COUNTY OF ERIE

MARK C. POLONCARZ
COUNTY EXECUTIVE

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March 14, 2013

W. Craig Fugate, Administrator
Federal Emergency Management Agency
United States Department of Homeland Security
500 C Street, SW
Washington, DC 20472

Charles K. Edwards, Acting Inspector General
Office of the Inspector General
United States Department of Homeland Security
245 Murray Drive, SW, Building 410
Washington, DC 20528

Jerome M. Hauer, Commissioner
New York State Division of Homeland Security and Emergency Services
1220 Washington Avenue
State Office Campus, Building 7A, Suite 710
Albany, New York 12242

Re: US Department of Homeland Security Office of Inspector General Audit OIG-13-23
FEMA Disaster Number 1665-DR-NY

Dear Administrator Fugate, Inspector General Edwards and Commissioner Hauer:

On February 8, 2013, the Office of Inspector General of the US Department of Homeland Security ("OIG") issued Audit Report Number OIG-13-23 entitled "FEMA Should Recover $48 Million of Public Assistance Grant Funds Awarded to Erie County, New York – Severe Weather October 2006" ("Audit"). In that unprecedented local disaster, the New York State Division of Homeland Security and Emergency Services ("HSES"), through the New York State Emergency Management Office ("NYSEMO") was the federal grantee and Erie County ("County") was the subgrantee.

The Audit contained five findings and six recommendations, of which the County strongly objects to and disagrees with the two main findings and the two main recommendations. The major OIG finding declared that the then-Erie County Executive Joel Giambra in October 2006 directed the County's Division of Purchase to award storm disaster contracts giving preference to local vendors. OIG found that a public statement by County Executive Giambra in the days immediately following the storm in which he expressed his desire to award debris removal, cleanup and monitoring contracts to local vendors meant that the County violated United States Code of Federal Regulations ("CFR") Chapter 44 at § 13.36(c)(2) against administratively imposed geographic preferences. As a result of this alleged County violation, OIG determined that the County was improperly awarded $39.4 million of Public

Assistance Grant Funds by the Federal Emergency Management Agency ("FEMA") and OIG requested that FEMA recover those funds.

Secondly, OIG made a separate finding that the County did not provide adequate documentation justifying FEMA's payment of $9.03 million in claimed costs, and OIG recommended that FEMA recover those funds as well.

Finally, OIG stated that the County and the New York State Division of Homeland Security and Emergency Services ("HSES") "did not exercise due diligence over FEMA's $55.4 million disaster assistance grant" and that "HSES did not provide adequate day-to-day management or monitor subgrant activity."

For the reasons noted herein, the County profoundly disagrees with OIG's findings and related recommendations and provides our detailed explanations and rationale for your consideration.

That said, I must point out one major, salient fact throughout these findings: there is absolutely no evidence of improper use of these funds. FEMA and NYSEMO staff signed-off and approved of all County actions, activities, procurements, and claims between October 2006 and the closing out of the storm activities in 2010. Every single claim and reimbursement and County action was vetted, audited and approved by FEMA and NYSEMO officials. While certain County officials may have had difficulty tracking down some records and files six years after the storm during the Audit fieldwork, the fact remains that everything that was done in 2006-2010 was conducted with FEMA and NYSEMO approvals. If County officials unknowingly violated federal rules or regulations, they were never corrected by the appropriate oversight agencies who knew the regulations, including HSES, the grantee, and FEMA, the appropriating agency.

Detailed Analysis

OIG Finding A: Lack of Open and Full Contracting Competition

"Contrary to Federal procurement regulations, the County Executive directed the County's Purchasing Department to award contracts giving preference to local contractors, thus improperly limiting the competitive pool the County's Purchasing Department could use to award contracts. The contracts in question, totaling $39,391,260, covered vegetative debris removal and disposition, storm-damaged tree removal, and the monitoring of these activities. Despite the apparent desire to keep this work local, the local contractors then subcontracted with contractors from outside of the area."

Erie County Response to OIG Finding A

OIG has cited 44 CFR § 13.36(c)(2) [1] as its legal basis against administratively imposed geographic preferences. However, OIG has failed to acknowledge superseding federal law that explicitly directed local preference in disaster recovery.

[1] 44 CFR § 13.36(c)(2) states as follows: Grantees and subgrantees will conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals, ***except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference***. (emphasis added).

