

## MEMORANDUM

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**TO:** PREPA T&D Transformation Qualified Respondents (Data Room)

**DATE:** February 1, 2019

**RE:** Federal Funding Overview: Eligibility and Process of Puerto Rico Recovery and Compliance with Federal Procurement Requirements Applicable to Grants Awarded to PREPA

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### Executive Summary

This White Paper is designed for use by potential Private Party partners to assist them in formulating their bids in response to the Request for Proposals (the “RFP”) for Puerto Rico Electric Power Authority (“PREPA”) Transmission and Distribution System (the “T&D System”). The first three chapters summarize the Federal funding available to Puerto Rico and to the T&D System restoration and reconstruction, as well as the Federal rules that apply to that funding. The final chapter lists the resources relevant to the issues summarized herein, all of which have been uploaded to the Data Room for review.

**Chapter One** outlines the Federal funding sources and estimated amounts available to Puerto Rico and PREPA for recovery. The primary sources of recovery funding are (i) grants administered by the Federal Emergency Management Agency (“FEMA”) and funded through the Disaster Relief Fund (“DRF”), and (ii) Congressional appropriations of Community Development Block Grants for Disaster Recovery (“CDBG-DR”) administered through the U.S. Department of Housing and Urban Development (“HUD”).

**Chapter Two** summarizes the eligibility criteria and the process generally followed for approval of Federal recovery funds. It outlines the four components of FEMA eligibility: Applicant, Facility, Work and Cost. It also provides the process by which FEMA permanent work funding will be provided under the procedures published in FEMA’s Section 428 Guide for Puerto Rico<sup>1</sup> and a brief summary of the status of PREPA’s process thus far. CDBG-DR funding will be disbursed by the Puerto Rico Department of Housing (“PRDOH”) in accordance with the approved Puerto Rico Disaster Recovery Action Plan: For the Use of CDBG-DR Funds in Response to 2017 Hurricanes Irma and Maria (“Action Plan”).

**Chapter Three** outlines the procurement requirements applicable to Federal awards pursuant to 2 C.F.R. Part 200. PREPA is considered a “State” under the definitions in those regulations. As such, when procuring goods and services under a Federal award, PREPA, and any entity expending PREPA’s Federal funds on its behalf, must follow the same policies and procedures as used for PREPA’s non-Federally funded purchases, comply with 2 C.F.R. § 200.322, Procurement of Recovered Materials, and ensure that every purchase order or contract includes all clauses required by 2 C.F.R. § 200.326, Contract Provisions.

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<sup>1</sup> See Public Assistance Alternative Procedures (Section 428) Guide for Permanent Work (FEMA-4339-DR-PR) (April 2018).

This document may not be construed as giving legal advice and any statement made within the document may not be used against PREPA, the Puerto Rico Public-Private Partnerships Authority, the Government of Puerto Rico's Central Office of Recovery, Reconstruction ("COR3"), any other agency or instrumentality of the Government of Puerto Rico, and/or the authors. Each Private Party is encouraged to seek legal advice regarding Federal funding and applicable Federal law, regulation and policies. In the event that there are inconsistencies between this White Paper and the Partnership Contract, the provisions of the Partnership Contract language will control.

### **Key Takeaways**

- As of December 10, 2018 PREPA has \$1.87 billion in obligated FEMA funds, of which \$1 billion has been disbursed. PREPA is working with FEMA to reach agreement on a cost-estimate for obligation of additional funds for permanent work. Additionally, Congress has specifically appropriated \$2 billion through CDBG-DR "for improved electrical power systems in areas impacted by hurricane Maria." FEMA funding is transmitted through COR3. CDBG-DR funding is transmitted through PRDOH.
  - Throughout the restoration and reconstruction of PREPA's T&D System, the T&D System shall remain eligible for Federal funding. PREPA, or another eligible government entity, will retain title to and legal ownership of the T&D System as explained in the RFP and agreed upon in the Partnership Contract, and PREPA, or another eligible government entity, will remain the subrecipient/applicant for Federal funding.
  - All grant requirements, including those applicable to procurement, must be satisfied for all work and costs submitted for Federal reimbursement, regardless of whether PREPA or the Private Party is contracting for the goods, services, construction, or repairs.
  - COR3 may authorize a third party to act as grant manager ("Grant Manager") to help seek, administer and apply federal funding for the restoration and reconstruction of the T&D System and related costs. The Private Party may be expected to cooperate with and support the efforts of any such Grant Manager to the fullest extent needed to effectively and efficiently administer the Federal funding.
  - Any work related to the T&D System, the cost of which may be submitted for Federal funding, shall be separately procured in full compliance with Applicable Law, including but not limited to the procurement rules set forth in 2 C.F.R. Part 200 and applicable to PREPA. PREPA must be a signatory and included party on any contracts for work and costs that may be submitted for Federal funding..
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- Congress, through HUD, has appropriated a total of \$19.9 billion in post-hurricane assistance through its CDBG-DR program for Puerto Rico. The updated Action Plan prepared by PRDOH was submitted to HUD for approval on November 18, 2018 and is currently still pending.<sup>2</sup> There are several possible options/programs submitted as part of the Action Plan that may result in additional Federal funding available for restoration and reconstruction of the T&D System.<sup>3</sup>
- FEMA funding will be available as soon as a COR3, PREPA, and FEMA reach an agreement on the cost estimate (as described in Chapter 2) and FEMA subsequently obligates the approved funding. CDBG-DR funding will likely not be available immediately. Such funding is traditionally delayed due to the Action Plan approval process by HUD.

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<sup>22</sup> As of January 22, 2019. Updates on the approval of the revised Action Plan can be found here: <http://www.cdbg-dr.pr.gov/en/action-plan/>.

<sup>3</sup> Puerto Rico CDBG-DR Action Plan, November 18, 2018 at 162.

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## I. Chapter One: Federal Funds Overview

In September 2017, Hurricanes Irma and Maria delivered devastating blows to Puerto Rico, resulting in the largest and most complex disaster response and recovery effort in recent U.S. history. The President of the United States issued federal disaster declarations for these events, DR-4336 and DR-4339, respectively. These declarations triggered eligibility for various federal disaster assistance funding programs managed by FEMA. Congress also appropriated additional recovery funding.

FEMA, HUD and other federal disaster recovery funding is expected to be available to help finance the restoration and reconstruction of the T&D System as a result of the damage from Hurricanes Maria and Irma. The Private Party may be expected to cooperate with COR3, PREPA, the Grant Manager, if applicable, and any necessary federal or other public entity partners to the fullest extent possible with respect to such disaster recovery funding, including by assisting with management of any construction work for the T&D System and the coordination of any necessary elements of the work or grant application process as agreed upon in the Partnership Contract.

**A. Federal Funds.** The Government of Puerto Rico is eligible for Federal funds from the following sources:

- FEMA: Public Assistance and Hazard Mitigation grants (DRF)
  - HUD: CDBG-DR; and
  - Other: Supplemental funding in the form of contributions from other Federal governmental agencies.
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Federal funding for Puerto Rico Recovery<sup>4</sup>:

FEMA	CDBG	Other Federal agencies	Yearly
Estimated \$30-40 Billion <sup>5*</sup>	\$19.9 Billion <sup>6</sup>	\$434 million <sup>7</sup>	\$300 million <sup>8</sup>

\*FEMA Public Assistance<sup>9</sup> funding will be distributed in accordance with eligibility determinations, cost-share, and Sec. 428 procedures. *See* Chapter Two, “Eligibility and Process of Puerto Rico Recovery” and Chapter Three, “Procurement Requirements Under 2 C.F.R. Part 200.”

**B. FEMA**

For purposes of this White Paper, the terms “applicant,” “subrecipient,” and “non-federal entity” and “NFE” refer to PREPA, and “Grantee” or “Recipient” refers to COR3.<sup>10</sup> All FEMA funds for PREPA recovery will pass through COR3. COR3 was designated as the grantee pursuant to Executive Order 2018-111 issued by Governor Rosselló on March 20, 2018.

FEMA publishes its status on assistance in two parts: Obligations and Disbursements. Dollars “obligated” include funds made available to COR3 via electronic transfer through Smartlink following FEMA’s review and approval of Public Assistance projects. For Hurricane Maria, the current deadline to agree upon a cost estimate in order for FEMA to make an obligation for each permanent work project is October 2019. Every project undergoes a separate cost estimate process. “Disbursement” is money paid by FEMA to the Recipient (COR3), and then from the Recipient to the Subrecipient (PREPA), after a request for reimbursement is approved.

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<sup>4</sup> These numbers are for the entire island’s recovery, not just PREPA.

<sup>5</sup> <http://www.p3.pr.gov/assets/pr-draft-recovery-plan-for-comment-july-9-2018.pdf>.

<sup>6</sup> <https://www.hudexchange.info/programs/cdbg-dr/cdbg-dr-grantee-contact-information/#hurricanes-harvey-irma-and-maria-2017-events-pl-115-56-pl-115-72>.

