Questions per Puerto Rico Public-Private Partnership Authority
Communication to Qualified Respondents
dated September 16, 2019

1. Can the hazard mitigation proposals, cost estimates, and scopes of work shared with FEMA, and/or those internally developed by COR3/PREPA and its consultants, be added to the data room soon as possible and iteratively updated?

2. Can all draft Project Worksheets ("PWs") provided by FEMA be added to the data room as soon as possible and iteratively updated?

3. Please provide the one obligated PW and associated statement of work and cost estimate.

4. Please confirm that PREPA/COR3 does not intend that the Operations and Maintenance (O&M) Agreement is a FEMA compliant procurement.

5. Please confirm, if the O&M Agreement is not a FEMA compliant procurement that the costs of labor provided by employees of Operator, ServCo, OpCo, and/or their affiliates:

   a. are not costs to be submitted and recovered under a FEMA, HUD or other federal grant for Capital Projects, Storm Costs, Non-Storm Emergencies, or other projects that could be reimbursed with federal grant funds?

   b. are costs that will be funded from a Front-End Transition Account, from a Capital Account – Non-Federally Funded, as a Pass-Through Expenditure or from a Back-End Transition Account without using federal funds?

6. If you have confirmed that the O&M Agreement is not a FEMA compliant procurement, then will you be amending the RFP Section 2.5 to remove the following sentence: **"To the extent the Authority and PREPA determine to submit any of the costs incurred under the Partnership Contract for Federal reimbursement, the Qualified Respondent will be required to comply with all applicable Federal certifications, terms and conditions. The Partnership Contract will include, as applicable, the contract provisions required by 2 CFR 200.326 and FEMA and HUD guidance."**

7. Are any work rules, CBA requirements or other prohibitions on PREPA hiring third party labor to perform capital work contemplated to be paid for by Federal Funding? If so, please explain.

8. Please confirm that the employees of Operator, ServCo, OpCo and/or their affiliates are not "force account labor." See 44 CFR 206.221(b).

9. Please confirm that Operator is to award "Contracts" for O&M services as agent for Owner.

10. Please confirm that Contracts awarded by Operator as agent for Owner (a state agency) ("agent for" contracts) are "Contracts" as that term is defined in 2 CFR 200.22.

11. Please confirm that "System Contracts" to be entered into by Operator as agent for Owner are "Contracts" as that term is defined in 2 CFR 200.22. See O&M Article 1.1 and 5.2

12. Please confirm that the System Contracts to be entered into by Operator as agent for Owner can be used to procure all types of O&M Services as those services are defined in the O&M Agreement. Compare definition of "Subcontract" with "System Contract" in O&M Article 1.1.

13. Please confirm that the O&M Agreement is a "Partnership Contract" as that term is defined in Act 29, that Operator is a "Contractor" as that term is defined in Act 29, but that the Partnership Contract is not a "Contract" as that term is defined in 2 CFR 200.22 and Operator is not a "Contractor" as that term is defined in 2 CFR 200.23.

14. Consistent with the above items regarding Contracts and Contractors, please confirm that O&M Article 11, currently entitled Subcontractors, should be revised to "Contractors" and the text revised to reflect the requirements to be established for Contractors and the "agent for" relationship and/or consistent provisions established for Contractors that are procured under "agent for" Contracts. The O&M Agreement could identify other arrangements that may not be procured or paid for with PREPA or federal funding but for the use and benefit solely of Operator as Operator contracts, this might include, for example a management consulting contract that is paid for out of the Operator's fixed fee. This comment seeks to clarify that there are three basic type of arrangements: (1) existing System Contracts that may or may not be FEMA Compliant, with the understanding that all future Systems Contracts would become "agent for" Contracts; (2) "agent for" Contracts that are FEMA Compliant; and (3) Operator contracts that would not be "agent for" contracts and <u>would not be funded by PREPA or FEMA</u>.

15. Please confirm:

    a. that Federal Funding Procurement Manual (FFPM) will establish the guidelines to be applied and the contract provisions to be included in Contracts,

    b. that FFPM will be reviewed and/or approved by FEMA/PDAT (and potentially DHS OIG) prior to the completion of the Front End Transition Period and as a condition Precedent to Service Commencement Date, and

    c. that actions taken and costs incurred in accordance with the FFPM that are subsequently disallowed will be treated as Pass-Through Expenditures and **not** "Disallowed Costs."

