Nano Turchi, AIA, to prepare construction documents for permanent repairs and to manage the procurement process for these repairs. See Exhibit 7 – Jesuit-NTA Contract, November 15, 2005. The OIG asserts that Jesuit did not openly compete this contract and, therefore, FEMA should disallow these costs.

FEMA determined, however, that the exigent circumstances prevailing in the area at this time plus Jesuit's long experience with this architect justified the use of a sole-source award. This architect had been the architect of record for previous Jesuit construction projects dating from 1981 and possessed a copy of many of the historical Jesuit architecture and engineering documents lost in the floodwaters. Therefore, Jesuit awarded this contract based on the successful past experience and long-standing relationship between Jesuit and the architect.

Jesuit paid the architect \$787,566 in fees. FEMA's Cost Estimating Center (CEC) determined the costs to be reasonable. See Exhibit 8 – CEC Cost Reasonableness Analysis.

Design Engineering Inc. (DEI) had designed the campus drainage system in 2000. DEI was then retained to assist Jesuit in assessing damage to the drainage system under the Katrina-damaged parking lot. DEI also designed work needed to complete permanent repairs to the parking lot. Jesuit had a long-standing relationship with DEI and determined that, given the institutional knowledge of that firm, a contract with them was in the best interest of the school. The total contract costs for services performed by DEI were \$14,277. See Exhibit 9 – Design Engineering INC. Invoice and Check. Since the services performed by DEI were less than \$100,000, the informal method for securing such services is allowed under 44 CFR § 13.36 (d)(1)³, which states:

³ See Public Assistance Guide, FEMA-322/October 1999, p. 39 Small Purchase Procedures

Methods of procurement to be followed-(1) Procurement by small purchase procedures. Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than the simplified acquisition threshold fixed at 41 USC 403 (11) (currently set at \$100,000). If small purchase procedures are used, price or rate quotations shall be obtained from an adequate number of qualified sources.

Thus, the “informal method” would be allowable for the \$14, 277 procurement for services by DEI on the parking lot drainage, but for the stipulation that applicants will obtain price or rate quotations “from an adequate number of qualified sources.” There is no indication in Jesuit’s submission of an effort to obtain multiple price quotes; therefore, Jesuit did not comply with Federal procurement regulations. However, FEMA’s CEC determined the costs to be reasonable. See Exhibit 8 – CEC Cost Reasonableness Analysis. Jesuit also contracted Gootee LLC to perform its permanent repairs and restoration work. Jesuit selected Gootee LLC through a competitive bid process. The OIG concluded Jesuit had not “openly” advertised for this contract and, as such, failed to comply with 44 CFR § 13.36 (d)(2). This regulation does specify “formal advertising” as the preferred method for soliciting construction proposals. Consequently, the OIG recommended all funding for this work be disallowed.

FEMA does not concur with this recommendation. In its submission, Jesuit recounted its experience in procuring the services of a general contractor to manage and direct this work. The architect of record surveyed the general contractor community in the area to determine interest and availability of resources in light of the heavy demand for these services in the aftermath of the major disaster. The architect states of the ten plus contractors contacted, five expressed interest in bidding and three eventually submitted bids. Jesuit selected the lowest, qualified bidder. See Exhibit 10 – Jesuit Bid Tabulation Form.

FEMA agrees Jesuit did not use formal advertising to solicit bids for its permanent work. However, Jesuit did conduct a competitive procurement process and complied with the criteria set forth in 44 CFR 13.36 (d)(3) Procurement by *competitive proposals*. Jesuit made no effort to limit competition and sought the broadest possible number of bidders for this work. Given the exigent conditions still prevailing in the area in early January 2006 and the demands placed on the construction industry as a result, Jesuit made a good faith effort to comply with federal procurement regulations. Jesuit claims it was following guidance from FEMA project specialists with regard to the requirement for three bids.

Moreover, 44 CFR §13.36(b) (8) states, “Grantees and subgrantees will make awards only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources”. As an educational institution, Jesuit officials had to consider the students’ welfare and safety in the selection of contractors to perform this work on campus. All three contractors had proven their reliability through previous work on the school campus.

Finally, FEMA is required under 44 CFR §13.22 to evaluate allowable costs using reasonable cost principles. As such, FEMA may reimburse for reasonable costs. FEMA’s CEC determined the overall project costs to be reasonable. See Exhibit 8 – CEC Cost Reasonableness Analysis.

Required contract provisions

Gootee, LLC contracts included articles on Enumeration of Contract Documents stating, "The General Conditions are the 1997 edition of the General Conditions of the Contract for Construction, AIA Document A201-1997". See Exhibit 5 and Exhibit 11 – Jesuit-Gootee Contract, January 25, 2006. Additionally, the Stipulated Sum contract dated January 25, 2006, added Supplementary Conditions & Additional General Conditions that further define the roles and responsibilities and more closely limit the opportunity for misunderstanding during the course of construction. See Exhibit 5 – Jesuit-Gootee Contract, Article 15, p. 10; Exhibit 11 Article 8, p. 5. These articles and conditions satisfy the required contract provisions under 2 CFR 215.48.