<sup>7</sup> <https://www.fema.gov/news-release/2018/09/10/fact-sheet-obligated-funding-puerto-rico>.

<sup>8</sup> *Id.*

<sup>9</sup> Public Assistance is defined in the Stafford Act, 42 U.S.C. § 5172, as “The President may make contributions to a State of local government for the repair, restoration, reconstruction, or replacement of a public facility damaged or destroyed by a major disaster and for associated expenses incurred by the government; and ... to a person that owns or operates a private nonprofit facility damaged or destroyed by a major disaster for the repair, restoration, reconstruction, or replacement of the facility and for associated expenses incurred by the person.”

<sup>10</sup> Pursuant to Executive Order 2018-11, issued by Governor Rosselló on March 20, 2018, COR3 is designated as the “Grantee” or the “Recipient” in the FEMA State Agreements for FEMA’s Public Assistance and Hazard Mitigation Grant Assistance Programs under Hurricane Irma, DR-4336, and Hurricane Maria, DR-4339.

FEMA provides all of its assistance from the DRF. In FY 2017-2018, the U.S. Congress appropriated \$50 billion for the DRF through three disaster related bills, for which funds are expected to be spent in Puerto Rico and at least seven other states and the U.S. Virgin Islands.<sup>11</sup> According to the latest congressional monthly report, updated as of November 20, 2018, the DRF balance currently stands at \$13.74 billion. There is no express limitation, from FEMA or Congress, on Puerto Rico accessing funds from the remaining DRF balance as long as it is in accordance with eligibility requirements (*See* Chapter Two- Eligibility and Process of Puerto Rico Recovery). Hurricanes Florence and Michael, which struck mainland U.S. during the 2018 storm season (September 14, 2018; October 10, 2018 respectively), and the recent California wildfires will likely affect available funding and access thereto, given increased needs for emergency funding. However, historically, anytime the balance of the DRF has dwindled, Congress has prioritized appropriations to replenish it.

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<sup>11</sup> PL 115-56, PL 115-72, and PL 115-119.

*Puerto Rico FEMA Obligations and Disbursement for ALL of Puerto Rico as of 12-10-18:<sup>12</sup>*

<b>FEMA Categories - Public Assistance</b>	<b>Total Obligated</b>	<b>Total Disbursed</b>	<b>% Disbursed</b>
Municipalities	\$ 318,212,742	\$ 153,705,578	48.3%
Private Non-Profit	3,797,605	2,522,001	
Agencies	288,174,490	123,895,397	43.0%
<b>Category A - Debris Removal</b>	<b>610,184,837</b>	<b>280,122,976</b>	<b>45.9%</b>
Municipalities	120,528,030	68,350,992	56.7%
Private Non-Profit	17,699,061	13,514,801	76.4%
Agencies	3,331,836,942	1,854,314,534	55.7%
<b>Category B - Protective Measures</b>	<b>3,470,064,033</b>	<b>1,936,180,327</b>	<b>55.8%</b>
Municipalities	823,828	-	0.0%
Agencies	135,000,000	32,400,000	24.0%
<b>Category C - Roads and Bridges</b>	<b>135,823,828</b>	<b>32,400,000</b>	<b>23.9%</b>
Municipalities	-	-	n/a
Private Non-Profit	422,563	-	0%
Agencies	15,711,258	1,344,560	8.6%
<b>Category E - Buildings and Equipment</b>	<b>16,133,821</b>	<b>1,344,560</b>	<b>8.3%</b>
Municipalities	8,550	8,550	100%
Agencies	180,054,868	21,115	0.0%
<b>Category F - Utilities</b>	<b>180,063,418</b>	<b>29,665</b>	<b>0.0%</b>
Municipalities	5,942,517	-	0.0%
Agencies	244,899	91,899	37.5%
<b>Category G - Parks, Recreational Facilities, and Other Items</b>	<b>6,187,416</b>	<b>91,899</b>	<b>1.5%</b>
Municipalities	11,683,521	-	0.0%
Private Non- Profit	95,595	-	0.0%
Agencies	156,539,643	11,821,436	7.6%
<b>Category Z - Recipient and State Mgm</b>	<b>168,318,759</b>	<b>11,821,436</b>	<b>7.0%</b>
Municipalities	457,199,188	222,065,120	48.6%
Private Non-Profit	22,014,824	16,036,802	
Agencies	4,107,562,100	2,023,888,941	49.3%
<b>TOTAL</b>	<b>\$ 4,586,776,112</b>	<b>\$ 2,261,990,863</b>	<b>49.3%</b>

As of December 10, 2018, FEMA had obligated to PREPA over \$1.87 billion in Public Assistance, of which \$1 billion already has been disbursed. These funds are for the emergency protective measures taken before, during, and immediately after the storm. The majority of assistance from FEMA for PREPA will be for permanent work.

*Puerto Rico FEMA Obligations and Disbursement for PREPA as of 12-10-2018:*

<b>Total Obligated</b>	<b>Total Disbursed</b>	<b>% Disbursed</b>
<b>\$1,877,184,618</b>	<b>\$1,089,154,845</b>	<b>58.02%</b>

<sup>12</sup> For the most up-to-date figures on obligations and disbursements see the COR3 Transparency Portal at <https://recovery.pr/en/home.aspx>.

PREPA is in the process of reaching an agreement on a cost-estimate from FEMA for obligation of these additional funds for permanent work.<sup>13</sup> COR3 and PREPA are currently working with various energy sector partners to develop the Energy System Modernization Plan, a formal document to summarize the goals and objectives for transformation of Puerto Rico's electric system (the "ESM Plan"). The ESM Plan will be submitted to FEMA on or about January 31, 2019. The ESM Plan includes an estimate of costs to complete the work necessary to restore the PREPA system, which encompasses Federal funding and also other available or potentially available resources. The expectation is that COR3, PREPA and FEMA will use the ESM Plan to further efforts to define the eligible scope of work and cost estimate which will support the Federal funding to be awarded by FEMA. COR3 and PREPA are working with FEMA to agree to a scope of work and cost estimate before the Partnership Contract is signed. An estimated \$24 billion is required to fully and permanently reconstruct Puerto Rico's energy sector.<sup>14</sup> The Private Party will be required to cooperate with COR3 and PREPA and support these efforts including support to finalize the scope of work and cost estimate if necessary.

The Private Party may be expected to cooperate with COR3, PREPA, the Grant Manager, as applicable, and any other implicated partners to effectively and efficiently apply the approved Federal funding to the T&D System including implementation of the ESM Plan.<sup>15</sup> The ESM Plan is expected to be uploaded to the Data Room along with any information on the agreed-to scope of work and cost estimates for Federal funding to the extent this information is available before the RFP closes.

### **C. CDBG**

Congress, through HUD, has appropriated for Puerto Rico a total of \$19.9 billion in post-hurricane assistance through its CDBG-DR program. These funds will be disbursed in several tranches.

HUD approved the Action Plan for the first appropriation of \$1.5 billion on July 29, 2018. On September 20, the Governor of Puerto Rico and the HUD Secretary formally executed the first grant agreement.

- The first tranche grants \$1 billion toward restoring damaged homes, including \$145 million for economic revitalization and workforce training, and \$100 million for infrastructure development and matching funds for FEMA public assistance and hazard mitigation grants. No funds have yet been disbursed from this first tranche per latest available data.<sup>16</sup>

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<sup>13</sup> See Chapter Two.

<sup>14</sup> See PREPA Transformation CIM.

<sup>15</sup> The ESM Plan is expected to be published in the Data Room as soon as available.

<sup>16</sup> <https://www.hudexchange.info/resources/documents/CDBG-DR-Financial-Report-2018-11-01.pdf>.



The second appropriation of \$8.2 billion was announced on April 10, 2018 and is intended to provide additional funds to the programs of the first tranche with an expanded area of scope, through the addition of a multi-sector program.<sup>17</sup>

- On November 18, 2018, the Government of Puerto Rico submitted to HUD a draft Action Plan for the second tranche. As of the date of this summary, the Action Plan is pending HUD approval.<sup>18</sup>
- Per the draft Action Plan, the second tranche allocates \$900 million for “FEMA coordination” to “leverage CDBG-DR funding to ease local cost share burden” by providing “all or a portion of the non-federal share” for permanent work under FEMA Categories C-G.<sup>19</sup> “This funding mechanism provides the local requirement of matching the FEMA federal funding for identified projects, while easing the financial burden on Puerto Rico.”<sup>20</sup>

The remaining \$10.28 billion balance should be distributed to Puerto Rico in future tranches. Of the amount committed to Puerto Rico by HUD, Congress has specifically appropriated \$2 billion through CDBG-DR “for improved electrical power systems in areas impacted by Hurricane Maria.”<sup>21</sup> These funds, to be shared between Puerto Rico and the U.S. Virgin Islands, have been appropriated but are not yet obligated.<sup>22</sup> HUD will set forth the general conditions of use for these funds in a future notice published in the Federal Register. The Government of Puerto Rico will develop a draft Action Plan for HUD approval prior to obligation and disbursement of this special purpose funding.

