

REQUEST FOR LEGAL SERVICES

Date: March 8, 2024
From: Tom Cook, Chair
Water and Infrastructure Committee

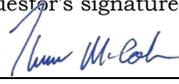
TRANSMITTAL

Memo to: DEPARTMENT OF THE CORPORATION COUNSEL
Attention: Michael J. Hopper, Esq.

Subject: BILL 41 (2024), INTERGOVERNMENTAL AGREEMENT WITH THE U.S. DEPARTMENT OF AGRICULTURE NATURAL RESOURCES CONSERVATION SERVICE RELATED TO THE KULANIHAKOI STREAM SEDIMENT REMOVAL EMERGENCY WATERSHED PROTECTION PROJECT (WAI-22)

Background Data: Please see revised bill. Please amend, if possible, the Recipient Organization on page 1 of Exhibit "1" to reflect the Department of Public Works. Please submit your response to wai.committee@mauicounty.us with a reference to WAI-22.

Work Requested: FOR APPROVAL AS TO FORM AND LEGALITY
 OTHER:

Requestor's signature  Tom Cook, Chair	Contact Person <u>Jarret Pascual or Richard E. Mitchell</u> (Telephone Extension: <u>7141 or 7662, respectively</u>)
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ROUTINE (WITHIN 15 WORKING DAYS) RUSH (WITHIN 5 WORKING DAYS)
 PRIORITY (WITHIN 10 WORKING DAYS) URGENT (WITHIN 3 WORKING DAYS)

SPECIFY DUE DATE (IF IMPOSED BY SPECIFIC CIRCUMSTANCES): March 13, 2024
REASON: For posting on the March 22, 2024, Council agenda.

FOR CORPORATION COUNSEL'S RESPONSE

ASSIGNED TO:	ASSIGNMENT NO.	BY:
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TO REQUESTOR: APPROVED DISAPPROVED OTHER (SEE COMMENTS BELOW)
 RETURNING--PLEASE EXPAND AND PROVIDE DETAILS REGARDING ITEMS AS NOTED

COMMENTS (NOTE - THIS SECTION NOT TO BE USED FOR LEGAL ADVICE): _____

DEPARTMENT OF THE CORPORATION COUNSEL

Date _____

By _____

(Rev. 7/03)

ORDINANCE NO. _____

BILL NO. 41, CD1 (2024)

A BILL FOR AN ORDINANCE AUTHORIZING THE MAYOR OF THE COUNTY OF MAUI TO ENTER INTO AN INTERGOVERNMENTAL AGREEMENT WITH THE U.S. DEPARTMENT OF AGRICULTURE NATURAL RESOURCES CONSERVATION SERVICE RELATED TO THE KULANIHAKOI STREAM SEDIMENT REMOVAL EMERGENCY WATERSHED PROTECTION PROJECT

BE IT ORDAINED BY THE PEOPLE OF THE COUNTY OF MAUI:

SECTION 1. Purpose. The U.S. Department of Agriculture Natural Resources Conservation Service (“NRCS”) and the County of Maui (“County”) wish to enter into an agreement for NRCS to provide technical and financial assistance for the Kulanihakoi Stream Sediment Removal Emergency Watershed Protection Project (“Project”) to the County. The Project will remove up to 30,000 cubic yards of sediment from Kulanihakoi Stream, or a total construction cost of \$3,219,000, whichever is reached first. NRCS will provide 75 percent of the estimated construction cost of up to \$2,414,250, and \$160,000 for technical assistance. The County has an approximate cost share of \$804,750 for a total estimated Project budget of \$3,379,000.

The Project’s purpose is to minimize loss of life and risk of property damage due to flooding. Sedimentation has occurred within the Kulanihakoi Stream and approximately 10 feet of material has been deposited within the channel.

The Notice of Grant Agreement and Award (“Agreement”) is attached as Exhibit “1” and incorporated by reference.

Additionally, paragraph 22 of the Agreement requires the County to indemnify and hold harmless NRCS as established in the Agreement.

SECTION 2. Council authorization. In accordance with Section 2.20.020, Maui County Code, the Council of the County of Maui authorizes the Mayor to execute the Agreement, all other necessary documents relating to the Agreement, and any amendments.

SECTION 3. Effective date. This Ordinance takes effect on approval.

APPROVED AS TO FORM AND LEGALITY:

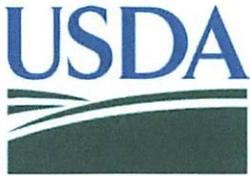
Department of the Corporation Counsel
County of Maui

wai:misc:022abill01:jpp

INTRODUCED BY:

A handwritten signature in cursive script, appearing to read "Charles R. Lee". The signature is written in black ink and is positioned above a horizontal line.

Upon the request of the Mayor.



U.S. Department of Agriculture
Natural Resources Conservation Service

EXHIBIT "1"

NRCS-ADS-093

NOTICE OF GRANT AND AGREEMENT AWARD

1. Award Identifying Number NR2492510002C001	2. Amendment Number	3. Award /Project Period Date of Final Signature - 05/05/2024	4. Type of award instrument: Cooperative Agreement
5. Agency (Name and Address) Natural Resources Conservation Service Pacific Islands Area State Office P.O. Box 50004 Honolulu, Hawaii 96850-0050		6. Recipient Organization (Name and Address) COUNTY OF MAUI DEPARTMENT OF WATER SUPPLY 200 S HIGH ST WAILUKU HI 96793-2155 UEI Number / DUNS Number: VJLZC958JLH6 / 077680155 EIN:	
7. NRCS Program Contact Name: Amy KOCH Email: amy.koch@hi.usda.gov	8. NRCS Administrative Contact Name: KAYLIE ALDERMAN Email: kaylie.alderman@usda.gov	9. Recipient Program Contact Name: Kristi Ono Phone: (808) 270-7745 Email: kristi.ono@co.maui.hi.us	10. Recipient Administrative Contact Name: Kristi Ono Phone: (808) 270-7745 Email: kristi.ono@co.maui.hi.us
11. CFDA 10.923	12. Authority 33 U.S.C. 701b-1	13. Type of Action New Agreement	14. Program Director Name: Ty Takeno Phone: 808-270-7434 Email: Ty.Takeno@co.maui.hi.us
15. Project Title/ Description: EWP DSR 15-02-23-5031-001-Sediment removal from Kulanihako'i Stream, located in Maui County, Hawaii.			
16. Entity Type: B = County Government			
17. Select Funding Type			
Select funding type:	<input checked="" type="checkbox"/> Federal	<input checked="" type="checkbox"/> Non-Federal	
Original funds total	\$2,574,250.00	\$804,750.00	
Additional funds total	\$0.00	\$0.00	
Grand total	\$2,574,250.00	\$804,750.00	
18. Approved Budget			

Personnel	\$0.00	Fringe Benefits	\$0.00
Travel	\$0.00	Equipment	\$0.00
Supplies	\$0.00	Contractual	\$0.00
Construction	\$2,414,250.00	Other	\$160,000.00
Total Direct Cost	\$2,574,250.00	Total Indirect Cost	\$0.00
		Total Non-Federal Funds	\$804,750.00
		Total Federal Funds Awarded	\$2,574,250.00
		Total Approved Budget	\$3,379,000.00

This agreement is subject to applicable USDA NRCS statutory provisions and Financial Assistance Regulations. In accepting this award or amendment and any payments made pursuant thereto, the undersigned represents that he or she is duly authorized to act on behalf of the awardee organization, agrees that the award is subject to the applicable provisions of this agreement (and all attachments), and agrees that acceptance of any payments constitutes an agreement by the payee that the amounts, if any, found by NRCS to have been overpaid, will be refunded or credited in full to NRCS.

Name and Title of Authorized Government Representative JB. Martin Director, Pacific Island Area	Signature	Date
Name and Title of Authorized Recipient Representative See attached signature page	Signature See attached signature page	Date

NONDISCRIMINATION STATEMENT

The U.S. Department of Agriculture (USDA) prohibits discrimination in all its programs and activities on the basis of race, color, national origin, age, disability, and where applicable, sex, marital status, familial status, parental status, religion, sexual orientation, genetic information, political beliefs, reprisal, or because all or a part of an individual's income is derived from any public assistance program. (Not all prohibited bases apply to all programs.) Persons with disabilities who require alternative means for communication of program information (Braille, large print, audiotope, etc.) should contact USDA's TARGET Center at (202) 720-2600 (voice and TDD). To file a complaint of discrimination write to USDA, Director, Office of Civil Rights, 1400 Independence Avenue, SW., Washington, DC 20250-9410 or call (800) 795-3272 (voice) or (202) 720-6382 (TDD). USDA is an equal opportunity provider and employer.

PRIVACY ACT STATEMENT

The above statements are made in accordance with the Privacy Act of 1974 (5 U.S.C. Section 522a).

COUNTY EXECUTION PAGE

This agreement is subject to applicable USDA NRCS statutory provisions and Financial Assistance Regulations. In accepting this award or amendment and any payments made pursuant thereto, the undersigned represents that he or she is duly authorized to act on behalf of the awardee organization, agrees that the award is subject to the applicable provisions of this agreement (and all attachments), and agrees that acceptance of any payments constitutes an agreement by the payee that the amounts, if any, found by NRCS to have been overpaid, will be refunded or credited in full to NRCS.