The Local Community Recovery Act of 2006 (Public Law 109-218, signed into law by President George W. Bush on April 20, 2006) amended Section 307 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act to authorize set-asides for major disaster or emergency assistance acquisitions for businesses "that reside or primarily do business in the area affected by the disaster or emergency." Furthermore, Section 694 of the Department of Homeland Security Appropriations Act of 2007 (Public Law 109-295, signed into law by President Bush on October 4, 2006) required justifications for expenditures in disaster situations to *non-local firms or individuals*. Section 694 states:

> In the expenditure of Federal funds for debris clearance, distribution of supplies, reconstruction, and other major disaster or emergency assistance activities which may be carried out by contract or agreement with private organizations, firms, or individuals, preference shall be given, to the extent feasible and practicable, to those organizations, firms, and individuals residing or doing business primarily in the area affected by such major disaster or emergency.

Both federal laws, passed by Congress and signed into law prior to the October 12, 2006 storm, clearly allow – and even demand – local preferences. Yet, OIG has failed to acknowledge either of these laws when trying to justify their findings and recommended penalizing the County for following the law. For this reason, we believe that OIG Audit Finding A is without merit. We request that FEMA and HSES perform their own legal analysis of the subject matter, confirm our legal analysis, and that FEMA, OIG and HSES agree with our request that this finding be retracted and a corrected Audit report issued.

I would also note for the record that in media comments to the *Buffalo News* in an article published on March 4, 2013, D. Michael Beard, Assistant Inspector General at OIG while claiming to the press that Erie County made certain errors in its storm response that were not contained in the Audit, seemingly admitted that his auditors failed to acknowledge the superseding federal laws governing local preferences.

OIG Finding B: Unsupported Claimed Costs

"The County claimed unsupported costs of $9,030,634 under projects 600, 614, 628, and 675. Federal regulation 2 CFR 225, *Cost Principles for State, Local, and Indian Tribal Governments*, Appendix A, C.1.j., states that a cost must be adequately documented to be allowable under Federal awards. Federal regulation 44 CFR 13.20(b)(6) further states that accounting records must be supported by such source documentation as canceled checks, paid bills, payrolls, time and attendance records, contract and subgrantee award documents, and so on. In addition, 44 CFR 206.223(a)(1) states that an item of work must be required as a result of a major disaster event to be eligible for financial assistance. The County did not provide adequate documentation to show that the amounts charged to projects 600, 614, 628, and 675 contain expenditures allowable under the PA program. Further, the County could not produce a cost summary or reconciliation that could support the amounts questioned. The project worksheets simply described these costs as estimates. In addition, the interim summaries provided by

the County showed these costs as estimates, and the projects as not completed. The County never performed a final reconciliation."

Erie County Response to OIG Finding B

OIG stated in the Audit that the County response was that the County "lost" the records for projects 600, 614, 628, and 675. While certain records were not initially located in a County warehouse six years after the storm, the County contacted HSES in Albany, New York and successfully obtained some missing data. That data was provided to the OIG field auditors in summer 2012. However, due to a miscommunication between the auditors and the County emergency services staff, the data provided was apparently not specifically what the auditors required – a factor which did not become clear until the audit was issued and the County received the Audit report. Following the meeting in August 2012 and the County's provision of records after that meeting, the County did not know that OIG was continuing to assert an unsupported claimed costs finding until we received a one-page Audit Summary from OIG on December 31, 2012 (which did not include any specific information). In early January 2013, upon a County inquiry, OIG told us the Audit was being issued and the County would not receive any other opportunity to comment or address the Audit findings until after the County received the Audit report on January 29, 2013.

Upon receiving the embargoed Audit report on January 29, 2013, the County became alarmed by the finding and the discrepancy in the requested records. Records in question are available and pursuant to a telephone conference call between County staff and the OIG auditors on February 26, 2013 to clarify their original request, we will provide them to the appropriate federal officials (the OIG auditors informed us that their work was concluded and they would no longer accept any records). We would further note that the Audit fails to offer any specific data or evidence pertaining to the $9.03 million in questioned costs and there is still some ambiguity concerning how the auditors developed and calculated the $9.03 million figure. If the County is given an opportunity to understand in detail, how OIG calculated this number and what specific records, invoices and so forth, were allegedly not provided, the County will immediately provide those documents to FEMA and OIG. As stated, the Audit is lacking in any specificity and it is impossible to determine the $9.03 million in questioned costs until such specificity is provided by OIG.

In their counter-response, OIG stated that "If the County can produce records documenting the amounts in question, the costs could be allowable." We respectfully request that OIG or FEMA consider this request to address the $9.03 million in questioned costs based on the available data and the misunderstanding between OIG and the County and allow the County the opportunity (1) to understand OIG's methodology determining the exact nature of the $9.03 million figure; and (2) to provide FEMA and OIG with the records in question.

Audit Finding E: Accounting and Grant Management

"The County and HSES did not exercise due prudence over FEMA's $55.4 million disaster assistance grant. The County's internal report on recordkeeping, overtime, and financial issues made

these same observations. While the County is ultimately responsible for its recordkeeping and the costs incurred; HSES did not provide adequate day-to-day management or monitor subgrant activity."