#### **D. Other Funding<sup>23</sup>**

In addition to DRF and CDBG-DR funds, FEMA reports that Puerto Rico has received \$434 million supplemental funding from U.S. Federal agencies including the U.S. Environmental Protection Agency, U.S. Department of Transportation, the U.S. Army Corps of Engineers, U.S. Customs and Border Patrol, the U.S. Defense Logistics Agency, the U.S. Coast Guard and other agencies for disaster related recovery.

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<sup>17</sup> The Multi-sector program includes City Revitalization and Puerto Rico by Design (PR Design-Build) and more information can be found on page 188 of the Action Plan here: [http://www.cdbg-dr.pr.gov/wp-content/uploads/downloads/111618\\_PRDOH%20Action%20Plan\\_Substantial%20Amendment.pdf](http://www.cdbg-dr.pr.gov/wp-content/uploads/downloads/111618_PRDOH%20Action%20Plan_Substantial%20Amendment.pdf).

<sup>18</sup> <http://www.cdbg-dr.pr.gov/en/action-plan/>.

<sup>19</sup> See page 179, [http://www.cdbg-dr.pr.gov/wp-content/uploads/2018/09/AP\\_Amendment\\_EN\\_for\\_Comment-2](http://www.cdbg-dr.pr.gov/wp-content/uploads/2018/09/AP_Amendment_EN_for_Comment-2).

<sup>20</sup> See page 180, [http://www.cdbg-dr.pr.gov/wp-content/uploads/downloads/111618\\_PRDOH%20Action%20Plan\\_Substantial%20Amendment.pdf](http://www.cdbg-dr.pr.gov/wp-content/uploads/downloads/111618_PRDOH%20Action%20Plan_Substantial%20Amendment.pdf).

<sup>21</sup> <https://www.federalregister.gov/documents/2018/08/14/2018-17365/allocations-common-application-waivers-and-alternative-requirements-for-community-development-block>.

<sup>22</sup> The apportionment of sums between PR and USVI is pending formal confirmation <https://www.federalregister.gov/documents/2018/08/14/2018-17365/allocations-common-application-waivers-and-alternative-requirements-for-community-development-block>.

<sup>23</sup> See <https://recovery.pr/en/RecoveryOtherMain.aspx>.

Puerto Rico has access to “steady-state” funding from ongoing pre-disaster Federal grants. The Governor’s recovery plan, “Transformation and Innovation in the Wake of Devastation: An Economic and Disaster Recovery Plan for Puerto Rico,” estimates this amount to be \$9.4 billion a year, of which \$300 million per year may be redirected toward disaster recovery efforts.<sup>24</sup>

## **II. Chapter Two: Eligibility and Process of Puerto Rico Recovery**

FEMA administers programs under authority provided in the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended (“Stafford Act”) Title 42 U.S.C. § 5121 et seq., and implemented through the Code of Federal Regulations, primarily Title 44, Emergency Management and Assistance, and 2 C.F.R. Part 200, the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (“Super Circular” or “Omni Circular”). FEMA has also issued various guidance, policies, and management aids to provide greater detail regarding its eligibility rules, requirements, and processes.

The Government of Puerto Rico is eligible for Federal funds from FEMA in the following categories:

- **FEMA: Public Assistance**<sup>25</sup> (“PA”)

Categories:

Emergency Work:

A: Debris Removal

B: Emergency Protective Measures

Permanent Work:

C: Roads and Bridges

D: Water Control Facilities

E: Public Buildings and Contents

F: Public Utilities

G: Parks, Recreational, and other Facilities

- **FEMA: Hazard Mitigation**

**404** Hazard Mitigation<sup>26</sup>- FEMA 404 Hazard Mitigation funding is used to provide protection to undamaged parts of an eligible facility or to prevent or

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<sup>24</sup> See page 164, <http://www.cdbg-dr.pr.gov/wp-content/uploads/2018/09/Transformation-and-Innovation-document.pdf>.

<sup>25</sup> FEMA Public Assistance funding will be distributed in accordance with eligibility determinations, cost-share, and Sec. 428 procedures. See Version 3 of the Public Assistance Program and Policy Guide, at 9 (FP 104-009-2/April 2018) (“PAPPG”).

<sup>26</sup> Section 404, Stafford Act (42 U.S.C. § 5170c).

reduce damages caused by future disasters and is referred to as the Hazard Mitigation Grant Program (“HMGP”).<sup>27</sup>

**406 Hazard Mitigation**<sup>28</sup> - FEMA’s 406 Hazard Mitigation funds are distributed under Public Assistance grants and are applied to the parts of an eligible facility that were damaged by the disaster and the mitigation measure directly reduces the potential of future, similar disaster damages to such eligible facility.<sup>29</sup>

**Current Estimates of FEMA Funding for ALL of Puerto Rico**<sup>30</sup>

FEMA Public Assistance (A&B)	FEMA Public Assistance (C-G) (includes 406 mitigation)	FEMA HMGP (404)
\$4 Billion <sup>31</sup>	Estimated \$26- 36 Billion <sup>32</sup>	\$163 million

PREPA is eligible for Public Assistance and Hazard Mitigation (both 404 and 406). As of December 10, 2018, FEMA has obligated \$1.87 billion in funding for PREPA emergency work, of which \$1 billion already has been disbursed to PREPA. PREPA is in the process of agreeing to a cost-estimate with FEMA for obligation of permanent work funds. The ESM Plan is expected to provide more specific estimates of Federal funding applicable to restoration and reconstruction of the T&D System.

**A. FEMA ELIGIBILITY GENERALLY:**

FEMA evaluates legal responsibility of a Subrecipient/Applicant based on whether the Subrecipient/Applicant has legal responsibility for the facility and work at the time of the declared event. However, an eligible governmental or non-profit entity must continue to be the eligible Subrecipient/Applicant in order to maintain funds and successfully closeout the project with FEMA. For FEMA disaster assistance funding to be successfully retained, PREPA must continue to be the Subrecipient/Applicant of funds. The only exception would be transfer of ownership to another entity eligible for this Federal funding and such a transfer would require FEMA’s pre-approval. A Grant Manager may be authorized to help seek, administer, and apply Federal funding for the restoration and reconstruction of the T&D System and related costs. A trust or other account may be established to receive funds from FEMA, through COR3, and release those funds as necessary.

<sup>27</sup> See 44 C.F.R. § 206.434.

<sup>28</sup> Section 406, Stafford Act (42 U.S.C. § 5172).

<sup>29</sup> See Public Assistance Alternative Procedures (Section 428) Guide for Permanent Work (FEMA-4339-DR-PR) at 14-15 (April 2018).

<sup>30</sup> Dates current as of December 2018, for the most up to date figures See: <https://recovery.pr/en/home.aspx>.

<sup>31</sup> <https://recovery.pr/en/home.aspx>.

<sup>32</sup> <http://www.p3.pr.gov/assets/pr-draft-recovery-plan-for-comment-july-9-2018.pdf>.

Each Request for Reimbursement (“RFR”) must include documentation that evidences compliance with all Federal grant requirements, including the four components of eligibility discussed below and Federal procurement procedures discussed in Chapter Three. Any contract for costs expected to be reimbursed by FEMA must be procured consistent with these requirements and must include all necessary federal considerations and clauses. Costs incurred to restore the facilities that are not in compliance with the applicable Federal requirements including those specific to procurement, will be at risk for denial of reimbursement or recoupment by the Federal government.

The four basic components of eligibility are: Applicant, Facility, Work and Cost.<sup>33</sup>

### **i. Applicant Eligibility**

Pursuant to 44 C.F.R. § 206.222, state and local governments, among others, are eligible to apply for assistance under a Public Assistance grant.

PREPA was created pursuant to the Puerto Rico Electric Power Authority Act, which describes it as a “public corporation and governmental instrumentality of the Government of Puerto Rico”.<sup>34</sup> Moreover, PREPA has operated publicly since 1941. In 1981, PREPA acquired another public electric system, which effectuated the consolidation of all Puerto Rico public power systems under one entity.<sup>35</sup> PREPA now operates throughout Puerto Rico and is the sole provider of electric service in Puerto Rico. PREPA is considered a state agency under FEMA regulations governing its Public Assistance and Hazard Mitigation programs. Further, FEMA’s Procurement Disaster Assistance Team (“PDAT”) has concurred that PREPA should be treated as a State under the procurement requirements of Part 200.<sup>36</sup>

Throughout the construction and repair of PREPA’s T&D System, PREPA, or another eligible entity as approved by FEMA, must remain the Subrecipient/Applicant in order to preserve eligibility for Federal funding, and all grant requirements, including procurement, will be applicable to all federal grant funding spent.<sup>37</sup>

### **ii. Facility Eligibility**

The components of PREPA’s T&D System are considered “eligible facilities” under the Stafford Act and FEMA regulations, but only if the repair, restoration, and reconstruction of

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<sup>33</sup> Version 3 of the Public Assistance Program and Policy Guide, at 9(FP 104-009-2/April 2018) (“PAPPG”).