GRANTEE:

COUNTY OF MAUI

By _____
RICHARD T. BISSEN, JR.
Its Mayor

Date _____

APPROVAL RECOMMENDED:

JORDAN MOLINA
Director
Department of Public Works

Date _____

**APPROVED AS TO FORM
AND LEGALITY:**

MICHAEL J. HOPPER
Deputy Corporation Counsel
County of Maui

Date _____
LF2023-1911

Statement of Work

Purpose

The purpose of this agreement is for the United States Department of Agriculture, Natural Resources Conservation Service, hereinafter referred to as the "NRCS", to provide technical and financial assistance to County of Maui Department of Public Works, hereinafter referred to as the "Sponsor", for EWP Project 5031-001, Kulanihakoī Debris Removal, in Maui County, Hawai'i, for implementation of recovery measures that, if left undone, pose a risk to life and/or property.

Objectives

The objective of this agreement is to install Emergency Watershed Protection (EWP) measures as detailed in the individual Damage Survey Reports (DSR) and described here:

DSR 15-02-23-5031-001, titled Kulanihakoī Debris Removal EWP 5031-001, for sediment removal from Kulanihakoī Gulch, Maui County, Hawai'i within the EWP project limits identified in the report, up to a threshold value of 30,000 cubic yards or total construction cost of \$3,219,000.00, whichever is reached first.

Budget Narrative

The official budget described in this Budget Narrative will be considered the total budget as last approved by the Federal awarding agency for this award.

Amounts included in this budget narrative are estimates. Reimbursement will be based on actual expenditures, not to exceed the amount obligated.

Total Estimated Project Budget: \$3,379,000.00

This budget includes:

Financial Assistance (FA) Costs:

Construction Costs (75% NRCS \$2,414,250.00 + 25% Sponsor \$804,750.00): \$3,219,000.00

Technical Assistance (TA) Costs:

100% NRCS up to \$160,000.00

1. NRCS pays up to 75 percent of eligible construction costs and Sponsor pays 25 percent of eligible construction costs for work within the EWP project boundary. NRCS will contribute up to \$160,000 for the costs of construction management services. It is possible that construction management costs will exceed this amount, requiring the Sponsor to contribute additional funding to complete the construction management services. Other technical and agreement administration work required for the EWP construction activities will be paid by the Sponsor.
2. NRCS funding for this project is provided to the Sponsor in two separate NRCS funding accounts, one for financial assistance (FA) and one for technical assistance (TA). FA costs are associated with construction activities; TA costs are associated with services. These expenditures shall be accounted for separately in order for expenses to be eligible for reimbursement.
3. NRCS will provide FA for actual costs as reimbursement to the Sponsor for approved on-the-ground construction costs, subject to above limits. If costs are reduced, reimbursement will be reduced accordingly. Construction costs are associated with the installation of the project measures including labor, equipment, and materials.
4. NRCS will provide TA reimbursement to the Sponsor for contractual construction management service costs charged to the project, subject to the above limits. If costs are less than the limit, reimbursement will be reduced accordingly.
5. The Sponsor will contribute funds toward the total EWP construction costs in either direct cash expenditures, the value of non-cash materials or services, or in-kind contributions. The value of any in-kind contribution shall be agreed to in writing prior to implementation.

Responsibilities of the Parties:

If inconsistencies arise between the language in the Statement of Work (SOW) in the agreement and the General Terms and Conditions, the language in the SOW takes precedence.

SPONSOR RESPONSIBILITIES

1. Perform the work and produce the deliverables as outlined in this Statement of Work.
2. Comply with the applicable version of the General Terms and Conditions.
3. Accomplish construction of the EWP project measures by contracting, in-kind construction services, or a combination of both.
4. Ensure and certify by signing this agreement that its cost share obligation is from a non-Federal source.
5. Acquire adequate real property rights (land and water), permits and licenses in accordance with local, state, and Federal laws necessary for the installation of EWP project measures at no cost to NRCS prior to construction. This includes any rights associated with required environmental mitigation. Costs related to land rights and permits are the Sponsor's responsibility and ineligible for reimbursement.
6. Accept all financial and other responsibility for excess costs resulting from their failure to obtain, or their delay in obtaining, adequate land and water rights, permits and licenses needed for the Project.
7. Provide the agreed-to portion of the actual, eligible and approved construction cost. These costs may be in the form of cash, in-kind construction services, or a combination of both. Final construction items that are eligible construction costs will be agreed upon during the pre-design conference. These costs consist of costs from contracts awarded to contractors and eligible Sponsor in-kind construction costs for materials, labor, and equipment. The Sponsor shall provide NRCS documentation to support all eligible construction costs. Construction costs incurred prior to the Sponsor and NRCS signing this agreement are ineligible and will not be reimbursed.
8. Be responsible for 100 percent of all ineligible construction costs and 100 percent of any unapproved upgrade to increase the level of protection over and above that described in the DSR, to the extent such funds are allocated by the Maui County Council. Ineligible costs are costs not referenced in this agreement. The Sponsor is also responsible for all costs in excess of the federal cost-share in this agreement to the extent such funds are allocated by the Maui County Council. The County of Maui may not make commitments in excess of funds authorized by law or made administratively available.
9. Account for and report FA and TA expenditures separately in order for expenses to be eligible for reimbursement. NRCS funding for this project is provided to the Sponsor in two separate NRCS funding accounts, one for TA and one for FA, requiring this separation.
10. The contracts for design services and construction described in this Agreement shall not be awarded to the Sponsor or to any firm in which any Sponsor's official or any member of such official's immediate family has direct or indirect interest in the pecuniary profits or contracts of such firms. Reference 2 CFR § 200.318 regarding standards of conduct covering conflicts of interest and governing the performance of its employees engaged in the selection, award, and administration of contracts.
11. For in-kind construction services (materials, labor, and/or equipment supplied by the Sponsor), develop a Plan of Operations describing the construction services to be performed including estimated quantities and values. The Plan of Operations shall be concurred in by NRCS at the pre-design conference. In-kind construction services for equipment shall not exceed published FEMA equipment rates unless otherwise documented and concurred in advance by NRCS.
12. The following documentation is required to support the Sponsor's request for reimbursement of in-kind construction services:
 - a. Invoices covering actual costs of materials used in constructing the eligible EWP project measures.
 - b. Records documenting the type, quality, and quantities of materials actually used in constructing the eligible EWP project measures.
 - c. Daily time records for each employee showing name, classification, wage rate, hours, and dates actually employed for constructing the eligible EWP project measures.
 - d. Equipment operating records showing the type and size of equipment, hourly rate, actual hours of operation and dates used to install the eligible EWP project measures. Equipment idle time is not eligible in-kind construction services, even

if on the job site, and should not be included in the equipment operating records.

13. Ensure that any special requirements for compliance with environmental and/or cultural resource laws are incorporated into the project.

14. The Sponsor must secure at its own expense all Federal, State, and local permits and licenses necessary for completion of the work described in this agreement as well as any necessary natural resource rights and provide copies of all permits and licenses obtained to NRCS.

15. Will arrange and pay for any necessary location, removal, or relocation of utilities. EWP program regulations prohibit NRCS from reimbursing the Sponsor or otherwise paying for any such costs; nor do the costs qualify as a Sponsor cost-share contribution.

16. Ensure that technical and engineering standards and specifications of NRCS are adhered to during construction of the Project, as interpreted by NRCS Program/Technical Contact. Provide NRCS Program/Technical Contact progress reports as necessary and agreed to. Progress reports should include technical on-site inspections of work accomplished for the period, work planned, results of material tests, deficient work products and/or tests with corrective actions taken, modifications anticipated, technical problems encountered, contractual issues and other relevant information.

17. Ensure that all contractors on NRCS assisted projects are performing their work in accordance with OSHA regulations and the Contract Work Hours and Safety Standards Act (40 USC 3701-3708) as supplemented by Department of Labor regulations (29 CFR Part 5). The Sponsor is responsible for periodically checking the contractor's compliance with safety requirements.

18. Provide PE-certified as-built drawings and quantities for the project. A copy of the as-built drawings will be submitted to the NRCS Program/Technical Contact.

19. Pay the contractor(s) for all work performed in accordance with the agreement and submit a SF 270, "Request for Advance and Reimbursement," with all documentation to support the request. Payments will be withheld until all required documentation is submitted and complete.

20. Ensure that information in the System for Award Management (SAM) is current and accurate until the final financial report (SF-425) under this award or final payment is received, whichever is later.

21. Take reasonable and necessary actions to dispose of all contractual and administrative issues arising out of the contract(s) awarded under this Agreement. This includes, but is not limited to disputes, claims, protests of award, source evaluation, and litigation that may result from the Project. Such actions will be at the expense of the Sponsor, including any legal expenses. The Sponsor will advise and consult with NRCS on any litigation matters in which NRCS could have a financial interest.