FEMA has determined Jesuit's permanent facility repairs were eligible for FEMA Public Assistance; FEMA's CEC has performed a cost reasonableness study to determine the allowable amounts for each contract at issue in this recommendation. The CEC determined these costs were reasonable and therefore eligible. See Exhibit 8 – CEC Cost Reasonableness Analysis.

Recommendation 2: Disallow \$4,693,265 (\$4,693,265 federal share) of ineligible duplicate funding (finding B).

The OIG audit report states donations to Jesuit's Katrina Restoration Fund are designated for the same purposes as FEMA grants to Jesuit, and, therefore, are a prohibited duplication of benefits. The OIG further states Jesuit has not provided documentation to prove these funds were not used for the same purpose as the FEMA grant funds.

GOHSEP and Jesuit do not agree with this recommendation.

FEMA Response: FEMA does not agree with this recommendation.

Following Hurricane Katrina, Jesuit High School established a relief fund to raise money for numerous expenses not covered by insurance or FEMA grant money. These included operating losses and damages to campus facilities not eligible for FEMA public assistance. Jesuit also used the opportunity to make improvements to existing facilities, work which would not be eligible for FEMA assistance. The initial goal of the fund was "...quickly established to raise \$5 million from outside sources for expenses **not covered by insurance or FEMA.**" See Exhibit 12 – Report of the President 2005-2006: Katrina Restoration Fund. Jesuit solicited and received donations for general disaster recovery/relief efforts and not for work covered by FEMA and/or insurance proceeds. Jesuit did not receive contributions designated by donors for any specific eligible work.

Jesuit provided documentation for the following projects contracted with Gootee, LLC, utilizing contributions of \$4,259,316 from the Katrina Fund:

- Science Labs' Update - \$358,038 See Exhibit 13 - Science Labs' Update Costs
- 1953 Courtyard/Palmyra Windows - \$416,627 See Exhibit 14 – 1953 Courtyard Palmyra Window Costs
- Chemistry Lab Update - \$682,283 See Exhibit 15 - Chemistry Lab Update Costs

- 2008 General Building Update - \$833,101 See Exhibit 16 - 2008 General Building Update Costs
- Lintel Repair/Window Replacement - \$1,969,267 See Exhibit 17 2008 Lintel Repair/Window Replacement Costs

FEMA did not prepare project worksheets nor obligate funding for any of the above projects.

Section 312 (a) of the Stafford Act ⁴ states that no entity will receive assistance for any loss for which financial assistance has already been received from any other program, from insurance, or from any other source. However, "...cash donations that are received for unspecified purposes or ineligible work do not constitute a duplication of benefits." ⁵

Further guidance is found in FEMA's Directive Policy Number 9525.3⁶, which clarifies issues related to grants and cash donations from third parties for emergency and permanent work under the Public Assistance program. While grants and cash donations from non-Federal sources designated for specific eligible work *may* be considered a duplication of benefits, this guidance specifically provides that "...donations received for unspecified purposes (e.g. 'for disaster recovery/relief efforts'), or work not eligible for FEMA assistance, **do not constitute a duplication of benefits.**" (Emphasis added)

Consequently, Jesuit was able to show that it did not apply funds raised from non-Federal sources to FEMA-eligible projects. Rather, Jesuit was able to show that the funding was used to defray increased operating costs, loss revenue, and to cover costs for upgrades and improvements to ineligible projects.

Recommendation 3: Disallow \$20,369 (\$20,369 federal share) of ineligible contract costs billed in excess of contract terms (finding C).

The OIG audit report states contract costs were ineligible because the contractor did not bill the costs according to the contract terms and conditions.

GOHSEP and Jesuit do not agree with this recommendation. Jesuit agrees with the calculation of the contractor's fee of 21% in connection with the emergency work done.

FEMA Response: FEMA partially agrees with this recommendation.

The contractor did in fact, bill in accordance with the terms of the contract. According to Article §5.1.2 of the contract, the contractor's fee was to be calculated at "10 percent Overhead *plus* 10 percent Profit." See Exhibit 5 – Ryan Gootee General Contractors, LLC dated October 4, 2005, p. 3. (Emphasis added)

FEMA is required under 44 CFR §13.22 to evaluate allowable costs using reasonable cost principles. Based on an industry practice analysis, these costs are considered reasonable. In this

⁴ 42 U.S.C §5155, 44 C.F.R § 206.226(a)(1)

⁵ FEMA Public Assistance Guide 322, October 1999

⁶ FEMA Response and Recovery Directorate Policy Number 9525.3, October 30, 2000

case, overhead costs were added to contract costs as the basis for profit calculation. Profit was then calculated on the sum of the contract costs plus overhead costs, which resulted in a 21 percent total markup.⁷

However, Gootee did submit invoices with costs totaling 25% for overhead and profit. In most cases, the invoices were corrected. However, Invoice # 05015-01 charged 25% and was not corrected. Version 2 of PW 5130 has been written to de-obligate \$732.23 of the excess 4% profit markups. See Exhibit 18 – PW 5130 Version 2.