<sup>34</sup> 22 L.P.R.A. § 193.

<sup>35</sup> See PREPA (or “Autoridad de Energia Electrica de Puerto Rico”) official website, available at <https://www.aeepr.com/INVESTORS/History.aspx>.

<sup>36</sup> PDAT Compliance Review Memo on PREPA Contact Amendment No. 5 to Emergency Master Services Agreement for PREPA’s Electrical Grid Repairs with Cobra Acquisitions, LLC (February 12, 2018) states: “PREPA is a state agency of the Government of Puerto Rico and is therefore required to follow the federal procurement rules outlined at 2 C.F.R. § 200.317.”

<sup>37</sup> See Chapter Three.

those facilities is the legal responsibility of an eligible Subrecipient/Applicant. The eligibility for funding to repair, restore or replace damaged facilities is set forth in Stafford Act Section 406, 42 U.S.C. § 5172(a)(1), which provides “The President may make contributions to a State or local government for the repair, restoration, reconstruction, or replacement of a public facility damaged or destroyed by a major disaster and for associated expenses incurred by the government.”<sup>38</sup>

“Public Facility” is defined in Stafford Act Section 102(10), 42 U.S.C. § 5122(10), which states, “Public facility means the following facilities owned by a State or local government” which includes “any flood control, navigation, irrigation, reclamation, public power, sewage treatment and collection, water supply and distribution, watershed development, or airport facility”, “any non-Federal-air street, road, or highway”, “any other public building, structure, or system, including those used for educational, recreational, or cultural purposes”, or “any park.”<sup>39</sup> The PREPA T&D System is eligible because it is owned, and will continue to be owned, by PREPA, a state agency, and it is a public facility that provides public power.

### iii. Work eligibility

If an eligible facility, such as PREPA’s T&D System, is damaged or destroyed by a declared disaster event such as Hurricane Maria, then the work which is necessary to repair, restore, reconstruct, or replace that facility, in accordance with FEMA regulations and policies, is eligible work as long as it was the legal responsibility of an eligible Subrecipient/Applicant at the time of the event.<sup>40</sup>

Version 3 of the Public Assistance Program and Policy Guide (FP 104-009-2/April 2018) (“PAPPG”)<sup>41</sup> is the applicable FEMA policy providing guidance regarding work eligibility. It states:

To be eligible, work must be the legal responsibility of the Applicant requesting assistance.

...To determine legal responsibility for facility restoration, FEMA evaluates whether the Applicant claiming the costs had legal responsibility for disaster-related restoration of the facility at the time of the incident based on ownership and the terms of any written agreements (such as for facilities under construction, leased facilities and facilities owned by a Federal agency).

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<sup>38</sup> 44 C.F.R. § 223, General Work Eligibility, states that, to be eligible for federal disaster funding, the item of work must be required as a result of the major disaster event, be located in a designated disaster area, and “**be the legal responsibility of an eligible applicant.**” (Emphasis added).

<sup>39</sup> Emphasis added.

<sup>40</sup> Emphasis added.

<sup>41</sup> at 20.

When an Applicant requests PA funding to restore a facility, it is the Applicant's responsibility to provide proof that it owns the facility. To determine ownership, FEMA may review deeds, title documents, and local government tax records...

...Ownership of a facility is generally sufficient to establish the Applicant's legal responsibility to restore the facility, provided it is not under construction by a Contractor or leased to another entity at the time of the incident.

The Partnership Contract is expected to grant the Private Party certain rights and responsibilities associated with the T&D System, including but not limited to managing, operating, maintaining, rehabilitating, repairing, refurbishing, replacing, improving, expanding and financing, as needed, the T&D System. Puerto Rico law requires the Government to retain title to its real property assets related to the T&D System, which will preserve eligibility for disaster funds from Hurricanes Irma and Maria with respect to such assets.

In order for work to be eligible for FEMA funding, it must be the legal responsibility of an eligible Subrecipient/Applicant at the time of the event. In the event of a future federally declared disaster, federal disaster assistance from FEMA will only be eligible to the extent that FEMA determines the facility and work is the legal responsibility of an eligible applicant/subrecipient. FEMA will look at ownership as an indicator of legal responsibility, however, where legal responsibility for the required restoration work has been transferred by contract to an ineligible party, eligibility for the work may be lost.

#### **iv. Cost Eligibility**

In accordance with the PAPPG, "to be eligible, costs must be:

- Directly tied to the performance of eligible work;
- Adequately documented;
- Reduced by all applicable credits, such as insurance proceeds and salvage values;
- Authorized and not prohibited under Federal, State, Territorial, Tribal, or local government laws or regulations;
- Consistent with the Applicant's internal policies, regulations, and procedures that apply uniformly to both Federal awards and other activities of the Applicant; **and**
- Necessary and reasonable to accomplish the work properly and efficiently."<sup>42</sup>

As discussed below in more detail in Chapter Three of this White Paper, FEMA will not reimburse unreasonable costs.

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<sup>42</sup> Version 3 of the Public Assistance Program and Policy Guide, at 21-22 (FP 104-009-2/April 2018) ("PAPPG").

## **B. PUERTO RICO**

On October 30, 2017, the Government of Puerto Rico elected to participate in alternative procedures for all large project funding for Public Assistance Categories C-G for Hurricane Maria permanent work. For Emergency Work, Public Assistance Categories A and B, the Federal Cost share is 100%. For Permanent Work, Public Assistance Categories C-G, the Federal Cost is 90% and the Subrecipient share is 10%.<sup>43</sup>

In April 2018, FEMA published the “Public Assistance Alternative Procedures (Section 428) Guide for Permanent Work (FEMA-4339-DR-PR) (April 2018) (the “428 Guide”).” The 428 Guide is applicable only to Hurricane Maria large permanent work projects in Puerto Rico. Due to the close proximity of Hurricanes Irma and Maria, the following guidance was published: “any permanent work started before 12:00 am on September 17, 2017 will be attributed to DR-4336, using the traditional PA procedures. Any work started after that time, regardless of whether the work was required by Hurricane Irma or Hurricane Maria, will be attributed to DR-4339 and will follow the procedures established in this guide.”<sup>44</sup>

All permanent work for PREPA will follow the 428 Guide and are described below.<sup>45</sup>

### **i. FEMA Process**

#### **a. Overview**

Under the 428 Guide, FEMA will fund all permanent work for large projects on the basis of fixed estimates. The alternative procedures do not change the Public Assistance eligibility requirements for applicants, facilities, or work.<sup>46</sup> The current deadline set to agree on a fixed estimate is October 2019.<sup>47</sup>

Generally, there are three (3) steps to these alternative procedures: 1) project formulation 2) use of the funding, and 3) subaward closure.

#### **b. Step One: Project Formulation**

The 428 Guide states that “project formulation includes identifying Damage Descriptions and Dimensions (“DDD”), determining eligible Scopes of Work (“SOW”) including Section 406 Hazard Mitigation Proposals (“HMP”), and developing cost estimates.”<sup>48</sup> The project formulation process is designed to be collaborative among FEMA, the FEMA Technical Assistance Contractors (“TAC”), the Recipient (COR3), and Subrecipients. PREPA is the

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<sup>43</sup> Public Assistance Alternative Procedures (Section 428) Guide for Permanent Work (FEMA-4339-DR-PR) at 3 (April 2018).

<sup>44</sup> *Id.*

<sup>45</sup> Unless this 428 Guide is updated or superseded by FEMA in the future.

<sup>46</sup> *Id.* at 7.

<sup>47</sup> *Id.* at 12. (“within 18 months of the date of publication of this guide” in April, 2018).

<sup>48</sup> *Id.* at 8.