22. Sponsor must indemnify and hold NRCS harmless to the extent permitted by State law for any costs, damages, claims, liabilities, and judgments arising from past, present, and future acts or omissions of the Sponsor in connection with its acquisition and management of the Emergency Watershed Protection Program pursuant to this agreement. Further, the Sponsor agrees that NRCS will have no responsibility for acts and omissions of the Sponsor, its agents, successors, assigns, employees, contractors, or lessees in connection with the acquisition and management of the Emergency Watershed Protection Program pursuant to this agreement that result in violation of any laws and regulations that are now or that may in the future become applicable.

23. Retain all records dealing with the award and administration of the contract(s) for 3 years from the date of the Sponsor's submission of the final request for reimbursement or until final audit findings have been resolved, whichever is longer. If any litigation is started before the expiration of the 3-year period, records are to be retained until the litigation is resolved or the end of the 3-year period, whichever is longer. Make such records available to the Comptroller General of the United States or his or her duly authorized representative and accredited representatives of the Department of Agriculture or cognizant audit agency for the purpose of making audit, examination, excerpts, and transcriptions.

24. Submit reports and payment requests to the ezFedGrants system or the Farm Production and Conservation (FPAC) Grants and Agreements Division via email to FPAC.BC.GAD@usda.gov as outlined in the applicable version of the General Terms and Conditions. For payments, ezFedGrants does not have a process for construction line items. Reporting frequency is as follows:

Performance reports: annual

SF425 Financial Reports: annual

NRCS RESPONSIBILITIES

1. Assist Sponsor in establishing design parameters; determine eligible construction costs during the pre-design

conference.

2. If applicable designate a Government Representative (GR) to serve as liaison with the Sponsor and identify that person's contact information with this executed agreement.
3. Review, comment and concur in preliminary and final plans, specifications, Plan of Operations (if required), and QAP.
4. Make periodic site visits during the installation of the EWP project measures to review construction progress, document conformance to engineering plans and specifications, and provide any necessary clarification on the Sponsor's responsibilities.
5. Upon notification of the completion of the EWP project measures, NRCS shall promptly review the performance of the Sponsor to determine if the requirements of this agreement and fund expenditures as agreed have been met.
6. Make payment to the Sponsor covering NRCS' share of the cost upon receipt and approval of Form SF-270 and supporting documentation. In the event there are questions regarding the SF 270 and supporting documentation, NRCS will contact the Sponsor in a timely manner to resolve concerns.

SPECIAL PROVISIONS

1. The furnishing of financial, administrative, and/or technical assistance above the original funding amount by NRCS is contingent on there being sufficient unobligated and uncommitted funding in the Emergency Watershed Protection Program that is available for obligation in the year in which the assistance will be provided. NRCS may not make commitments in excess of funds authorized by law or made administratively available. Congress may impose obligational limits on program funding that constrains NRCS's ability to provide such assistance.
2. In the event of default of a construction contract awarded pursuant to this agreement, any additional funds properly allocable as construction costs required to ensure completion of the job are to be provided in the same ratio as construction funds are contributed by the parties under the terms of this agreement. Any excess costs including interest resulting from a judgment collected from the defaulting contractor, or his or her surety, will be prorated between the Sponsor and NRCS in the same ratio as construction funds are contributed under the terms of the agreement.
3. Additional funds, including interest properly allocable as construction costs as determined by NRCS, required as a result of decision of the CO or a court judgment in favor of a claimant will be provided in the same ratio as construction funds are contributed under the terms of this agreement. NRCS will not be obligated to contribute funds under any agreement or commitment made by the Sponsor without prior concurrence of NRCS.
4. The State Conservationist may make adjustments in the estimated cost to NRCS set forth in this agreement for constructing the EWP measures. Such adjustments may increase or decrease the amount of estimated funds that are related to differences between such estimated cost and the amount of the awarded contract or to changes, differing site conditions, quantity variations, or other actions taken under the provisions of the contract. No adjustment will be made to change the cost sharing assistance provided by NRCS as set forth in this agreement, nor reduce funds below the amount required to carry out NRCS' share of the contract.
5. NRCS, at its sole discretion, may refuse to cost share should the Sponsor, in administering the contract, elect to proceed without obtaining concurrence as set out in this agreement.
6. Once the project is completed and all requests for reimbursement submitted, any excess funding remaining in the agreement will be de-obligated from the agreement.

Expected Accomplishments and Deliverables

1. Prepare design, construction specifications, and drawings in accordance with standard engineering principles that comply with NRCS programmatic requirements; and/or contract/install the designed construction. Any design services will be by a professional registered engineer. Sponsor will obtain NRCS review and concurrence on the design, construction plans, and specifications. The Sponsor must ensure description of work is reviewed, concurred, and approved by NRCS. A copy of the final signed and sealed plans and specifications shall be provided to NRCS.
2. Contract for services and construction in accordance with the Code of Federal Regulations (CFR), 2 CFR § 200.317 through 200.327, applicable State regulations, and the Sponsor's procurement regulations, as appropriate. (See general terms and conditions attached to this agreement for a link to the CFR.) In accordance with 2 CFR § 200.327, contracts must contain the applicable provisions described in Appendix II to Part 200. Davis-Bacon Act would not apply under this Federal program legislation.

3. Provide copies of site maps to appropriate Federal and State agencies for environmental review. Sponsor will notify NRCS of environmental clearance, modification of construction plans, or any unresolved concerns as well as copies of all permits, licenses, and other documents required by Federal, state, and local statutes and ordinances prior to solicitation for installation of the EWP project measures. All modifications to the plans and specifications shall be reviewed and concurred on by NRCS.

4. Prior to commencement of work and/or solicitation of bids, submit for NRCS review and concurrence a Quality Assurance Plan (QAP). The QAP shall outline technical and administrative expertise required to ensure the EWP project measures are installed in accordance with the plans and specifications, identify individuals with the expertise, describe items to be inspected, list equipment required for inspection, outline the frequency and timing of inspection (continuous or periodic), outline inspection procedures, and record keeping requirements. A copy of the final QAP shall be provided to NRCS prior to commencement of construction.

5. Provide construction inspection in accordance with the QAP.

6. Arrange for and conduct final inspection of completed project with NRCS to determine whether all work has been performed in accordance with contractual requirements.

Resources Required

See the Responsibilities of the Parties section for required resources, if applicable.

Milestones

1. Obtaining permits: estimated month 3
2. Completing quality assurance plan: estimated month 3
3. Solicit bids: estimated month 3
4. Award contract: estimated month 5
5. Date of estimated completion of construction: 05/05/2024, or as amended by a NRCS no-cost-extension process
6. Complete close-out activities: within 120 days of construction completion

GENERAL TERMS AND CONDITIONS

Please reference the below link(s) for the General Terms and Conditions pertaining to this award:
<https://www.fpacbc.usda.gov/about/grants-and-agreements/award-terms-and-conditions/index.html>

**U.S. DEPARTMENT OF AGRICULTURE
FARM PRODUCTION AND
CONSERVATION**

**GENERAL TERMS AND CONDITIONS FOR
GRANTS AND COOPERATIVE AGREEMENTS**

The Farm Production and Conservation (FPAC) mission area encompasses the following USDA agencies: Natural Resources Conservation Service (NRCS), Farm Service Agency (FSA), Risk Management Agency (RMA), the Commodity Credit Corporation (CCC), and the FPAC Business Center.

I. APPLICABLE REGULATIONS

- a. As a condition of this award, the recipient assures and certifies that it has and/or will comply and require subrecipients to comply with the requirements contained in the following statutes and regulations, as applicable. The full text of Code of Federal Regulations references may be found at <https://www.gpo.gov/fdsys/browse/collectionCfr.action?collectionCode=CFR> and <http://www.ecfr.gov/>.
1. 2 CFR Part 25, "Universal Identifier and System of Award Management"
 2. 2 CFR Part 170, "Reporting Subaward and Executive Compensation Information"
 3. 2 CFR Part 175, "Award Term for Trafficking in Persons"
 4. 2 CFR Part 180, "OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement)"
 5. 2 CFR Part 182, "Governmentwide Requirements for Drug-Free Workplace (Financial Assistance)"
 6. 2 CFR Part 200, "Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards"
 7. 2 CFR Part 400, "Uniform Administrative Requirements, Cost Principles, And Audit Requirements for Federal Awards"
 8. 2 CFR Part 417, "Nonprocurement Debarment and Suspension"
 9. 2 CFR Part 418, "New Restrictions on Lobbying"
 10. 2 CFR Part 421, "Requirements for Drug-Free Workplace (Financial Assistance)"
 11. 2 CFR Part 422, "Research Institutions Conducting USDA-Funded Extramural Research; Research Misconduct"
- b. Allowable project costs will be determined in accordance with the authorizing statute, the purpose of the award, and, to the extent applicable, to the type of organizations receiving the award, regardless of tier. The following portions of the Code of Federal Regulations are hereby incorporated by reference. The full text of Code of Federal Regulations references may be found at

<https://www.gpo.gov/fdsys/browse/collectionCfr.action?collectionCode=CFR>
and <http://www.ecfr.gov/>.