16. The current draft of the O&M Agreement creates a Storm Reserve Account and Storms are defined so that they do not include all types of Emergencies (e.g. landslides, solar flares, fires, man-made disasters) for which funding might be needed and/or available from FEMA/the federal government.

a. how do you envision funding Non-Storm Emergencies – could a reserve be created for Non-Storm Emergencies?

b. would you consider creating a Non-Storm Emergency definition and a process for providing funds/seeking funding from FEMA/others for Non-Storm Emergencies?

c. would you consider revising the O&M Agreement to create potentially several categories: Storm Event, Declared Storm Emergency or Major Disaster, Non-Storm Event, Declared Non-Storm Emergency or Major Disaster? The intent would be to create definitions that segregate between types of events (Storm/Non-Storm) and categories of events (Non-Declared and Declared) that tie to and are consistent with the Emergency Plan, the Stafford Act and implementing procurement, accounting, project management, polices, procedures and practices?

17. What, if any, procurement rules and/or contract clauses would be applicable if Operator wanted to use an arrangement with an affiliate other than ServCo or OpCo (an entity not a Party to the O&M Agreement) to perform work under the O&M Agreement that **was not funded by federal funds**? For example, if Operator would want to use an affiliate for certain tasks (emergency and/or non-emergency),

    a. would the affiliate have to compete with other potential Contractors?

    b. would the affiliate have to have included in its "Agreement" with Operator the same terms and conditions contained in a Contract between Operator and an "agent for" Contractor?

18. What, if any federal procurement rules and/or contract clauses would be applicable if Operator wanted to use an arrangement with an affiliate other than ServCo or OpCo (an entity not a Party to the O&M Agreement) to perform work under the O&M Agreement that **was funded by federal funds**?

    a. would the affiliate have to compete with other potential Contractors?

    b. would the affiliate have to have included in its "Agreement" with Operator the same terms and conditions contained in a Contract between Operator and an "agent for" Contractor?

19. Are the existing Systems Contracts in the data room in the file named "Commercial Contracts & Agreements?" Would Operator be expected/required to use the existing System Contracts in performing the O&M Agreement and the FEMA/HUD PWs?

20. Were the existing System Contracts procured in accordance with all Applicable Laws, including Federal procurement rules?

21. If Operator is required to use the existing Systems Contracts and the System Contracts were not procured in a FEMA compliant manner, would the costs of such contracts be treated as a

Pass-Through Expenditure not subject to disallowance for FEMA non-compliance?

22. As to disbursement of FEMA monies, will the monies be placed in an account that Operator will have access to immediately fund the FEMA obligated hazard mitigation program? If so, please describe the mechanics of drawing from the account and how much will be in the account at any time?

23. Has the risk of OIG/DHS overruling FEMA decisions regarding its review of PREPA procurement systems been addressed (e.g., Cobra audit findings) by PREPA, and, if so, where is this risk addressed in the O&M Agreement?

24. In light of the Cobra audit, will PREPA: (a) add to the O&M a Reserve Account to cover costs approved by FEMA that are subsequently questioned or disallowed by DHS OIG and/or (b) treat as Pass-Through Expenditures and not Disallowed Costs allowed by FEMA but subsequently questioned and/or disallowed by DHS OIG?

25. Has PREPA reserved funds if there is a disallowance as a result of the pending OIG audit of the Cobra contract? If so, how much? If not, please explain.

26. Explain the role of the Operator in each step of the Federal Funds process and how will the Operator interact with PR government officials/PREPA/Authority in seeking federal funds?

    For example, in the 5th Amendment to the RFP an evaluation criteria includes "procurement" of federal funds and in Section 5.9 it states that "The Parties shall cooperate and participate . . . in order to help seek, procure, administer, manage, deploy and apply and Federal Funding . . . ." Please explain:

    a. the role of the Operator in "procuring" these funds;

    b. the role of the Owner/COR3 in procuring these funds;

    c. what, if any, role Operator will have in "lobbying" to obtain funds for Puerto Rico/PREPA;

    d. what role Puerto Rico/PREPA will have in "lobbying" to obtain funds for the T&D system; and

    e. what commitments Owner will make to continue to work to obtain funding from the federal government that could be used for the T&D system.

27. If under the O&M/P3 agreement the Operator will be entering into the contracts with third parties as agent for PREPA for FEMA projects, has this been brought to FEMA's attention as a contracting methodology? If it has been brought to FEMA's attention, has FEMA addressed what procurement rules should apply to the "agent for" procurement process and "agent for" contracts? If it has not been brought to FEMA's attention, has PREPA considered the potential for developing and/or negotiating an "agent for" procurement process using the

authority of, for example, section 19(e) of Act 29.

Section19.—Inapplicability of Certain Laws

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(e) Exemption from Certain Requirements for Government Contracting.— All Government Entities that are parties to a Partnership are hereby exempted from compliance with the provisions on contracting and bidding contained in their Enabling Acts, and any pertinent special laws or corresponding regulation, including any obligation or requirement that compels contracting or bidding through the General Services Administration. As to Partnerships, only the provisions of the regulation adopted by the Authority under this Act shall apply. **Moreover, in consideration of the complexity of contracting in relation to Partnership Contracts, the Authority shall have the power to modify the representations that are included in government contracts, by law and regulation, to adjust them to the demands of the negotiation.** (Emphasis added).