Subrecipient of the FEMA funds; the Private Party may be expected to assist in seeking funding, administering sub-grants to PREPA, documenting compliance with grant conditions, and handling audits of project expenditures.<sup>49</sup>

During the SOW and cost estimate formulation FEMA will also undertake Environmental and Historical Preservation (“EHP”) considerations. The 428 Guide states “EHP compliance review will proceed as soon as SOWs have been established and agreed upon. This can occur prior to agreement on cost estimates or concurrently, and prior to formally documenting DDDs, SOWs, and HMPs in FEMA’s Public Assistance system of record.”<sup>50</sup>

Also during the SOW and cost estimate formulation, FEMA will review 404 and 406 hazard mitigation opportunities for the project. The 428 Guide states, “when the 404 and 406 mitigation grants apply to the same facility and the 406 hazard mitigation SOW is changed after the fixed-cost subaward has been agreed to, the 404 grant shall be re-evaluated in accordance with 44 C.F.R. § 206.434.”<sup>51</sup>

Finally, insurance reductions will be based on actual or anticipated proceeds for the disaster-damaged facility.<sup>52</sup>

The 428 Guide states that FEMA licensed professionals, in collaboration with local professionals, will develop cost estimates using appropriate application of cost estimating methodologies developed by its operational center of excellence for the US territories. The 428 Guide states that “FEMA will collaborate with local engineering professionals, particularly those professional architects and engineers hired by Subrecipients to do the design work (i.e. develop plans and specifications or similar contract documents) for reconstruction, and utilize local engineering reports to inform the development of DDDs, SOWs, HMPs, and cost estimates. FEMA will also collaborate with engineering, technical, and other project formulation professionals representing the Recipient.”<sup>53</sup> Cost estimates above \$5 million are subject to validation by a third-party independent expert panel.”<sup>54</sup> Any project where FEMA and the Recipient and/or Subrecipient cannot reach agreement on the cost estimate may also be reviewed by the panel.

After FEMA certifies an estimate, the Recipient, COR3 and Subrecipient, PREPA, will review and discuss any issues or concerns with FEMA. Based on the discussions, FEMA may adjust the estimate.

Allowable costs include, architectural, engineering, environmental review and design fees, construction and other restoration and reconstruction costs, 406 hazard mitigation, and

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 15.

<sup>51</sup> *Id.* at 14.

<sup>52</sup> *Id.* at 16.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 10.



Direct Administrative Costs (“DAC”). Once FEMA, COR3, and PREPA agree to the fixed estimate for the subaward, or the panel issues its finding, there will be no further adjustment, with the exception of insurance adjustments.”<sup>55</sup>

After the fixed cost estimate has been agreed to, no further adjustments to the cost estimate is permitted, with the exception of insurance adjustments and adjustments for approved SOW changes associated with 406 Hazard Mitigation Proposals.<sup>56</sup>

The current deadline to agree to the cost estimate is October 2019.<sup>57</sup>

#### **d. Step Two: Use of Funding**

The Private Party shall be subject to federal grant requirements, including procurement requirements, for any use of grant funds.<sup>58</sup>

The 428 Guide states, “the Recipient or Subrecipient may use funds from the fixed-cost subawards for:

- Repair, restoration, or replacement of disaster-damaged facilities and equipment;
- Construction of new facilities to include land acquisition;
- Purchase of equipment; or
- Measures that reduce future risk.”<sup>59</sup>

Any 406 mitigation funds that are included in the fixed-cost subaward, must be used for the approved SOW of the HMP in order to retain that funding.<sup>60</sup>

An improved or alternate project may be used, but the Recipient or Subrecipient must notify FEMA.<sup>61</sup> The proposed work on the T&D System is anticipated to be an alternate project that will result in an improved grid. The T&D System is not intended to be built exactly as was constructed before the declared disaster. This will require the Private Party to coordinate construction plans with COR3, PREPA and FEMA. If there is a change to the FEMA approved SOW, changes must be approved by both FEMA and the Puerto Rico Energy Bureau (“PREB”) before any changes to the SOW are initiated or procured.<sup>62</sup>

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<sup>55</sup> *Id.* at 12.

<sup>56</sup> *Id.*

<sup>57</sup> The 428 Guide states “In order to expedite assistance, agreement on the cost estimate of each project must be reached within 18 months of the date of publication of this guide.” The 428 Guide was published in April 2018.

<sup>58</sup> See more information regarding Procurement in Chapter Three.

<sup>59</sup> Public Assistance Alternative Procedures (Section 428) Guide for Permanent Work (FEMA-4339-DR-PR) at 16 (April 2018).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 17.

<sup>62</sup> See Puerto Rico Electricity Sector Regulatory Framework White Paper in Data Room.

RFRs must be based on invoices received and paid on contracts related to the FEMA approved SOW for the T&D System. The Private Party may be expected to cooperate with COR3, any of its representatives or assigns, and the Grant Manager, as applicable, to ensure accuracy and sufficient supporting documentation. Upon approval of the RFR, COR3 would be able to deposit funds into a trust or other account, and those funds would be used to make any applicable reimbursements.

#### **e. Step Three: Subaward Closure**

In order to complete subaward closure, PREPA, or its designee, must submit to the Recipient (COR3) a final report of project costs. The Private Party may be expected to assist with coordinating the necessary information with COR3, PREPA, the Grant Manager, and/or FEMA. The 428 Guide states “review of this report will not result in additional funding for fixed-cost subawards under the alternative procedures, nor a reduction in funding if the Recipient or Subrecipient elects to use excess funds for allowable purposes. The final report should include documentation supporting the following components:

- Actual work completed with fixed-cost subaward funds;
- Mitigation measures achieved, if applicable;
- Compliance with EHP conditions and requirements to obtain insurance;
- Total actual costs to complete the project;
- Compliance with Federal procurement procedures; and
- Actual insurance proceeds received by the Recipient or Subrecipient.”<sup>63</sup>

#### **ii. PREPA Status**

As previously discussed, COR3 and PREPA have developed the ESM Plan which includes a plan for the full restoration and reconstruction of the T&D System and will be submitted to FEMA on or about January 31, 2019. The ESM Plan is based on intensive damage assessments and provides a comprehensive and resilient energy grid project. The ESM Plan includes the full cost estimate of all necessary funding, which encompasses FEMA funding. The expectation is that COR3, PREPA and FEMA will have used the ESM Plan to agree to a SOW and cost estimate on or before October 2019 and before the Partnership Contract is signed. The ESM Plan estimates a total of about \$24 billion will be required to fully and permanently reconstruct Puerto Rico’s energy sector. The Private Party will be expected to assist with the implementation of the ESM Plan as well as any additional SOW details agreed to with PREB and FEMA. Any exceptions or changes to the ESM Plan/SOW that become necessary must be processed through COR3 and approved by the PREB and FEMA before any deviations from the ESM Plan can be implemented.

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<sup>63</sup> *Id.* at 19.

### **C. HUD**

Congress, through HUD, has appropriated for Puerto Rico a total of \$19.9 billion in post-hurricane assistance through its CDBG-DR program. HUD approved the first Action Plan on July 29, 2018, and the related Grant Agreement (for the corresponding \$1.5 billion appropriation) was signed September 20, 2018. A second Action Plan that includes an additional \$8.2 billion has not yet been approved by HUD.<sup>64</sup> Each Action Plan defines eligible programs and disbursement process of CDBG-DR funds.<sup>65</sup>

CDBG-DR funds must be used for necessary expenses related to disaster relief, long-term recovery, and restoration of infrastructure, housing, and economic development. Each CDBG-DR activity must: address a disaster-related impact (direct or indirect) in a Presidentially declared area, be a CDBG eligible activity, and meet a CDBG national objective. The national objectives include: benefiting low-and moderate income (LMI) persons, aiding in the prevention or elimination of slums or blight, or meeting a need having particular urgency (urgent need), such as the restoration and mitigation of Puerto Rico's T&D System.

CDBG-DR funds may be used toward the FEMA non-Federal cost share if the project supports HUD eligible activities defined under section 105(a)(9) of the Housing and Community Development Act (HCDA) of 1974.<sup>66</sup> CDBG-DR funds used pursuant to HMGP programs must "meet a national objective," accomplish a CDBG-DR eligible activity, and meet FEMA HMGP requirements.<sup>67</sup> The restoration and mitigation of damaged infrastructure, such as the public energy grid, is generally considered to meet these requirements.

CDBG-DR funding may also be available for a Workforce Training Program. The Action Plan states that "funds will be administered through units of local government, nonprofit organizations, and governmental and quasi-governmental agencies who will be invited to propose workforce training programs that best serve the needs of the recovery.

Furthermore, of the overall amount committed to Puerto Rico by HUD, Congress has specifically appropriated \$2 billion through CDBG-DR "for improved electrical power systems in areas impacted by Hurricane Maria." These funds, to be shared between Puerto Rico and the U.S. Virgin Islands, have been appropriated but are not yet obligated. HUD will set forth the general conditions of use for these funds in a future notice published in the Federal Register. The Government of Puerto Rico will develop a draft Action Plan for HUD approval prior to obligation and disbursement of this special purpose funding.

## **III. Chapter Three: Procurement under 2 C.F.R. Part 200**

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<sup>64</sup> <http://www.cdbg-dr.pr.gov/en/schedule/>.

<sup>65</sup> The most updated Action Plan can be found here: <http://www.cdbg-dr.pr.gov/en/action-plan/>.

<sup>66</sup> Version 3 of the Public Assistance Program and Policy Guide, at 41(FP 104-009-2/April 2018) ("PAPPG").

<sup>67</sup> See page 178, [http://www.CDBG-DR-dr.pr.gov/wp-content/uploads/2018/09/AP\\_Amendment\\_EN\\_for\\_Comment-2.pdf](http://www.CDBG-DR-dr.pr.gov/wp-content/uploads/2018/09/AP_Amendment_EN_for_Comment-2.pdf).