2 CFR Part 200, "Uniform Administrative Requirements, Cost Principles and Audit Requirements for Federal Awards"

- c. For corporate recipients, by accepting this award the recipient acknowledges: (1) that it does not have a Federal tax delinquency, meaning that it is not subject to any unpaid Federal tax liability that has been assessed, for which all judicial and administrative remedies have been exhausted or have lapsed, and that is not being paid in a timely manner pursuant to an agreement with the authority responsible for collecting the tax liability, **and** (2) that it has not been convicted of a felony criminal violation under any Federal law within 24 months preceding the award, unless a suspending and debarring official of the USDA has considered suspension or debarment of the recipient corporation based on these convictions and/or tax delinquencies and determined that suspension or debarment is not necessary to protect the interests of the Government. If the recipient fails to comply with these provisions, the agency will annul this agreement and may recover any funds the recipient has expended in violation of the above cited statutory provisions.

II. UNALLOWABLE COSTS

The following costs are not allowed:

- a. Profit and management fees. Recipients may not earn and keep income resulting from an award
- b. Costs above the amount authorized for the project.
- c. Costs incurred after the award period of performance end date.
- d. Costs not identified in the approved budget or approved budget revisions.
- e. Costs of promotional items and memorabilia, including models, gifts, and souvenirs.
- f. Compensation for injuries to persons or damage to property arising from project activities.
- g. Meals: Meals may be charged to an award only if they are necessary for the performance of the project. For instance, meals (normally only lunch) that are a necessary part of the costs of meetings and conferences (i.e., required attendance and continuity of a meeting), the primary purpose of which is the dissemination of information, are allowable, as are costs of transportation, rental of facilities, speakers' fees, and other items incidental to such meetings or conferences. Note: Meals consumed while in official travel status do not fall in this category. They are considered to be per diem expenses and should be reimbursed in accordance with the organization's established travel policies subject to statutory limitations or in accordance with Federal travel policies.
- h. Costs normally charged as indirect costs may not be charged as direct costs without proper justification and agency approval. Proper justification includes documentation that the costs meet the criteria for allowability (see 2 CFR 200.403). Examples of such costs include rent, utilities, depreciation on buildings and equipment, the costs of operating and maintaining facilities, and general administration and general expenses, such as the salaries and expenses of executive officers, personnel administration, and accounting.
- i. Salaries that are not commensurate with level of work: All costs must be reasonable

to be allowable (2 CFR 200.403), and 2 CFR 200.404 defines a reasonable cost as one if, in its nature and amount, it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost. Salaries determined not to be reasonable compared to the level of work will be unallowable.

- j. Honoraria. Speaker fees are allowable.
- k. Costs which lie outside the scope of the approved project and amendments thereto.
- l. Entertainment costs, regardless of their apparent relationship to project objectives.
- m. Consulting services performed by a Federal employee during official duty hours when such consulting services result in the payment of additional compensation to the employee; and
- n. Renovation or refurbishment of facilities, the purchase or installation of fixed equipment in facilities, and the planning, repair, rehabilitation, acquisition, or construction of buildings or facilities.

This list is not exhaustive. For general information about the allowability of particular items of costs, please see 2 CFR Part 200, "Subpart E - Cost Principles", or direct specific inquiries to the administrative contact identified in the award. The allowability of some items of costs may be difficult to determine. To avoid disallowance or dispute of such costs, the recipient may seek prior approval before incurring them. See 2 CFR 200.407.

III. PRIOR APPROVAL REQUIREMENTS

Certain items of cost and award revisions require the prior written approval of the awarding agency. The following are the most common situations requiring prior approval. However, this list is not exhaustive, and the recipient is also bound by any other prior approval requirements identified in the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards. Submit all requests for the approvals described below via e-mail to FPAC.BC.GAD@usda.gov. All requests for prior approval must reference the applicable agreement number.

- a. **Pre-award costs.**—To receive reimbursement for costs incurred prior to the award date, recipients must request written approval. This restriction also applies to costs intended to meet cost-share requirements. Even with approval, recipients incur pre-award costs at their own risk. The Federal awarding agency is under no obligation to reimburse such costs if for any reason the recipient does not receive a Federal award or if the Federal award is less than anticipated and inadequate to cover the costs.
- b. **Revisions to scope, objective, or deliverables.**—When it is necessary to modify the scope, objective, or deliverables of an award, the recipient must submit a written request and justification for the change along with the revised scope, objective, or deliverables of the award.
- c. **Additions or changes to subawards and contracts.**—The subawarding, transferring, or contracting out of any work (i.e., services) under a Federal award not identified in the original award budget or any changes to subaward or contracts requires prior written approval. The recipient must submit a justification for the proposed subaward/contract, a statement of work to be performed, and a detailed budget for the subaward/contract. This provision does not apply to the acquisition of supplies,

material, equipment, or general support services.

- d. **Permanent change in a key person specified in the award.**—When there is a permanent change in key personnel, such as a project director or principal investigator, the recipient must request prior written approval for the substitution or change. The request must identify the replacement personnel and provide his or her qualifications.
- e. **Absence or temporary change in project leadership.**—If the approved project director or principal investigator disengages from the project for more than three months or reduces time devoted to the project by 25 percent or more, the recipient must request prior approval in writing, identifying who will be in charge during the project director's absence. The notification must include the qualifications of the replacement.
- f. **Budget revisions.**—Recipients must request prior written approval for deviations from the approved budget in the instances described below. For budget revisions, the recipient may be required to submit a new SF 424A or 424C and budget narrative, even those that do not require prior approval..
 - 1. The inclusion of costs that require prior approval in accordance with Subpart E—Cost Principles of this part or 45 CFR part 75 Appendix IX, “Principles for Determining Costs Applicable to Research and Development under Awards and Contracts with Hospitals,” or 48 CFR part 31, “Contract Cost Principles and Procedures,” as applicable.
 - 2. Where the cumulative amount of transfers of funds among direct cost categories or programs, functions, and activities exceeds or is expected to exceed 10 percent of the total budget as last approved by the Federal awarding agency, and where the Federal share of the project exceeds the simplified acquisition threshold. Recipients must notify the Government of budget changes that do not meet the threshold described above.
 - 3. The transfer of funds budgeted for participant support costs to other categories of expense requires prior written approval. Participant support costs means direct costs for items such as stipends or subsistence allowances, travel allowances, and registration fees paid to or on behalf of participants or trainees (but not employees) in connection with conferences or training projects.
 - 4. Changes in the approved cost-sharing or matching provided by the recipient, including to amount, source, or type.
 - 5. Additional Federal funds needed to complete the project. This change also requires a formal agreement amendment.
 - 6. Changes to negotiated indirect cost rates during the award period of performance. If the change is due to receipt of a new negotiated indirect costs rate agreement (NICRA), the prior approval request must include a copy of the new agreement.
- g. **No-Cost Extensions of Time.**—When a no-cost extension of time is necessary, the recipient authorized signatory must submit a written request via e-mail to FPAC.BC.GAD@usda.gov. Except in limited circumstances, a no-cost extension of time cannot exceed 12 months. FPAC cannot approve requests for no-cost extensions received after the expiration of the award. In addition, time may not

allow extension requests submitted less than 30 calendar days before the period of performance end date to be processed, so recipients are encouraged to submit requests as soon as possible. FPAC agencies cannot approve no-cost extensions requested merely to expend remaining funds. The request must contain the following:

1. Amount of additional time requested
2. Explanation for the need for the extension
3. A summary of progress to date and revised milestones

IV. PAYMENTS

- a. Recipients must request reimbursement or advances using a properly completed and executed SF-270, submitted with a Budget Expense Table or Deliverable Expense Table (or similar summary document), as applicable to either the ezFedGrants system or to FPAC.BC.GAD@usda.gov. Templates for Budget Expense Tables and Deliverable Expense Tables are available at this link: <https://www.fpacbc.usda.gov/about/doing-business/index.html>.
- b. Recipients requesting advances should request payments in amounts necessary to meet their current needs pursuant to procedures contained in the Federal administrative provisions and 31 CFR Part 205. Requests must be submitted no less than 15 days prior to the start of the requested advance period. The recipient must provide a summary document showing the amount of advanced funds spent within 30 days of the end of the advance period. If applicable, the recipient must also submit a summary of the cost-share provided.
- c. The method of payment between the recipient and its contractors will be in accordance with the policies and procedures established by the recipient except that the contractors may not use the USDA Office of Financial Management/National Finance Center method to request payments. If the recipient makes advance payments to contractors, the recipient must ensure that the timing of such payments is designed to minimize elapsed time between the advance payment and the disbursement of funds. Recipients must not submit requests from their contractors for review or approval.
- d. The recipient must maintain records of supporting documentation all costs incurred under this award. Such documentation includes, but is not limited to, canceled checks, paid bills, payroll records, and subaward documents. Labor cost charges to this award must be based upon salaries actually earned and the time actually worked on this award. All project costs must be incurred within the period of performance of this award, including any approved no-cost extension of time. The Government may disallow costs that cannot be supported by supporting documentation or that are incurred outside of the agreement period of performance and budget and may require the return of any funds paid out for those costs. The level of detail and documentation required to be provided to support any individual payment request is at the discretion of the Government. Do not provide supporting documentation unless it is specifically requested.
- e. Recipients must pay all costs incurred (i.e., liquidate obligations) under the award

and request all final requests for payment not later than 120 calendar days after the period of performance end date. The Government must timely close-out expired agreements, which includes de-obligation of unspent funds. Therefore, funds may not be available for payment requests received more than 120 days after the period of performance end date, and the Government is not obligated to make such payments.