Recommendation 4: Disallow \$4,293 (\$4,293 federal share) of unsupported costs (finding D).

The OIG audit report states Jesuit must carefully document contractor expenses and disallow unsupported costs.

GOHSEP and Jesuit agree with this recommendation to de-obligate the ineligible costs.

FEMA Response: FEMA agrees with this recommendation.

FEMA prepared version 1 to PW 16617 to de-obligate \$4,293.22 of unsupported costs. See Exhibit 19 – PW 16617 version 1.

Recommendation 5: De-obligate \$27,518 (\$27,518 federal share) and put those federal funds to better use (finding E).

The OIG states FEMA should de-obligate unneeded funds and put those federal funds to better use.

GOHSEP and Jesuit agree with this recommendation. In addition, Jesuit had requested closeout on that project more than three years ago.

FEMA Response: FEMA agrees with this recommendation.

FEMA prepared PW 16617v1 to de-obligate \$27,518.50. See Exhibit 19 – PW 16617 version 1.

Recommendation 6: Complete the insurance review, allocate approximately \$736,000 of applicable insurance proceeds to Jesuit's projects, and disallow those amounts from the projects as ineligible (finding F).

The OIG audit states that FEMA has not completed its insurance review and has not allocated the applicable insurance proceeds to Jesuit's projects.

GOHSEP and Jesuit agree with this recommendation to complete the insurance review and allocate all insurance proceeds.

⁷ For example, to calculate overhead plus profit charges for \$100,000 of contract costs using this formulation: \$100,000 x 10% = \$10,000 (overhead); \$100,000 + \$10,000 x 10% = \$11,000 (profit); \$10,000 + \$11,000 = \$21,000.

FEMA Response: FEMA agrees with this recommendation.

The total insurance deduction for Jesuit is \$1,620,429.30. FEMA deducted \$1,326,321.65 for actual insurance benefits and \$294,107.65 for mandatory flood reductions. Seven Project Worksheets were prepared for \$239,812.33 to finalize application of insurance. See Exhibit 20—Seven Project Worksheets for Insurance Reductions. The FEMA Insurance Group has provided a detailed analysis of insurance deductions by project worksheet. See Exhibit 21 – Insurance Reductions by Project Worksheet.

Conclusion

In summary, FEMA has taken the following actions:

- Recommendation 1: FEMA partially agrees with this recommendation. However, FEMA has performed cost reasonableness analyses for contracted emergency remediation work and permanent work and determined that Jesuit's incurred costs were reasonable and therefore eligible for reimbursement;
- Recommendation 2: FEMA disagrees with this recommendation;
- Recommendation 3: FEMA partially agrees with this recommendation. Version 2 of PW 5130 has been written to de-obligate \$732.23 of excess 4% profit markups;
- Recommendation 4: FEMA agrees with this recommendation. FEMA prepared version 1 to PW 16617 to de-obligate \$4,293.22 of unsupported costs;
- Recommendation 5: FEMA agrees with this recommendation. FEMA prepared PW 16617v1 to de-obligate \$27,518;
- Recommendation 6: FEMA agrees with this recommendation. FEMA has completed the insurance review and has allocated the remaining insurance reductions to seven project worksheets, totaling \$239,812.33.

We believe that the explanations and actions described herein should adequately resolve the OIG's audit recommendations. If further information or clarification is needed, please do not hesitate to contact us.

Enclosures:

- Exhibit 1 - Gootee Emergency Work Invoice
- Exhibit 2 - FEMA Obligated Costs for Construction Contracts
- Exhibit 3 - FEMA DR 1603 Emergency Period
- Exhibit 4 - Applicant's Response, October 24, 2011
- Exhibit 5 - Jesuit-Gootee Contract, October 4, 2005
- Exhibit 6 - FEMA CEC Emergency Work Cost Analysis, December 12, 2011
- Exhibit 7 - Jesuit-NTA Contract, November 15, 2005
- Exhibit 8 - CEC Cost Reasonableness Analysis
- Exhibit 9 - Design Engineering, Inc. Invoice and Check
- Exhibit 10 - Jesuit Bid Tabulation Form
- Exhibit 11 - Jesuit-Gootee Contract, January 25, 2006
- Exhibit 12 - Report of the President 2005-2006, Katrina Restoration Fund
- Exhibit 13 - Science Labs' Update Costs

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Exhibit 14 - 1953 Courtyard Palmyra Window Costs

Exhibit 15 - Chemistry Lab Update Costs

Exhibit 16 - 2008 General Building Update Costs

Exhibit 17 - Lintel Repair/Window Replacement Costs

Exhibit 18 - PW 5130v2

Exhibit 19 - PW 16617v1

Exhibit 20 - Seven Project Worksheets for Insurance Reductions

Exhibit 21 - Insurance Reductions by Project Worksheets

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