Any work related to the T&D System, the cost of which may be submitted for Federal funding, shall be separately procured in full compliance with Applicable Law, including but not limited to the procurement rules set forth in 2 C.F.R. Part 200 and applicable to PREPA. All contracts procured in whole or in part with FEMA funds must have PREPA as a party to allow submission of costs. The applicable federal regulations are located in the *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards*, at 2 C.F.R. §§ 200.317 through 200.326 (“Uniform Rules”).

As indicated in Chapter One, FEMA has determined that PREPA is a State under the procurement requirements of Part 200. As a consequence, all procurements entered into by or on behalf of PREPA, for costs to be claimed for federal reimbursement, must be compliant with 2 C.F.R. § 200.317.

Pursuant to 2 C.F.R. § 200.317, Procurements by states:

When procuring property and services under a Federal award, a state must follow the same policies and procedures it uses for procurements from its non-Federal funds. The state will comply with § 200.322 Procurement of recovered materials and ensure that every purchase order or other contract includes any clauses required by section § 200.326 Contract provisions. All other non-Federal entities, including subrecipients of a state, will follow §§ 200.318 General procurement standards through 200.326 Contract provisions.

“State” is defined in 2 C.F.R. § 200.90 as follows:

any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any agency or instrumentality thereof exclusive of local governments.

#### **A. Required Compliance with PREPA and COR3 Policy - 2 C.F.R. § 200.317**

Throughout the construction and repair of PREPA’s T&D System, PREPA will remain the Subrecipient/Applicant and all grant requirements, including procurement, will be applicable to all costs that may be eligible for reimbursement from Federal grant funding.

Although PREPA is expected to maintain legal ownership of certain T&D assets, the Private Party may nonetheless be expected to comply with Puerto Rico’s procurement laws, PREPA Procurement Policy, and 2 C.F.R. § 200.317.

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This White Paper gives a very brief overview of 2 C.F.R. § 200.317 requirements. Proponents are encouraged to review the COR3 and PREPA Procurement Policy located in the Data Room<sup>68</sup> as well as a review of 2 C.F.R. and HUD and FEMA policy on Procurement.<sup>69</sup>

PREPA currently has the following procurement policies:<sup>70</sup>

- 1. Procedimiento para las Compras por Solicitud de Cotizaciones u Ofertas Exentas del Proceso de Subasta Formal de la AEE / *Procedure for RFQs or Procurements Exempt from PREPA's Formal Competitive Bid Process:***  
Procedure for procurements that do not have to undergo a “formal” competitive bid process and be awarded by PREPA’s Permanent Bid Committee. Act 83, as amended, establishes that PREPA should acquire material, equipment and services via a competitive sealed bid process and also establishes the exemptions from such processes.
- 2. Reglamento de Subastas - *Formal Competitive Bid Regulation:***  
As established in Act 83, this is the regular procurement process. This is the process used for requisitions that are over \$200,000 and not covered by any of the exemption in Act 83. The process is a competitive sealed bid process.
- 3. Manual Administrativo Capitulo 500 – Compras - *PREPA's Administrative Manual / Chapter 500 – Procurement:***  
PREPA’s Administrative Manual, Chapter 500 provides the structure and responsibilities of each office with regards to procurement process.
- 4. Manual para la Adquisición de Bienes y Servicios en Emergencia Decretada por el Director Ejecutivo - *Manual for Emergency Procurement of Goods and Services (for Emergencies Declared by PREPA's CEO):***  
Defines PREPA’s procurement processes when an emergency is declared by PREPA’s CEO, to mitigate the effects that the emergency could have on our Operations. This manual defines emergency purchases, defines what is considered an emergency and the factors that have to be present for the CEO to declare an emergency.
- 5. Norma Sobre Niveles de Aprobación de Documentos de la AEE - *PREPA's Standard for Approval Levels of Documents:***  
The purpose of this document is to maintain transparency in PREPA’s administrative processes, simplify decision making, and help control costs. It defines who, by position

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<sup>68</sup> Policies will be uploaded to the Data Room as soon as available.

<sup>69</sup> FEMA Procurement resources can be found here: <https://www.fema.gov/procurement-disaster-assistance-team>; HUD Procurement resources can be found here: <https://www.hudexchange.info/trainings/courses/2017-cdbg-dr-updates-and-clarifications-to-procurement-requirements-for-states-at-2-cfr-200-webinar/1916/>.

<sup>70</sup> These policies have not been reviewed by Baker Donelson and information on each policy has been provided by Ankura.

and by quantity or dollar amount, at PREPA approves budgets, fund transfers, requisitions, contracts, amendments to contracts, per diems, sales, etc.

COR3, as the Recipient/Grantee and pass-through entity, has the authority to review and approve each procurement completed by the Private Party prior to contract completion when the resulting costs will be partly or wholly reimbursed using Federal funding. COR3 also has the authority to review the associated contracts prior to execution and any Federal funding disbursed.

### **C. Requirements of the Cost Principles**

FEMA requires that all costs claimed by PREPA be compliant with the Cost Principles of 2 C.F.R. 200 Subpart E, which include the requirement that all costs be reasonable and well documented.

**Cost or Price Analysis.** Although the requirement for applicants to conduct a price or cost analysis to ensure cost reasonableness does not apply to PREPA, because it is considered a “State” under the Uniform Rules, the Private Party may be required to work with PREPA and COR3 personnel as necessary to prepare an independent cost estimate prior to opening proposals and a cost or price analysis upon opening them. While pre-procurement cost estimates and cost or price analyses may not be required by the Uniform Rules, FEMA is prohibited by regulation and the applicable Cost Principles from reimbursing unreasonable costs. Conducting such analyses will help ensure there is support for any request for reimbursement.

**Full and open competition required.** All procurement transactions must be conducted in a manner providing full and open competition, which FEMA considers to mean publicly solicited (except if specifically not required), where all interested potential contractors are permitted to compete. The following list provides examples of conduct considered restrictive:

- Placing unreasonable requirements on firms in order for them to qualify to do business.
  - Requiring unnecessary experience and excessive bonding.
  - Allowing noncompetitive pricing practices between firms or between affiliated companies, e.g., bid suppression or bid rigging.
  - Awarding noncompetitive contracts to consultants that are on retainer contracts, e.g., out-of-scope disaster work added to the consultant’s work on retainer.
  - Awarding contracts subject to any actual or apparent organizational conflicts of interest.
  - Specifying only a “brand name” product instead of allowing “an equal” product to offered and describing the performance or other relevant requirements of the procurement.
  - Including any arbitrary action in the procurement process.
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**Geographical preference prohibited.**<sup>71</sup> FEMA prohibits non-State applicants/subrecipients from imposing any state or local geographic preference in the evaluation of bids or proposals.<sup>72</sup> While this is not a direct prohibition as to PREPA, because it is deemed to be a State for procurement compliance purposes, the Private Party must avoid any action that may be overly restrictive of competition or give the impression that all respondents will not be given an opportunity to complete. Examples of geographic preferences include:

- Exclusion of contractors from outside the geographic area;
- Allowing in-state or local vendors within a certain range of the lowest bid to match the lowest bid;
- Reducing bids from in-state or local vendors by a certain percentage for evaluation purposes;
- Adding weight to evaluation factors for in-state or local vendors.

**Solicitation requirements.** All solicitations should incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured and identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.<sup>73</sup>

Any work related to the T&D System, the cost of which may be submitted for Federal funding, shall be separately procured in full compliance of these above listed cost principles.

#### **D. Types of Contracts**

Any solicitations for work related to the T&D System, the cost of which may be submitted for Federal funding, should state the type of contract that will be awarded. The following types of contracts are compliant with FEMA procurement standards:

- Fixed Price/Lump Sum – provides a clearly defined SOW and a price that remains fixed irrespective of the actual cost of performing the work.. May include an economic price adjustment, incentives, or both.
- Unit Price – work is done on an item-by-item basis, with cost determined per unit with a not to exceed amount set.
- Cost Reimbursement – provides for payment of certain incurred costs and for the reimbursement of reasonable, allocable, actual, and allowable costs, with an agreed-upon fee. Must include a limit to the costs that may be incurred, and such limit may not be

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<sup>71</sup> 2 C.F.R. § 200.319(b).

<sup>72</sup> Geographic preferences are generally not allowed under FEMA grants. However, when contracting for architectural and engineering (A/E) services, geographic location may be a selection criterion provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

<sup>73</sup> 2 C.F.R. § 200.319(c).

exceeded without approval, except at the contracting parties' own risk. Examples include cost-plus-fixed-fee, cost-plus-incentive-fee, and cost-plus-award-fee contracts.