- f. Payments under fixed-amount awards are made based on deliverables completed, milestones achieved, or as a single payment upon award completion rather than costs incurred. The Government and recipient must utilize 2 CFR 200, Subpart E, Cost principles to support unit prices included in fixed amount awards prior to agreement execution.

V. FINANCIAL REPORTING

- a. Recipients must submit a Federal Financial Report (FFR), SF 425 in accordance with the schedule included in the award statement of work. Recipients must submit reports to either the ezFedGrants system or via e-mail to FPAC.BC.GAD@usda.gov. Failure to submit reports as required may result in suspension or termination of award.
 - b. The recipient must submit a final financial report no later than 120 days after the period of performance end date. Failure to do so may result in a negative report to the Federal Awardee Performance and Integrity Information System (FAPIIS).
 - c. The FPAC awarding agency will withhold payments under this award if the recipient is delinquent in submitting required reports.

VI. PERFORMANCE MONITORING AND REPORTING

- a. The recipient is responsible for monitoring day-to-day performance and for reporting to the FPAC awarding agency. If the project involves subaward/contractual arrangements, the recipient is also responsible for monitoring the performance of project activities under those arrangements to ensure that approved goals and schedules are met.
- b. The recipient must submit a written progress report at the frequency specified in the statement of work to either the ezFedGrants system or via e-mail to FPAC.BC.GAD.usda.gov. Each report must cover—
 - 1. A comparison of actual accomplishments with the milestones and deliverables established for the reporting period and, where project output can be quantified, a computation of the costs per unit of output.
 - 2. The reasons why milestones and deliverables targets were not met, if appropriate.
 - 3. Additional pertinent information including, where appropriate, analysis and explanation of cost overruns or high unit costs.
- c. The recipient must submit a final performance report within 120

calendar days of the period of performance end date. Failure to do so may result in a negative report to the Federal Awardee Performance and Integrity Information System (FAPIIS).

- d. The FPAC awarding agency will withhold payments under this award if the recipient is delinquent in submitting required reports.

VII. REPORTING SUBAWARDS AND EXECUTIVE COMPENSATION

a. Reporting of first-tier subawards.

1. Applicability. Unless you are exempt as provided in paragraph d. of this award term, you must report each action that obligates \$30,000 or more in Federal funds that does not include Recovery funds (as defined in section 1512(a)(2) of the American Recovery and Reinvestment Act of 2009, Pub. L. 111-5) for a subaward to an entity (see definitions in paragraph e. of this award term).
2. Where and when to report.
 - i. You must report each obligating action described in paragraph a.1. of this award term to <http://www.fsrs.gov>.
 - ii. For subaward information, report no later than the end of the month following the month in which the obligation was made. (For example, if the obligation was made on November 7, 2010, the obligation must be reported by no later than December 31, 2010.)
1. What to report. You must report the information about each obligating action that the submission instructions posted at <http://www.fsrs.gov>.

b. Reporting Total Compensation of Recipient Executives.

1. Applicability and what to report. You must report total compensation for each of your five most highly compensated executives for the preceding completed fiscal year, if—
 - i. the total Federal funding authorized to date under this award is \$30,000 or more;
 - ii. in the preceding fiscal year, you received—
 - A. 80 percent or more of your annual gross revenues from Federal procurement contracts (and subcontracts) and Federal financial assistance subject to the Transparency Act, as defined at 2 CFR 170.320 (and subawards); and
 - B. \$25,000,000 or more in annual gross revenues from Federal procurement contracts (and subcontracts) and Federal financial assistance subject to the Transparency Act, as defined at 2 CFR 170.320 (and subawards); and
 - iii. The public does not have access to information about the compensation of the executives through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986. (To determine if the public has access to the compensation information, see the U.S. Security and Exchange

Commission total compensation filings at
<http://www.sec.gov/answers/execomp.htm>.)

2. Where and when to report. You must report executive total compensation described in paragraph b.1. of this award term:
 - i. As part of your registration profile at <https://www.sam.gov>.
 - ii. By the end of the month following the month in which this award is made, and annually thereafter.
- c. Reporting of Total Compensation of Subrecipient Executives.
 1. Applicability and what to report. Unless you are exempt as provided in paragraph d. of this award term, for each first-tier subrecipient under this award, you shall report the names and total compensation of each of the subrecipient's five most highly compensated executives for the subrecipient's preceding completed fiscal year, if—
 - i. in the subrecipient's preceding fiscal year, the subrecipient received—
 - A. 80 percent or more of its annual gross revenues from Federal procurement contracts (and subcontracts) and Federal financial assistance subject to the Transparency Act, as defined at 2 CFR 170.320 (and subawards); and
 - B. \$25,000,000 or more in annual gross revenues from Federal procurement contracts (and subcontracts), and Federal financial assistance subject to the Transparency Act (and subawards); and
 - ii. The public does not have access to information about the compensation of the executives through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986. (To determine if the public has access to the compensation information, see the U.S. Security and Exchange Commission total compensation filings at <http://www.sec.gov/answers/execomp.htm>.)
 2. Where and when to report. You must report subrecipient executive total compensation described in paragraph c.1. of this award term:
 - i. To the recipient.
 - ii. By the end of the month following the month during which you make the subaward. For example, if a subaward is obligated on any date during the month of October of a given year (*i.e.*, between October 1 and 31), you must report any required compensation information of the subrecipient by November 30 of that year.
- d. Exemptions

If, in the previous tax year, you had gross income, from all sources, under \$300,000, you are exempt from the requirements to report:

 1. Subawards, and
 2. The total compensation of the five most highly compensated executives of any subrecipient.

e. Definitions. For purposes of this award term:

- 1. Entity means all of the following, as defined in 2 CFR part 25:**
 - i. A Governmental organization, which is a State, local government, or Indian tribe;**
 - ii. A foreign public entity;**
 - iii. A domestic or foreign nonprofit organization;**
 - iv. A domestic or foreign for-profit organization;**
 - v. A Federal agency, but only as a subrecipient under an award or subaward to a non- Federal entity.**
- 2. Executive means officers, managing partners, or any other employees in management positions.**
- 3. Subaward:**
 - i. This term means a legal instrument to provide support for the performance of any portion of the substantive project or program for which you received this award and that you as the recipient award to an eligible subrecipient.**
 - ii. The term does not include your procurement of property and services needed to carry out the project or program (for further explanation, see Sec.210 of the attachment to OMB Circular A-133, "Audits of States, Local Governments, and Non-Profit Organizations").**
 - iii. A subaward may be provided through any legal agreement, including an agreement that you or a subrecipient considers a contract.**
- 4. Subrecipient means an entity that:**
 - i. Receives a subaward from you (the recipient) under this award; and**
 - ii. Is accountable to you for the use of the Federal funds provided by the subaward.**
- 5. Total compensation means the cash and noncash dollar value earned by the executive during the recipient's or subrecipient's preceding fiscal year and includes the following (for more information see 17 CFR 229.402(c)(2)):**
 - i. Salary and bonus.**
 - ii. Awards of stock, stock options, and stock appreciation rights. Use the dollar amount recognized for financial statement reporting purposes with respect to the fiscal year in accordance with the Statement of Financial Accounting Standards No. 123 (Revised 2004) (FAS 123R), Shared Based Payments.**
 - iii. Earnings for services under non-equity incentive plans. This does not include group life, health, hospitalization or medical reimbursement plans that do not discriminate in favor of executives, and are available generally to all salaried**

employees.

- iv. Change in pension value. This is the change in present value of defined benefit and actuarial pension plans.
- v. Above-market earnings on deferred compensation which is not tax-qualified.
- vi. Other compensation, if the aggregate value of all such other compensation (e.g. severance, termination payments, value of life insurance paid on behalf of the employee, perquisites or property) for the executive exceeds \$10,000.

VIII. AUDIT REQUIREMENTS

The recipient is responsible for complying with audit requirements in accordance with 2 CFR 200, Subpart F. A recipient entity that expends \$750,000 or more during the recipient's fiscal year in Federal awards must have a single or program-specific audit conducted for that year. A single audit is required to be uploaded by the recipient to the Federal Audit Clearinghouse within 30 calendar days after receipt of the auditor's report, or nine (9) months after the end of the audit period, whichever comes first.