"HSES should have better managed its grant responsibilities and should have been aware of the County's need for additional support. Federal regulation 44 CFR 13.37(a)(2) requires the grantee to ensure that subgrantees know of the requirements imposed on them by Federal regulations. Further, 44 CFR 13.40(a) requires the grantee to manage the day-to-day operations of subgrant activity and monitor subgrant activity to assure compliance with applicable Federal requirements."

Erie County Response to Audit Finding E

OIG field staff claimed in meetings with County representatives and at the August 2012 meeting that the target of the Audit was FEMA and to an extent, HSES. OIG staff stated that they believed that FEMA and HSES did not properly supervise the County in 2006 et al, and the field auditors stated that US Department of Homeland Security headquarters management wanted to send a message to FEMA that it needed to exercise better due diligence during storms and post-storm recovery in the management of funds.

In reading the Audit, one is left with the impression that FEMA did nothing wrong whatsoever, and that all of the blame for alleged violations of federal law or regulations lies with the County and to a limited extent, HSES. I would point out again all County actions were done with the knowledge and approvals of FEMA and NYSEMO staff. While County officials in 2012 may have some difficulty providing or locating some specific names and paper trails for said approvals, the fact remains that FEMA and NYSEMO approvals were granted in 2006-2010 for all County actions. Had said approvals not taken place, the County clearly would not have received any of the $55 million in reimbursements from FEMA and NYSEMO. If Erie County had received some or all of the funds, as it did, the follow-up audits by FEMA and NYSEMO that were done prior to this OIG audit would have found the errors that OIG asserts. They did not.

It is perplexing that FEMA is not criticized in the Audit for its failure to monitor what would seem to be, based on the OIG comments, major systemic failures on the part of the grantee and subgrantee. If the County so profoundly violated federal laws and regulations, why didn't FEMA stop the allegedly improper behavior which took place for several years when it was occurring under FEMA and HSES oversight? FEMA is held harmless for its alleged lack of oversight while the County, which followed FEMA advice, is blamed.

Further, while OIG criticizes HSES as the grantee for not exercising better oversight of the County, the Audit does not call for New York State to repay FEMA; rather, the Audit demands recoupment of $48 million from the County. If NYSEMO and HSES are and were expected by FEMA and OIG to understand the myriad of federal regulations governing disaster assistance and were required to monitor the subgrantee, why doesn't the Audit call for the State to accept responsibility for the allegedly ineligible and unsupported costs?

In 2010, I served as Erie County Comptroller and my office conducted a review ("Review") of the financial proceedings associated with the storm recovery. The intent of that Review was to quantify the storm expense, County costs, and federal and state reimbursements so that County lawmakers and the public could understand the storm expense and revenues. In the Audit, OIG has made broad oversimplifications and mischaracterizations of my Review and has claimed that my 2010 Review agreed with them. That is not true or accurate. In fact, OIG never asked to interview me in regard to my review's findings and I reject its characterization of my Review.

A community, acting as a subgrantee in response to a then current disaster must be able to rely upon the advice of FEMA and the applicable state emergency management agency. The local responders cannot be expected to be up to date with all FEMA policies as they change from time to time. That is the duty of FEMA. OIG has indicated through this Audit that a different approach must be followed. That approach suggests that FEMA staff cannot be trusted. If their advice is followed and then found to be in error, the subgrantee is responsible, not FEMA or its staff. The approach contained in this Audit will lead to a very unwise public policy that will potentially delay disaster responses as subgrantees question the advice provided by FEMA, thus putting lives and property in jeopardy.

Methodological Issue

On August 17, 2012, several representatives of the County met with OIG staff at what was described as an "exit conference." At that meeting, OIG staff presented County officials with a nine-page PowerPoint presentation, of which four pages pertained to the storm and findings were presented in a "bullet"-style format. During the meeting, County officials were provided with a limited opportunity to comment on the presentation, a copy of which is enclosed for your review. Subsequent to that meeting, despite repeated County efforts inquiring about a formal exit conference and an opportunity to review an actual draft Audit document (and not bullet points) and to make a formal written reply, our efforts were rebuffed by OIG. We also note for the record that HSES apparently did not hold an exit conference with OIG or provide any comments to the Audit.

Having previously served as the County's Comptroller, in which role I served as the County's Chief Auditor and supervised auditors, I find this process troubling and seemingly not in accord with generally accepted government auditing standards. The County should have been given an opportunity to attend a genuine, formal exit conference, at which time the County should have been provided a draft Audit report to review and formally comment in writing prior to its public release. In fact the County was not accorded such opportunity.