- Time and Materials or Time and Equipment – cost to an applicant/subrecipient is the sum of direct labor hours charged at fixed hourly rates that reflect wages, general administrative expenses, and profit, plus the cost of materials or equipment.<sup>74</sup> Certain conditions precedent must be met before this contract may be used.<sup>75</sup> These contracts are generally discouraged by FEMA, but are allowable under certain conditions. Even where their use is unavoidable (e.g., for emergency debris removal), such use should be limited to only that time period for which the applicant is not able to define a clear SOW.<sup>76</sup>
- **Warning:** Cost Plus a Percentage of Cost – the use of cost plus a percentage of cost and cost plus a percentage of construction costs methods of contracting are prohibited for Federal contracts.<sup>77</sup> The following characteristics are suggestive of a prohibited cost plus percentage of cost contract: (1) payment is on a predetermined percentage rate; (2) the predetermined percentage rate is applied to actual performance costs; (3) entitlement is uncertain at the time of contracting; and (4) entitlement increases commensurately with increased performance costs.<sup>78</sup> This type of contract risks FEMA reimbursement.

#### **E. Required Contract Provisions - 2 C.F.R. § 200.326**

Contracts funded in whole or in part with Federal funds must include the following contract provisions:

- Remedies. Contracts exceeding \$150,000 must address administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for sanctions and penalties.
- Termination for cause and convenience. Contracts exceeding \$10,000 must address termination for cause and for convenience, including the manner by which it will be effected and the basis for settlement.
- Equal employment opportunity. “Federally assisted construction contracts” must include the equal opportunity clause provided under 41 C.F.R. § 60-1.4(b). “Federally assisted construction contract” is defined 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

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<sup>74</sup> FEMA Supplement to Public Assistance PDAT Field Manual (June 21, 2016) at IV-10.

<sup>75</sup> 2 C.F.R. § 200.318(j).

<sup>76</sup> FEMA Supplement to Public Assistance PDAT Field Manual (June 21, 2016) at IV-11.

<sup>77</sup> 2 C.F.R. § 200.323(d)

<sup>78</sup> FEMA Supplement to Public Assistance PDAT Field Manual (June 21, 2016) at V-24.



Government for a grant, contract, loan, insurance, or guarantee under which the applicant itself participates in the construction work. “Construction work” is defined 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.

- **Contract Work Hours and Safety Standards Act.** Contracts exceeding \$100,000 and involving the employment of mechanics or laborers must include a Contract Work Hours and Safety Standards clause. The text of the required clause is provided at 29 C.F.R. § 5.5(b).
  - **Clean Air Act and the Federal Water Pollution Control Act.** Contracts exceeding \$150,000 must include a provision requiring the Private Party to comply with all applicable standards, orders, or regulations issued pursuant to the Clean Air Act and the Federal Water Pollution Control Act.
  - **Suspension and debarment.** The regulations prohibit awards, subawards, and contracts to or with certain parties that are debarred, suspended, or otherwise excluded from or ineligible for participation in Federal assistance programs and activities. FEMA requires all contracts include a provision requiring compliance with debarment and suspension prohibitions.
  - **Byrd Anti-Lobbying Amendment.** All contracts must include a provision addressing the Byrd Anti-Lobbying Amendment. For contracts exceeding \$100,000, bidders or proposers must also file an anti-lobbying certification, found at Appendix A to 44 C.F.R. Part 18.
  - **Procurement of recovered materials.** All contracts by state agencies or agencies of a political subdivision of a state must include a provision requiring its contractors to comply with Section 6002 of the Solid Waste Disposal Act.
  - **Changes.** FEMA recommends that all contracts include a clause 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.
  - **Access to records.** All contracts must include a provision requiring contractors and their successors, transferees, assignees, and subcontractors agree to comply with applicable provisions governing Department of Homeland Security (“DHS”) and FEMA access to records, accounts, documents, information, facilities, and staff.
  - **DHS seal, logos, and flags.** All contracts must contain a prohibition against a Private Party using DHS seals, logos, and flags without specific FEMA pre-approval.
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- Compliance with Federal law, regulations, and Executive Orders. All contracts must require contractors to acknowledge that FEMA financial assistance will be used to fund the contract along with the requirement that the Private Party will comply with all applicable federal law, regulations, executive orders, and FEMA policies, procedures, and directives.
- No obligation by the Federal Government. All contracts must include a provision stating that the Federal Government is not a party to the contract and is not subject to any obligations or liabilities of PREPA, the Private Party, or any other party pertaining to any matter resulting from the contract.
- Program Fraud and False or Fraudulent Statements or Related Acts. All contracts are required to include a provision whereby the Private Party acknowledges that 31 U.S.C. Chapter 38 (Administrative Remedies for False Claims and Statements) applies to the Private Party's actions pertaining to the contract.
- Davis Bacon Act and Copeland "Anti-Kickback" Act. Prime construction contracts in excess of \$2,000 must include a provision for compliance with the Davis Bacon Act and the Copeland "Anti-Kickback" Act. These provisions are not required for contracts funded exclusively by FEMA's Public Assistance or Hazard Mitigation Grant Programs, among others. The provisions are required for contracts funded by HUD's CDBG program. If CDBG funds are used concurrent to the FEMA funds in a contract (such as applying CDBG funds to satisfy the local cost-share amount), these provisions should be included in the contract.

## **F. Bonding Requirements for Construction or Facility Improvement Contracts**

For construction or facility improvement contracts or subcontracts bond requirements are carried out under the PREPA enabling act (22 L.P.R.A. § 205). If the procurement is exempt from the bidding requirement, PREPA may, but is not required to, request a performance bond and, if the contract is in excess of \$150,000, also a payment bond (*See* Procedimiento para Compras por Solicitud de Cotizaciones u Ofertas Exentas del Proceso de Subasta Firma de la Autoridad de Energía Eléctrica de Puerto Rico). If a bid process is required, PREPA must request a bid bond of 10% of the bid price. (*See* Reglamento de Subasta). In those cases, PREPA's internal manuals also require that PREPA request a performance bond and a payment bond.

## **G. Compliance with Recovered Materials Requirements - 2 C.F.R. § 200.322**

As a "State" under the regulations, PREPA, or any party expending FEMA grant funds that have been designated for the restoration and reconstruction of the T&D System and related costs, must also comply with 2 C.F.R. § 200.322, which requires compliance with § 6002 of the Solid Waste Disposal Act, i.e., (1) procuring only items designated in guidelines of the EPA that contain the highest percentage of recovered materials practicable, consistent with maintaining a

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satisfactory level of competition, where the purchase price of the item exceeds \$10,000; (2) procuring solid waste management services in a manner that maximizes energy and resource recovery; and (3) establishing an affirmative procurement program for the procurement of recovered materials identified in the EPA guidelines. The EPA-designated items include:

- **Construction Products:** Building insulation, Carpet (polyester), Carpet cushion, Cement and concrete, Consolidated and reprocessed latex paint, Floor tiles, Flowable fill, Laminated paperboard, Modular threshold ramps, Nonpressure pipe, Patio blocks, Railroad grade crossing surfaces, Roofing materials, Shower and restroom dividers/partitions, Structural fiberboard, Proposed: Nylon carpet and nylon carpet backing
- **Landscaping Products:** Compost and fertilizer made from recovered organic materials, Garden and soaker hoses, Hydraulic mulch, Lawn and garden edging, Plastic lumber landscaping timbers and posts
- **Miscellaneous Products:** Awards and plaques, Bike racks, Blasting grit, Industrial drums, Manual-grade strapping, Mats, Pallets, Signage, Sorbents
- **Nonpaper Office Products:** Binders, Clipboards, File folders, Clip portfolios, Presentation folders, Office furniture, Office recycling containers, Office waste receptacles, Plastic desktop accessories, Plastic envelopes, Plastic trash bags, Printer ribbons, Toner cartridges
- **Paper and Paper Products:** Commercial/industrial sanitary tissue products, Miscellaneous papers, Newsprint, Paperboard and packaging products, Printing and writing papers
- **Park and Recreation Products:** Park benches and picnic tables, Plastic fencing, Playground equipment, Playground surfaces, Running tracks
- **Transportation Products:** Channelizers, Delineators, Flexible delineators, Parking stops, Traffic barricades, Traffic cones
- **Vehicular Products:** Engine coolants, Rebuilt vehicular parts, Re-refined lubricating oils, Retread tires

## H. Compliance with the Buy American Act

Domestic content restrictions are provisions which require that items purchased by federal agencies be mined, produced or manufactured in the United States. The Buy American Act (“BAA”) generally requires federal agencies and other covered entities to purchase “domestic end products” and use “domestic construction materials” on contracts that exceed a purchase threshold and are performed in the United States, including Puerto Rico. The Act states that:

Every contract for the construction, alteration, or repair of any public building or public work in the United States shall contain a provision that

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in the performance of the work the Private Party, subcontractors, material men, or suppliers shall use only --

(1) unmanufactured articles, materials, and supplies that have been mined or produced in the United States; and

(2) manufactured articles, materials, and supplies that have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured in the United States.<sup>79</sup>

The BAA defines the terms “public building,” “public use,” and “public work” as a public building of, use by, and a public work of, the Federal Government, the District of Columbia, American Samoa, the Virgin Islands, and *Puerto Rico*.<sup>80</sup> To paraphrase 41 U.S.C. §8303, a BAA provision must be included in every contract for the repair of any public work of PREPA unless a determination by PREPA, or by the Government of Puerto Rico in a determination applicable to PREPA, is made that an exception applies.