IX. SPECIAL PROVISIONS

- a. The recipient assures and certifies that it will comply with the minimum-wage and maximum-hour provisions of the Federal Fair Labor Standards Act.
- b. Employees of FPAC agencies will participate in efforts under this agreement solely as representatives of the United States. They may not participate as directors, officers, employees, or otherwise serve or hold themselves out as representatives of the recipient. They also may not assist the recipient with efforts to lobby Congress or to raise money through fundraising efforts. Further, FPAC employees must report to their immediate supervisor any negotiations with the recipient concerning future employment and must refrain from participation in projects or agreements with such recipients.
- c. Except for agreements entered under the Agriculture Conservation Experienced Services (ACES) program authorized by the Food, Conservation, and Energy Act of 2008, employees of the recipient will not be considered Federal employees or agents of the United States for any purposes under this agreement. An individual providing services under the ACES program is deemed to be an employee of the United States Government solely for purposes of chapter 171 of title 28, United States Code, provided the individual is acting within the scope of the agreement.
- d. Except in very limited circumstances (e.g., construction agreements), no agreement period of performance can exceed a total of five years, including extensions.
- e. Recipients who engage or assist in scientific related activities on behalf of USDA must uphold the principles of scientific integrity established by

Departmental Regulations 1074-001, Scientific Integrity. Covered activities include engaging in, supervising, managing, and reporting scientific work; analyzing and publicly communicating information resulting from scientific work; and utilizing information derived from scientific work in policy and decision making.

- f. Recipients of awards under covered programs (as defined in Executive Order 13858, January 31, 2019) are encouraged to use, to the greatest extent practicable, iron and aluminum as well as steel, cement, and other manufactured products produced in the United States in every contract, subcontract, purchase order, or subaward that is chargeable under the award. "Covered program" means a program that provides financial assistance for the alteration, construction, conversion, demolition, extension, improvement, maintenance, construction, rehabilitation, or repair of an infrastructure project in the United States. However, it does not include programs for which a domestic preference is inconsistent with law or programs providing financial assistance that are subject to comparable domestic preferences.**
- g. The recipient and its employees are prohibited from promoting, recommending, or discussing the availability of specific commercial products or services with FPAC agency clients in the course of carrying out activities under this agreement, including any products or services offered by the recipient, except as may be specifically allowed in the agreement.**

X. PATENTS, INVENTIONS, COPYRIGHTS, AND ACKNOWLEDGMENT OF SUPPORT AND DISCLAIMER

- a. The following acknowledgment of USDA support must appear in the publication of any material, whether copyrighted or not, and any products in electronic formats (web sites, computer programs, etc.) that is substantially based upon or developed under this award:**

"This material is based upon work supported by the U.S. Department of Agriculture, under agreement number [recipient should enter the applicable award number here]."

In addition, all publications and other materials, except scientific articles or papers published in scientific journals, must include the following statement:

"Any opinions, findings, conclusions, or recommendations expressed in this publication are those of the author(s) and do not necessarily reflect the views of the U.S. Department of Agriculture. In addition, any reference to specific brands or types of products or services does not constitute or imply an endorsement by the U.S. Department of Agriculture for those products or services."

- b. All publications printed with Federal Government funds will include the most current USDA nondiscrimination statement, available from the Public Affairs Division, Civil Rights Division, or on the USDA home page. If the material is too**

small to include the full nondiscrimination statement, the material must, at a minimum, include the following statement:

“USDA is an equal opportunity provider, employer, and lender.”

The recipient is responsible for ensuring that an acknowledgment of USDA is made during news media interviews, including popular media such as radio, television, and news magazines, that discuss work funded by this award in a substantial way.

- c. Allocation of rights of patents, inventions, and copyrights must be in accordance with 2 CFR Part 200.315. This regulation provides that small businesses normally may retain the principal worldwide patent rights to any invention developed with USDA support.
- d. In accordance with 37 CFR Section 401.14, each subject invention must be disclosed to the Federal agency within 2 months after the inventor discloses it in writing to recipient personnel responsible for patent matters. Invention disclosure statements pursuant to 37 CFR Section 401.14(c) must be made in writing to FPAC.BC.GAD@usda.gov.
- e. USDA receives a royalty-free license for Federal Government use, reserves the right to require the patentee to license others in certain circumstances, and requires that anyone exclusively licensed to sell the invention in the United States must manufacture it domestically.

XI. COST SHARING REQUIREMENTS

- a. If the award has specific cost-sharing requirements, cost-sharing participation in other projects must not be counted toward meeting the specific cost-share requirement of this award. Cost sharing must come from non-Federal sources unless otherwise stated in the applicable program authorizing statute.
- b. Cost sharing costs must be necessary and reasonable for accomplishment of project or program objectives.
- c. Cost sharing must be documented on each SF 425 and payment requests as it is provided by the recipient or third party. The required cost-share or matching ratio must be met by the end of the agreement period of performance; however, it does not have to be maintained for every payment request.
- d. Should the recipient become aware that it may be unable to provide the cost-sharing amount identified in this award, it must—
 1. Immediately notify the FPAC Business Center Grants and Agreements Division via e-mail to FPAC.BC.GAD@usda.gov, and
 2. Either specify the steps it plans to take to secure replacement cost sharing or specify the plans to phase out the project in the absence of cost sharing.

Failure by the recipient to notify FPAC in accordance with this section or failure to

submit an acceptable remediation plan may result in the disallowance of some or all the costs charged to the award, the subsequent recovery by FPAC of some of the FPAC funds provided under the award, and/or termination of the award. It may constitute a violation of the terms and conditions of the award so serious as to provide grounds for subsequent suspension or debarment. FPAC reviews and approves or disapproves cost-sharing remediation plans on a case-by-case basis.

- e. The recipient must maintain records of all project costs that are claimed as cost sharing as well as records of costs to be paid by FPAC. If the recipient's cost sharing includes in-kind contributions, the basis for determining the valuation for volunteer services and donated property must be documented.
- f. Recipients must also request prior approval before changing the source or type of cost sharing. See Section III(e)(4).

XII. PROGRAM INCOME

- a. Program income does not include Federal funds received under an award. Program income means gross income earned by the non-Federal entity that is directly generated by a supported activity or earned as a result of the Federal award during the period of performance except as provided in §200.307(f). Examples include fees charged for conferences or workshops, fees for services performed, the use or rental of real or personal property acquired under Federal awards, the sale of commodities or items fabricated under a Federal award, license fees and royalties on patents and copyrights, and principal and interest on loans made with Federal award funds. Interest earned on advances of Federal funds is not program income. Except as otherwise provided in Federal statutes, regulations, or the terms and conditions of the Federal award, program income does not include rebates, credits, discounts, and interest earned on any of them.
- b. FPAC recommends treating program income with the additive method, however recipients may request to use the deductive method.
- c. If program income is earned and not already identified and addressed in the award, the recipient must provide notification to the FPAC BC GAD via e-mail to FPAC.BC.GAD@usda.gov and indicate the preferred treatment method (additive or deductive).
- d. Program income may be used to meet recipient cost-sharing requirements with the approval of the Government.
- e. Recipients must report all program income on the applicable SF 270 and SF 425 as it is earned.

XIII. PROCUREMENT STANDARDS

The recipient must have and use documented procurement procedures, consistent with State, local, and tribal laws and regulations, for the acquisition of property or services (including construction) required under a Federal award or subaward. Those procedures must comply with the procurement standards set out in 2 CFR 200.317-327, including the requirements

regarding conflicts of interest, competition, and methods of procurement. Particularly, take note that sole-source contracting is unallowable in almost all instances. Procurements must be well-documented, and those records are subject to inspection and audit.

XIV. BUILD AMERICA, BUY AMERICA FOR CONSTRUCTION

“Buy America” preference applies to Federal financial assistance awards that include construction components, even if it is funded by both Federal and non-Federal funds under the award. Subawards should conform to the terms and conditions of the Federal award from which they flow. A Buy America preference only applies to articles, materials, and supplies that are consumed in, incorporated into, or affixed to a construction project.

In accordance with 2 CFR § 200.327, contracts must contain the applicable provisions described in Appendix II to Part 200. Solicitations for Bid and Pre-bid Conference must point out the requirement for the Buy America terms in the awarded contracts. Responsive bids must include any requests for waivers to the Buy America requirements.

Recipients must ensure that none of the funds provided under this award are used for project construction unless: (1) all iron and steel used in the project are produced in the United States—this means all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States; (2) all manufactured products used in the project are produced in the United States—this means the manufactured product was manufactured in the United States; and the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the manufactured product, unless another standard for determining the minimum amount of domestic content of the manufactured product has been established under applicable law or regulation; and (3) all construction materials are manufactured in the United States—this means that all manufacturing processes for the construction material occurred in the United States. (Excludes cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives.) The Buy America preference only applies to articles, materials, and supplies that are consumed in, incorporated into, or affixed to a construction project. As such, it does not apply to tools, equipment, and supplies, such as temporary scaffolding, brought to the construction site and removed at or before the completion of the project. Nor does a Buy America preference apply to equipment and furnishings, such as movable chairs, desks, and portable computer equipment, that are used at or within the finished project but are not an integral part of the structure or permanently affixed to it.

