



TO: THERESA-MARIA ORELLANA, GRANT WRITER, COMMUNITY AND ECONOMIC DEV, GRANTS DIVISION

FROM: FELICIA HOLLOMAN, ASSISTANT CITY ATTORNEY **FH**

THROUGH: SARA HEDGES, CITY ATTORNEY *SH*

RE: U.S. DOE, OFFICE OF ENERGY EFFICIENCY AND RENEWABLE ENERGY- EECBG PROGRAM SPECIAL TERMS AND CONDITIONS

CAO RLS FILE: 25-103

DATE: APRIL 24, 2025

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I have reviewed the above request for legal services related to the U.S. Department of Energy (“DOE”) EECBG program special terms and conditions. While this document is titled “Special Terms and Conditions”, it is an agreement between the City and DOE. The information you provided in Agenda Quick says it is intended for the City Manager to sign this agreement. Typically, grant agreements are signed by the Mayor following a vote of the City Commission. Unless DOE is requiring this to be signed by the City Manager (who is considered the Chief Executive of the City, per the Charter), which should be confirmed in writing, this agreement should be signed by the Mayor after a vote by the City Commission to approve it. While this agreement is approved as to legal form and correctness, meaning it can legally be entered into as written, there are terms and concerns noted below and a recommendation that this agreement not be entered into by the City with the indemnification language that has been included. This Memorandum should be reviewed in its entirety, carefully.

A copy of the application submitted by your Department was not attached, so I cannot opine as to what conditions are directly applicable to the City, but be aware that the document is an agreement acknowledging the City will comply with *all* of the terms and conditions required by the DOE for award of the grant money. Failure to comply with the conditions could result in termination of funds and being banned from future grants with federal agencies. It will be your responsibility to understand the terms and conditions as they apply to the application submitted.

Under Term 5, the City is bound to the application it submitted:

DOE must comply with the National Environmental Policy Act (NEPA) prior to authorizing the use of Federal funds. Based on all information provided by the Recipient, SCEP has made a NEPA determination by issuing a categorical exclusion (CX) for all activities listed in the Application approved by the Contracting Officer and the DOE NEPA Determination. *The Recipient is thereby authorized to use Federal funds for the defined project activities, except where such activity is subject to a restriction set forth elsewhere in this Award...*

*If the Recipient later intends to add to or modify the activities or locations as described in the approved Application and the DOE NEPA Determination, those new activities/locations or modified activities/locations are subject to additional NEPA review and are not authorized for Federal funding until the Contracting Officer provides written authorization on those additions or modifications. Should the Recipient elect to undertake activities or change locations prior to written authorization from the Contracting Officer, the Recipient does so at risk of not receiving Federal funding for those activities, and such costs may not be recognized as allowable cost share.*

Under Term 7, the City must submit reports, as delineated in the checklist provided with the award. The checklist was not attached to this RLS, so again, it will be your responsibility to understand and follow the reporting requirements:

The reporting requirements for this Award are identified on the Federal Assistance Reporting Checklist, attached to this Award. *Recipients will review and sign-off on all applicable reporting prepared by the Technical Assistance Administrator.* Failure to comply with these reporting requirements is considered a material noncompliance with the terms of the Award. Noncompliance may result in withholding of future payments, suspension, or termination of the current award, and withholding of future awards. A willful failure to perform, a history of failure to perform, or unsatisfactory performance of this and/or other financial assistance awards, may also result in a debarment action to preclude future awards by Federal agencies.”

Under Term 9, if the City is to include an acknowledgment and disclaimer to any publication “arising out of” or “relating to” work performed under the award. This would include press communications put out by the City in emails or postings on the City’s website:

*The Recipient is required to include the following acknowledgement in publications arising out of, or relating to, work performed under this Award, whether copyrighted or not:*

- Acknowledgment: “This material is based upon work supported by the U.S. Department of Energy’s Office of State and Community Energy Programs (SCEP) under the Energy Efficiency and Conservation Block Grant (EECBG) Program Application # XXXXXXXXX”
- Full Legal Disclaimer: “This report was prepared as an account of work sponsored by an agency of the United States Government. Neither the United States Government nor any agency thereof, nor any of their employees, makes any warranty, express or implied, or assumes any legal liability or responsibility for the accuracy, completeness, or usefulness of any information, apparatus, product, or process disclosed, or represents that its use would not infringe privately owned rights. Reference herein to any specific commercial product, process, or service by trade name, trademark, manufacturer, or otherwise does not necessarily constitute or imply its endorsement, recommendation, or favoring by the United States Government or any agency thereof. The views and opinions of authors expressed herein do not necessarily state or reflect those of the United States Government or any agency thereof.”

Under Term 13, the City is required to indemnify the DOE. Specifically, the agreement states:

The Recipient shall indemnify DOE and its officers, agents, or employees for any and all liability, including litigation expenses and attorneys' fees, arising from suits, actions, or claims of any character for death, bodily injury, or loss of or damage to property or to the environment, resulting from the project, except to the extent that such liability results from the direct fault or negligence of DOE officers, agents or employees, or to the extent such liability may be covered by applicable allowable costs provisions.

Generally, this Office does not recommend the City enter into agreements requiring indemnification. Indemnification is disfavored by the Courts. Further, indemnification language is advised against by the Florida Attorney General's Office due to the language of Section 768.28, Florida Statutes. I have included Attorney General Opinions with this Memorandum in support of and to explain this Office's position that terms requiring the City to indemnify another should not be entered into by the City. The Florida Supreme Court, in a matter of first impression, has found, however, that "government entities are only prohibited from entering into agreements to indemnify another government entity for the other entity's negligence, or to assume any liability for the other entity's negligence". Fla. Dep't of Nat. Res. v. Garcia, 753 So. 2d 72, 77 (Fla. 2000). While such may now be permitted by this one ruling by the Florida Supreme Court, such does not mean it is required or recommended. Additionally, as written, this term does not make any attempts to protect the City's sovereign immunity under Section 768.28, Florida Statutes. Therefore, it is recommended:

1. Term 13 be removed from this agreement, or
2. If DOE refuses to remove the term, a clause should be added to the beginning of the term that says: "To the maximum extent permitted by law..." and a sentence should be added to the end of the term that reads as follows: Nothing herein shall be construed to be a waiver of sovereign immunity or to increase any limits therein applicable to the Recipient, pursuant to Section 768.28, Florida Statutes.

If DOE refuses either of the above two options or agrees to option two (2) above, the agreement may legally be entered into as written, with the understanding that the City could be found to have waived sovereign immunity by signing the agreement. This would mean the City could be found to have no immunity protections from a lawsuit and no cap on the amount awarded to a Plaintiff. Further, the City's insurance company may refuse to defend or cover the lawsuit or any monetary judgment.

If you have any questions, please do not hesitate to contact this Office via phone or e-mail.

Thank you.