28. Would Owner consider utilizing section 19 of Act 29 to create a more flexible process which increases the Operator's autonomy in operating the T&D System to give Owner the benefits of public ownership, including transparency and accountability, and the benefits of private party operation consistent with the objectives of a P3 Agreement? The Current O&M Agreement, in several instances, appears to weight the balance towards control by the Administrator, PREB and others that would unnecessarily inhibit the full benefits of a P3 Agreement. See for example, the following sections of the O&M Agreement that are out of balance with the goals of a public/private partnership that should be reconsidered: Sections 4.3, 4.9, 5.2(e), 5.6(f), 5.6(g), 5.13(c), 7.3(c), 7.3(e), 7.5(a)(iii), and 10.4. Could alternative balances be provided as alternative proposals for consideration as amendments to the O&M Agreement after selection and award during the Front-End Transition Period, and the provision, consideration, and cooperation in seeking approval of such proposals be included in the Front End Transition roles of Operator and Owner, and the adoption of a mutually agreeable proposal be included as a Condition Precedent to Service Commencement Date?

29. The term "Audit" is used in numerous places throughout the O&M Agreement that is inconsistent with an audit requirement. Have you considered making changes to the O&M Agreement to only use the term "Audit" where an audit would be expected applying prudent utility practices?

30. Can you make the Sargent and Lundy 10 year capital plan and Navigant report available for review in the data room?

31. System Remediation – In response to Qualified Respondent feedback, the revised O&M Agreement includes the new concept of a System Remediation Plan that will be established by the Parties during the Front-End Transition Period. This plan will set out (i) the elements of the T&D System that need to be remediated in order for Operator to provide the O&M Services in accordance with the Contract Standards and (ii) the agreed costs and time frame for such remediation. All Budgets approved from time to time will take into account the costs

of the System Remediation Plan until such time as the plan has been completed. (See §4.1(c), §5.4 and §18.6.)

Question: Given Operator will be preparing the System Remediation Plan, what if this plan is inconsistent with prior work that was completed by PREPA, including the Sargent &Lundy Capital plan report, the Navigant report, and/or the 58 FEMA PWs?

32. In Section 14.3(f) the undefined term "requisite funding" is used. What is the definition of this term?

33. In addition to the limitations on liability provided in the O&M Agreement would PREPA consider an "amnesty period" by which the Operator will not be subject to any liability for acts/omissions (including gross negligence or willful misconduct) of the ServCo workforce since this workforce?

34. Should the Fixed Fees and Incentive Fees be prefunded and placed in an account segregated from the Operating Account that Operator can draw from to pay itself when such payments come due?

35. Section 1.1. Force Majeure Event. The definition provides that certain events "may, but not necessarily will, include the follow acts, events or conditions:"

    a. who determines whether an event is a Force Majeure Event?

    b. How is this determination made?

36. Section 5.9(c). This section states in part that the "Owner and Operator will cooperate in good faith and take all steps reasonably required to ensure that Federal Funding Requirements including the requirements described in the Federal Funding Procurement Manual are met in those circumstances where Operator or any Operator Related Party bids for or otherwise seeks to perform Federally Funded Capital Improvements."

    a. what is the definition of "otherwise seeks to perform"?

    b. under what circumstances would the Operator

        i. have to bid to perform Federally Funded Capital Improvements?

        ii. Have to otherwise seek to perform Federally Funded Capital Improvements?

    c. under what circumstances would the Operator Related Party

        i. have to bid to perform Federally Funded Capital Improvements?

        ii. Have to otherwise seek to perform Federally Funded Capital Improvements?

37. Section 5.12. This section states that "Operator shall manage Owner's legal matters in respect of the O&M Services and Owner's related reporting obligation, including those services listed in Annex II." See Annex II. H. Please clarify that nothing in the O&M shall require, or shall be construed as requiring, the Operator to act as legal counsel to or to provide legal advice or representation to, Owner.

38. Section 7.7. Clarify that Operator's duty to continue to perform must be contingent on the availability of funding. Therefore, it is suggested that a close out or transition fund be maintained at all times to cover the costs of an orderly transition from Operator to another provider. Would Owner be amenable to including such a fund in the O&M Agreement?

39. Schedule 1 to Annex II. Why is a new term/concept of "System Operator" added by this document? Does Owner intend that "System Operator" have the same meaning as "Operator"?

40. Are there local agency and/or municipal hazardous substances release reporting requirements in addition to the federal CERCLA reporting requirements?

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