As you can see from this response, I am greatly troubled not only by the findings, but the conduct of the OIG field staff. The fact that a senior OIG official is now conceding to a media outlet – only after the County rebutted the Audit's major finding on local preferences – that OIG completely failed to understand federal law, is profoundly troubling and worrisome. If OIG failed to understand the law and regulations on this point, it raises the question of what other items and findings in the Audit are suspect as well. This is why a formal exit conference is held with an audited entity: to give the entity the opportunity to address any inaccuracies or inconsistencies in the draft audit prior to its final release. If a traditional exit conference had been held prior to the audit's release, I believe the vast majority of the

audit findings would have been removed due to the inappropriate law relied upon and non-identification of alleged unsupported documentation.

I am also disappointed by the perception that FEMA and NYSEMO officials, whose mission is to not only help local governments recover from disasters but to oversee their compliance with federal regulations and laws, allegedly allowed the County to violate those rules and yet they said nothing and approved of all actions. The fact after this storm and the storm recovery, after complying with on-scene FEMA and NYSEMO advice and guidance, after numerous NYSEMO and FEMA reviews and audits of those audits—a total of six years afterwards—OIG raises profound questions about the ability of local governments suffering through federally declared disasters to trust the advice and counsel provided to them by FEMA and NYSEMO/HSES during traumatic and challenging times.

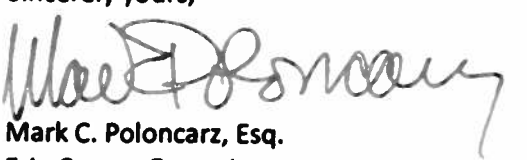
I therefore:

1. Call upon OIG to withdraw this deeply flawed Audit,
2. Call upon FEMA to reject the findings of the Audit as explained above and to decline to seek payments from Erie County or NYSEMO, and
3. Call upon NYSEMO to support Erie County in having this flawed Audit rejected or withdrawn.

Along with our federal representatives, Erie County will do everything possible to demonstrate the misinterpretation of the law, flawed methodology and improper conclusions expressed by OIG auditors to stave off a potential new disaster—this time, a financial one—that local taxpayers need not have to bear.

Thank you for the opportunity to provide this written response to the Audit. I look forward to hearing from you.

Sincerely yours,



Mark C. Poloncarz, Esq.
Erie County Executive

MCP/tc
Encl.

cc: MaryAnn Tierney, Acting Regional Administrator, Federal Emergency Management Agency
D. Michael Beard, Assistant Inspector General, OEMS, US Department of Homeland Security
Senator Charles E. Schumer
Senator Kirsten R. Gillibrand
Representative Brian M. Higgins
Representative Christopher C. Collins
Governor Andrew M. Cuomo

Public Assistance Audits for Erie County, NY

FEMA 1665-DR-NY & FEMA 1857-DR-NY

Exit Conference

August 17, 2012

Department of Homeland Security
Office of Inspector General
Office of Emergency Management Oversight

Scope of Audit

- Our audit scope for each of the public assistance claims: The amount claimed by the County as expended for disaster response. FEMA's Public Assistance program is to reimburse costs of disaster response and recovery. These costs must be for effort expended in the disaster and within the regulations set out.
- We did not focus on disaster response adequacy.

Audit Results – DR 1857

Disaster also known as the Gowanda flood.

This disaster is still open.

Dollars audited: $1,367,430

Amount questioned: $106,407

Questioned Costs Comprised:

$89,071	Project costs estimated, once repair was completed, funding availability not needed. Will be removed from project closeout.
$17,336	Lack of adequate support.

2 CFR part 225; 44 CFR 13.20(b)(2);

Audit Results – DR 1665

Disaster also known as the October Storm.

The disaster claim was closed in 2010.

Amount audited: $53 million

Amount questioned: $48,906,651

Questioned Costs Comprised:

$39,391,259 Contracts not awarded in accordance to federal procurement requirements. 44 CFR 13.36(c)(2) requires procurement to be conducted in a manner that prohibits administratively imposed local geographical preferences. Also, 44 CFR 13.36(c)(1) fair and open competition.

Questioned Costs Comprised:

$9,471,870 Lack of adequate documentation to demonstrate costs claimed were expended on eligible activities. 44 CFR 13.20(b)(2) Accounting Records, "...subgrantees must maintain records which adequately identify the source and application of funds provided for financially assisted activities."

Questioned Costs Comprised:

$33,066	Eligible administrative costs also claimed direct to a project.
$10,456	Equipment repair costs claimed direct, equipment repairs are part of the equipment use rate, also claimed.
$ 3,863	Costs incurred outside of the disaster period of performance.