XV. NONEXPENDABLE EQUIPMENT

- a. Recipients purchasing equipment or products with funds provided under this award are encouraged to purchase only American-made equipment and products. A state must use, manage and dispose of equipment acquired under a Federal award by the state in accordance with state laws and procedures. All other recipients must follow these procedures.
- b. Title to equipment acquired under a Federal award will vest conditionally in the recipient upon acquisition. The recipient must not encumber the property without

approval of the Government.

- c. The recipient must use the equipment for the authorized purposes of the project for as long as needed whether or not the project or program continues to be supported by the Federal award. When no longer needed for the original program or project, the equipment may be used in other activities supported by the Federal awarding agency, in the following order of priority:
 - 1. Activities under a Federal award from the Federal awarding agency which funded the original program or project, then
 - 2. Activities under Federal awards from other Federal awarding agencies.
- d. The recipient must maintain property records that include a description of the property, a serial number or other identification number, the source of funding for the property (including the FAIN), who holds title, the acquisition date, and cost of the property, percentage of Federal participation in the project costs for the Federal award under which the property was acquired, the location, use and condition of the property, and any ultimate disposition data including the date of disposal and sale price of the property.
- e. The recipient must take a physical inventory of the property and reconcile the results with the property records at least once every two years until final disposition.
- f. When equipment is no longer needed for any of the purposes set out in this provision and the per-unit fair market value is less than \$5,000, the recipient may retain, sell, or dispose of the equipment with no further obligation to FPAC. However, if the per-unit fair market value is \$5,000 or more, the recipient must submit a written request for disposition instructions to FPAC.BC.GAD@usda.gov.

XVI. LIMIT OF FEDERAL LIABILITY

- a. The maximum financial obligation of FPAC to the recipient is the amount of funds indicated in the award as obligated by FPAC. However, if an erroneous amount is stated on the approved budget, or any supporting document relating to the award, FPAC will have the unilateral right to make the correction and to make an appropriate adjustment in the FPAC share of the award to align with the Federal amount authorized.
- b. For awards where it is anticipated that the period of performance will include multiple budget periods, all subsequent budget periods are subject to the availability of funds, program authority, satisfactory performance, and compliance with the terms and conditions of the Federal award.

XVII. AMENDMENTS

The parties may modify this agreement via formal amendment executed by the authorized signatories of each. The FPAC Business Center's Grants and Agreements Division has developed streamlined procedures for certain agreement changes, including no-cost extensions and some changes to agency and recipient contacts that do not require formal amendments. Contact the administrative contact for this award for instructions.

XVIII. PRIVACY ACT AND PROHIBITION AGAINST CERTAIN INTERNAL CONFIDENTIALITY AGREEMENTS

- a. Activities performed under this award may involve access to confidential and potentially sensitive information about governmental and landowner issues. The term "confidential information" means proprietary information or data of a personal nature about an individual, or information or data submitted by or pertaining to an organization. This information must not be disclosed without the prior written consent of FPAC.
- b. The recipient's personnel will follow the rules and procedures of disclosure set forth in the Privacy Act of 1974, 5 U.S.C. Section 552a, and implementing regulations and policies with respect to systems of records determined to be subject to the Privacy Act. The recipient's personnel must also comply with privacy of personal information relating to natural resources conservation programs in accordance with section 1244 of Title II of the Farm Security and Rural Investment Act of 2002 (Public Law 107-171).
- c. The recipient agrees to comply with the **"Prohibition Against Certain Internal Confidentiality Agreements:"**
 1. You may not require your employees, contractors, or subrecipients seeking to report fraud, waste, or abuse to sign or comply with internal confidentiality agreements or statements prohibiting or otherwise restricting them from lawfully reporting that waste, fraud, or abuse to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information.
 2. You must notify your employees, contractors, or subrecipients that the prohibitions and restrictions of any internal confidentiality agreements inconsistent with paragraph (1) of this award provision are no longer in effect.
 3. The prohibition in paragraph (1) of this award provision does not contravene requirements applicable to any other form issued by a Federal department or agency governing the nondisclosure of classified information.
 4. If FPAC determines that you are not in compliance with this award provision, FPAC:
 - i. Will prohibit your use of funds under this award, in accordance with sections 743 and 744 of Division E of the Consolidated Appropriations Act, 2016, (Pub. L. 114-113) or any successor provision of law;
 - ii. May pursue other remedies available for your material failure to comply with award terms and conditions.

XIX. ACKNOWLEDGMENT OF SECTION 1619 COMPLIANCE

The recipient agrees to comply with FPAC guidelines and requirements regarding the disclosure of information protected under Section 1619 of the Food, Conservation, and Energy Act of 2008 (PL 110- 246), 7 U.S.C. 8791 as described below. Responsibilities.

- a. **Acceptance of this award indicates acknowledgment and understanding that the recipient is legally bound by Federal statute to comply with the provisions of Section 1619 and that the recipient will not subsequently disclose information protected by section 1619 to any individual or organization that is not directly covered by this award. Any such subsequent disclosure of the protected information (except as permitted under Section 1619) will be considered a violation of Section 1619. The recipient will be held responsible should disclosure of the protected information occur.**
- b. **Acceptance of this award legally binds every owner, manager, supervisor, employee, contractor, agent, and representative of the recipient to comply with the provisions in Section 1619. The recipient must consult with FPAC prior to providing protected information to an entity or individual outside of the recipient and as necessary to implement the program to ensure that such release is permissible.**
- c. **The recipient will use the protected information only to perform work that is directly connected to this award. Use of the protected information to perform work that is not directly connected to this award is expressly prohibited.**
- d. **The recipient must internally restrict access to the protected information to only those individuals who have a demonstrated need to know the protected information to perform work under this award.**
- e. **The provisions in Section 1619 are continuing obligations. Even when the recipient is no longer a recipient, or when individuals currently affiliated with the recipient become no longer so affiliated, every person having been provided access to the protected information will continue to be legally bound to comply with these provisions.**
- f. **The recipient must notify all managers, supervisors, employees, contractors, agents, and representatives about this provision and the requirements of Section 1619. Notifications about the existence of this provision must be made to those individuals who are new to the organization and periodic notifications must be sent throughout the organization (as well as to all contractors and agents) to remind all about the ongoing and continuing requirements.**
- g. **When the recipient is unsure whether particular information is covered or protected by Section 1619, the recipient must consult with FPAC to determine whether the information must be withheld.**
- h. **Use of the protected information for any purpose is expressly prohibited after the period of performance end date of this award. Upon the award end date, any protected information provided under this award must be immediately destroyed or returned to FPAC. The recipient must provide to FPAC written certification that the protected information (paper copy, electronic copy, or both) has been properly destroyed, removed from any electronic storage media, or both.**
- i. **Any State's "sunshine law," "open records act" or other version of the Freedom of Information Act is superseded by section 1619 under the Supremacy Clause of the U.S. Constitution. Accordingly, information protected from disclosure by section 1619 must not be released under such**

State laws.

j. Protected Information.

Examples of the types of information prohibited by disclosure under Section 1619 include, but are **not limited to**, the following:

- i. State identification and county number (where reported and where located).
 - ii. Producer or landowner name, business full address, phone number, Social Security Number, and similar personal identifying information.
 - iii. Farm, tract, field, and contract numbers.
 - iv. Production shares and share of acres for each Farm Serial Number (FSN) field.
 - v. Acreage information, including crop codes.
 - vi. All attributes for Common Land Units (CLUs) in USDA's Geospatial Information System
 - vii. Any photographic, map, or geospatial data that, when combined with other maps, can be used to identify a landowner.
 - viii. Location of conservation practices.
- k. Section 1619 allows disclosure of "payment information (including payment information and the names and addresses of recipients of payments) under any Department program *that is otherwise authorized by law*" (emphasis added). The names and payment information of producers generally may be provided to the public; however, the recipient shall consult with FPAC if there is any uncertainty as to the provision of such information.
- l. Section 1619 also allows disclosure of otherwise protected information if "the information has been transformed into a statistical or aggregate form without naming any—(i) individual owner, operator, or producer; or (ii) specific data gathering cite." The recipient must consult with FPAC as to whether specific information falls within this exception prior to relying on this exception.
- m. Violations. The recipient will be held responsible for violations of this provision and Section 1619. A violation of this provision by the recipient may result in action by FPAC, including termination of the underlying Federal award.
- n. Effective Period. The requirements of this provision is effective on the date of the final signature and will continue until FPAC notifies the recipient that it is no longer required based on changes in applicable Federal law.

XX. PROHIBITION ON CERTAIN TELECOMMUNICATIONS AND VIDEO SURVEILLANCE SERVICES OR EQUIPMENT

The recipient (including subrecipients) is responsible for compliance with the prohibition on certain telecommunications and video surveillance services or equipment identified in 2 CFR 200.216. See Public Law 115-232, Section 889 for additional information. In accordance with 2 CFR 200.216, the recipient (including subrecipients) is prohibited from obligating or expending loan or grant funds for covered telecommunications equipment or services to:

- o. procure or obtain, extend or renew a contract to procure or obtain;

- p. enter into a contract (or extend or renew a contract) to procure; or
- q. obtain the equipment, services or systems.