PREPA, or an agency of the Government of Puerto Rico authorized to review exceptions for work performed for PREPA (Agency), will consider any exception presented by the Private Party, but the Private Party must present and support to PREPA/ the Agency the applicability of such an exception. The exceptions are generally as follows: (1) where PREPA or the Agency determines American sourced materials are unavailable; (2) where PREPA/ the Agency determines use of American sourced materials would unreasonably increase the cost; and (3) where PREPA/ the Agency determines their purchase to be inconsistent with the public interest.

## **I. Other General Grant Requirements**

In addition to the procurement requirements above, there are other general grant requirements mandatory for compliance. This includes completing work in established regulatory timeframes, or requesting times extension as appropriate, and compliance with EHP requirements.

In order to maintain the grant, subawards must be properly closed after the approved SOW is completed. In order to do so, a final report of project costs must be submitted, which report includes documentation supporting the following components:

- Actual work completed with fixed-cost subaward funds;
- Mitigation measures achieved, if applicable;
- Compliance with EHP conditions and requirements to obtain insurance;

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<sup>79</sup> 41 U.S.C. § 8303(a).

<sup>80</sup> 41 U.S.C. § 8301(1).

- Total actual costs to complete the project;
- Compliance with Federal Procurement procedures; and
- Actual insurance proceeds received by the Recipient or Subrecipient.<sup>81</sup>

All documentation related to the T&D System that involves in whole or in part Federal funding must be retained for a minimum of three years after COR3 has certified the final expenditure report for the T&D System project completion.

## **J. Risks of Noncompliance**

Failure to comply with the applicable federal procurement requirements can result in full or partial denial of funding at the time a request for reimbursement is made or adverse audit findings by the DHS's Office of Inspector General ("DHS-OIG") or the HUD's Office of Inspector General ("HUD-OIG") sometimes years later, that trigger deobligation (revocation) of funding already provided and spent.

FEMA has broad authority with respect to the remedies it can impose. The regulations provide that FEMA can do one or more of the following:

- (a) Temporarily withhold cash payments pending correction of the deficiency.
- (b) Disallow (that is, deny both use of funds and any applicable matching credit for) all or part of the cost of the activity or action not in compliance.
- (c) Wholly or partly suspend or terminate the Federal award.
- (d) Initiate suspension or debarment proceedings (against an offending Private Party).
- (e) Withhold further Federal awards for the project or program.
- (f) Take other remedies that may be legally available.<sup>82</sup>

Under FEMA's programs, the Grantee of the funds, here COR3, also has a stake in enforcement of compliance as it has duties to enforce requirements and also bears risk, since the obligation and deobligation of FEMA funds flows through it to the applicant (here PREPA). As such, the regulations provide that the Grantee may also apply any of the remedies above.

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<sup>81</sup> *Public Assistance Alternative Procedures (Section 428) Guide for Permanent Work* (FEMA-4339-DR-PR) at 19 (April 2018)

<sup>82</sup> 2 C.F.R. § 200.338.

Further, the regulations place an affirmative duty on the Grantee to consider taking such actions upon a finding of noncompliance.<sup>83</sup>

#### **K. Additional Requirements related to PREPA**

Pursuant to the Contract Review Policy of the Financial Oversight and Management Board for Puerto Rico (the “FOMB”), as modified July 3, 2018, any contract that is proposed to be entered into by the Government of Puerto Rico, or any covered instrumentality with an aggregate expected value of \$10 million or more, including a contract that involves FEMA funding, must be submitted to the FOMB for approval before its execution.<sup>84</sup>

#### **L. Additional Requirements of HUD-CDBG-DR Funding**

Most procurement regulations apply regardless of the source of the federal funding. There are, however, some specific regulations governing procurement under a CDBG-DR award. First, PREPA, or any other party, when procuring any work related to the T&D System, the cost of which may be submitted for Federal funding, must comply with PREPA’s procurement policy that requires open and full competition for all services and goods for which procurement applies under the federal guidelines. This includes compliance with the standards of conduct for employees involved in the award or administration of contracts, along with a dispute resolution procedure.

All RFPs under a CDBG-DR funded program must include a standard list of federal statutes, regulations and orders that will govern the funding, including incorporating the section 3 clause set forth in 24 CFR § 135.32. All subsequent contracts awarded must also include a standard list of federal statutes, regulations and orders that will govern the funding, including incorporating the section 3 clause set forth in 24 CFR § 135.32. This may be added as an addendum or exhibit to the contract, but must be fully included and not simply referenced. Additionally, the parties administering CDBG-DR contracts must obtain a certification from all contractors that the principals and the entity are not debarred, ineligible, or excluded from participation in the federal program.

Professional services must be contracted through a RFP method of solicitation that contains the selection criteria (including cost) and must be advertised. If CDBG-DR administrative funds are not being used to pay for these services, only state laws must be followed.

As mentioned in Required Contract Provisions, Section E above, construction contracts in excess of \$2,000 that are funded in whole or in part with CDBG-DR funds must include a provision for compliance with the Davis Bacon Act and the Copeland “Anti-Kickback” Act.

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<sup>83</sup> See 2 C.F.R. § 200.331.

<sup>84</sup> See Puerto Rico Electric Power Authority Private-Public Partnership Title III Transformation White Paper in the data room.

## IV. Chapter Four: Resources

### Law:

- The Robert T. Stafford Act, as Amended (Stafford Act), Title 42 of the United States Code § 5121 et seq.
  - Disaster Recovery Reform Act of 2018
  - Puerto Rico Executive Order 2018-11
  - Housing and Community Development Act of 1974
  - 41 U.S.C. § 8301
  - 41 U.S.C. § 8303
  - Clean Air Act and the Federal Water Pollution Control Act
  - Byrd Anti-Lobbying Amendment
  - Section 6002 of the Solid Waste Disposal Act
  - 31 U.S.C. Chapter 38
  - Davis Bacon Act and Copeland “Anti-Kickback” Act
  - National Environmental Policy Act
  - National Historic Preservation Act, as Amended
  - Archeological and Historic Preservation Act
  - Endangered Species Act
  - Fish and Wildlife Coordination Act
  - Wild and Scenic Rivers Act
  - Wilderness Act
  - Farmland Protection Act
  - Section 10 Rivers and Harbors Act
  - Executive Order 11988, Floodplain Management
  - Executive Order 11990, Protection of Wetlands
  - Executive Order 12898, Environmental Justice for Low Income and Minority Population
  - Puerto Rico Electric Power Authority Act
  - Public Law 115-56
  - Public Law 115-72
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- Public Law 115-119

Regulation:

- Title 44 of the Code of Federal Regulations
- Title 2 of the Code of Federal Regulations
- Title 41 of the Code of Federal Regulations
- Title 29 of the Code of Federal Regulations
- Title 24 of the Code of Federal Regulations

Policy:

- Public Assistance Program and Policy Guide (FP 104-009-2/April 2018) (“PAPPG”)
- Public Assistance Alternative Procedures (Section 428) Guide for Permanent Work (FEMA-4339-DR-PR) at 19 (April 2018)
- Hazard Mitigation Assistance Guidance, Hazard Mitigation Grant Program, Pre-Disaster Mitigation Program, and Flood Mitigation Assistance Program (February 27, 2015)
- Procurement Guidance for Recipients and Subrecipients under 2 C.F.R. Part 200 (Uniform Rules) Supplement to the Public Assistance Procurement Disaster Assistance Team (PDAT) Field Manual (June 21, 2016)
- Puerto Rico Disaster Recovery Action Plan
- PREPA Procurement Policy

Online Resources (these are not uploaded to the Data Room):

- <https://www.recovery.pr/en/home.aspx>.
  - <http://www.p3.pr.gov/assets/pr-draft-recovery-plan-for-comment-july-9-2018.pdf>.
  - <https://www.hudexchange.info/programs/cdbg-dr/cdbg-dr-grantee-contact-information/#hurricanes-harvey-irma-and-maria-2017-events-pl-115-56-pl-115-72>.
  - <https://www.fema.gov/news-release/2018/09/10/fact-sheet-obligated-funding-puerto-rico>.
  - <http://www.cdbg-dr.pr.gov/en/action-plan/>.
  - <https://www.federalregister.gov/documents/2018/08/14/2018-17365/allocations-common-application-waivers-and-alternative-requirements-for-community-development-block>.
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- <https://www.aeepr.com/INVESTORS/History.aspx>.
  - <https://www.fema.gov/procurement-disaster-assistance-team>.
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