XXI. NATIONAL POLICY REQUIREMENTS

The recipient must comply with all relevant public policy requirements, including those in general appropriations provisions, which can be accessed at this link:

https://www.ocfo.usda.gov/docs/Regulatory_Statutory_and_National_Policy_Requirements_v2_2018_04_17.pdf

XXII. TERMINATION

In accordance with 2 CFR 200.340, the recipient understands this agreement may be terminated in whole or in part as follows:

- a. By the Federal awarding agency or pass-through entity, if a recipient fails to comply with the terms and conditions of a Federal award;
- b. By the Federal awarding agency or pass-through entity, to the greatest extent authorized by law, if an award no longer effectuates the program goals or agency priorities;
- c. By the Federal awarding agency or pass-through entity with the consent of the recipient, in which case the two parties must agree upon the termination conditions, including the effective date and, in the case of partial termination, the portion to be terminated; or
- d. By the recipient upon sending to the Federal awarding agency or pass-through entity written notification setting forth the reasons for such termination, the effective date, and, in the case of partial termination, the portion to be terminated. However, if the Federal awarding agency or pass-through entity determines in the case of partial termination that the reduced or modified portion of the Federal award or subaward will not accomplish the purposes for which the Federal award was made, the Federal awarding agency or pass-through entity may terminate the Federal award in its entirety.
- e. If the Federal award is terminated for the recipient's material failure to comply with the U.S. Constitution, Federal statutes, regulations, or terms and conditions of the Federal award, the termination decision will be reported to the OMB-designated integrity and performance system accessible through SAM (currently FAPIIS) in accordance with 2 CFR200.341.

XXIII. REPORTING OF MATTERS RELATED TO RECIPIENT INTEGRITY AND PERFORMANCE

If the total value of the recipient's currently active grants, cooperative agreements, and procurement contracts from all Federal awarding agencies exceeds \$10,000,000 for any period of time during the period of performance of this Federal award, then the recipient during that period of time must maintain the currency of information reported to the System for Award Management (SAM) that is made available in the designated integrity and

performance system (currently the Federal Awardee Performance and Integrity Information System (FAPIIS)) about civil, criminal, or administrative proceedings described in paragraph 2 of this award term and condition. This is a statutory requirement under section 872 of Public Law 110-417, as amended (41 U.S.C. 2313). As required by section 3010 of Public Law 111-212, all information posted in the designated integrity and performance system on or after April 15, 2011, except past performance reviews required for Federal procurement contracts, will be publicly available.

a. Proceedings About Which You Must Report

Submit the information required about each proceeding that:

1. Is in connection with the award or performance of a grant, cooperative agreement, or procurement contract from the Federal Government;
2. Reached its final disposition during the most recent five-year period; and
3. Is one of the following:
 - i. A criminal proceeding that resulted in a conviction, as defined in paragraph 5 of this award term and condition;
 - ii. A civil proceeding that resulted in a finding of fault and liability and payment of a monetary fine, penalty, reimbursement, restitution, or damages of \$5,000 or more;
 - iii. An administrative proceeding, as defined in paragraph 5. of this award term and condition, that resulted in a finding of fault and liability and your payment of either a monetary fine or penalty of \$5,000 or more or reimbursement, restitution, or damages in excess of \$100,000; or
 - iv. Any other criminal, civil, or administrative proceeding if:
 - A. It could have led to an outcome described in paragraph 2.c.(1), (2), or (3) of this award term and condition;
 - B. It had a different disposition arrived at by consent or compromise with an acknowledgment of fault on your part; and
 - C. The requirement in this award term and condition to disclose information about the proceeding does not conflict with applicable laws and regulations.

b. Reporting Procedures

Enter in the SAM Entity Management area the information that SAM requires about each proceeding described in paragraph 2 of this award term and condition. You do not need to submit the information a second time under assistance awards that you received if you already provided the information through SAM because you were required to do so under Federal procurement contracts that you were awarded.

c. Reporting Frequency

During any period of time when you are subject to the requirement in paragraph 1 of this award term and condition, you must report proceedings information through SAM for the most recent five-year period, either to report new information about any proceeding(s) that you have not reported previously or affirm that there is no new information to report. Recipients that have Federal contract, grant, and cooperative agreement awards with a cumulative total value greater than \$10,000,000 must disclose semiannually any information about the criminal, civil, and administrative proceedings.

d. Definitions

For purposes of this award term and condition:

1. **Administrative proceeding** means a non-judicial process that is adjudicatory in nature in order to make a determination of fault or liability (e.g., Securities and Exchange Commission Administrative proceedings, Civilian Board of Contract Appeals proceedings, and Armed Services Board of Contract Appeals proceedings). This includes proceedings at the Federal and State level but only in connection with performance of a Federal contract or grant. It does not include audits, site visits, corrective plans, or inspection of deliverables.
2. **Conviction**, for purposes of this award term and condition, means a judgment or conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, and includes a conviction entered upon a plea of nolo contendere.
3. **Total value of currently active grants, cooperative agreements, and procurement contracts includes—**
 - i. Only the Federal share of the funding under any Federal award with a recipient cost share or match; and
 - ii. The value of all expected funding increments under a Federal award and options, even if not yet exercised.

XXIV. AWARD CLOSEOUT

- a. **Award closeout** is the process by which FPAC determines that all required project activities have been performed satisfactorily and all necessary administrative actions have been completed.
- b. The recipient must submit, no later than 120 calendar days after the end date of the period of performance, all financial, performance, and other reports as required by the terms and conditions of the agreement, including documentation showing that match or cost-share requirements have been met. The awarding agency may approve extensions when requested by the recipient.
- c. Unless the awarding agency authorizes an extension, the recipient must liquidate all obligations incurred under the agreement not later than 120 calendar days after the end date of the period of performance.
- d. Recipients must submit all requests for reimbursements no later than 120 calendar days after the end date of the period of performance.
- e. The recipient must promptly refund any balances of unobligated cash that the awarding agency paid in advance or paid and that are not authorized to be retained by the recipient for use in other projects. See OMB Circular A-129 and see §200.345 Collection of amounts due, for requirements regarding unreturned amounts that become delinquent debts.
- f. Recipients must retain all records pertaining to the agreement in accordance with 2 CFR 200.333-337 and any additional requirements included in the

agreement statement of work.

- g. Recipients must follow disposition requirements for property acquired with award funds in accordance with 2 CFR 200.310-316 and the terms of this agreement.
- h. If the recipient does not submit all reports in accordance with this section and the terms and conditions of the Federal award within one year of the period of performance end date, the Federal awarding agency must proceed to close out with the information available, including de-obligation of remaining funds. In addition, in accordance with 2 CFR 200.344, the Federal awarding agency must report the non-Federal entity's material failure to comply with the terms and conditions of the award with the OMB-designated integrity and performance system (currently FAPIIS).

XXV. NON-DISCRIMINATION IN USDA PROGRAMS

The recipient agrees that, in accordance with Federal civil rights law and U.S. Department of Agriculture (USDA) civil rights regulations and policies, the USDA, its Agencies, offices, and employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

XXVI. CARE AND USE OF ANIMALS

For any award that involves the care and use of vertebrate animals, the recipient is responsible for complying with the Animal Welfare Act (7 USC, 2131-2156), Public Law 89-544, 1996, as amended, and the regulations promulgated thereunder by the Secretary of Agriculture in 9 CFR Parts, 1, 2, 3, and 4. In the case of domesticated farm animals housed under farm conditions, the recipient must adhere to the principles stated in the [Guide for the Care and Use of Agricultural Animals in Research and Teaching](#), published by the American Dairy Science Association®, the American Society of Animal Science, and the Poultry Science Association, 2020. The recipient must have an approved Animal Welfare Assurance Statement on file with the Public Health Service Office for Laboratory Animal Welfare (OLAW) that describes the institution's animal care and use policies, the line of authority for animal care at the institution, veterinary care program, personnel and facilities. If no assurance statement is on file, the organization must contact NRCS to discuss alternatives.

XXVII. USE AND ACCEPTANCE OF ELECTRONIC SIGNATURES

Use of electronic signatures is encouraged to increase efficiency when creating and maintaining electronic records. "Electronic signature" means symbols or other data in digital form attached to an electronically submitted document as verification of the sender's intent to sign the document or a method of signing an electronic message that identifies and authenticates a particular person as the source of the electronic message and indicates such person's approval of the information contained in the message along with a date stamp (44

U.S.C. 3504, Sec. 1710). FPAC agencies will accept such signatures on application materials, payment requests, reports, and any other document that requires a signature certification. Scanned or photographed images of manual signatures are also acceptable, though photographs are least preferred due to the large amount of digital storage required to maintain them. Names merely typed in script fonts or other unverified electronic signatures cannot be accepted. Application documents submitted through Grants.gov are deemed "signed" if they bear the Grants.gov date stamp footer. Documents transmitted via ezFedGrants are digitally authenticated and acceptable.

WAI Committee

From: WAI Committee
Sent: Friday, March 8, 2024 3:01 PM
To: CorpCounselRFLS@co.maui.hi.us
Cc: WAI Committee
Subject: (OCS) (WAI-22); reply by 3/13/24
Attachments: 022acc01_signed.pdf