

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

CITY OF NEW YORK,

Defendant.

19 Civ. 1588

**STIPULATION AND ORDER OF  
SETTLEMENT**

WHEREAS, this Stipulation and Order of Settlement and Dismissal (“Stipulation”) is entered into by and among plaintiff the United States of America (the “United States” or “Government”), by its attorney, Geoffrey S. Berman, United States Attorney for the Southern District of New York; and the defendant City of New York (the “City” or “Defendant,” and together with the Government, the “Parties”), by its authorized representatives;

WHEREAS, on or about May 14, 2014, the City submitted to the Federal Emergency Management Agency (“FEMA”) a request for reimbursement relating to alleged damages to vehicles and equipment that were purportedly sustained by the New York City Department of Transportation (“NYCDOT”) as a result of Super Storm Sandy (“Sandy”) in or about October 2012;

WHEREAS, consistent with FEMA policies and procedures, the City’s original request for reimbursement was submitted to FEMA as version zero of Project Worksheet 3817/NYC5113 (the “PW”), a document that contained a description of the alleged damages and the amount sought to be reimbursed;

WHEREAS, on or about July 15, 2014, FEMA granted the City's reimbursement request made in the PW by authorizing the allocation of up to \$12,758,664 of FEMA funds to replace the NYCDOT vehicles purportedly damaged during Sandy;

WHEREAS, subsequent to FEMA granting the City's reimbursement request made in the PW, the City subsequently amended the PW three times;

WHEREAS, the first amended PW ("Version 1") was identical to the initial PW other than it included a request for an additional \$683,145.37 to cover additional costs relating to NYCDOT vehicles purportedly damaged during Sandy;

WHEREAS, FEMA approved Version 1, including its request for additional funds, on September 9, 2015;

WHEREAS, after it became aware of an investigation by the United States Attorney's Office for the Southern District of New York (the "SDNY") into allegations that the City had improperly submitted ineligible vehicles as part of the PW's reimbursement request to FEMA, the City amended the PW two additional times;

WHEREAS, the second amended PW ("Version 2") was identical to Version 1, other than it included a request to de-obligate, or return to FEMA, \$2,282,135, based on the City's acknowledgment that five of the vehicles for which it had sought and been granted reimbursement as part of the initial PW were, in fact, ineligible for reimbursement;

WHEREAS, FEMA approved Version 2, including the City's request for de-obligation, on August 26, 2016;

WHEREAS, the third amended PW ("Version 3") was identical to Version 2, other than it included a request to de-obligate an additional \$914,241, based on the City's acknowledgment

that two additional vehicles for which it had sought and been granted reimbursement as part of the initial PW were also ineligible for reimbursement;

WHEREAS, FEMA approved Version 3, including the City's second request for de-obligation, on August 30, 2017;

WHEREAS, by approving the requests for de-obligation made in Version 2 and Version 3 of the PW, FEMA agreed to reduce the total amount of authorized funding earmarked for the City by \$3,196,376;

WHEREAS, on or about February [ ], 2019, the Government filed a complaint against the City asserting claims under the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq.*, and the common law, based on allegations that the City submitted false certifications to FEMA in connection with the PW and Versions 1 through 3 of the PW (the "Complaint");

WHEREAS, the Complaint specifically alleges that the City falsely certified in the PW and Version 1 that all of the NYCDOT vehicles listed in the PW were damaged to a state beyond repair as a direct result of Sandy, when in fact, certain of those vehicles were ineligible for reimbursement. The Complaint further alleges that the City falsely certified in Versions 2 and 3 that all of the vehicles listed in the PW, other than the seven vehicles that were the subject of the de-obligation requests, were damaged to a state beyond repair as a direct result of Sandy, when in fact, certain of those vehicles were ineligible for reimbursement. According to the allegations of the Complaint, as a result of the City's false certifications in the PW and Versions 1 through 3, FEMA allocated millions of dollars to pay reimbursement claims that the City made for ineligible vehicles. The conduct described in this paragraph, including all activities involved in submitting the PW to FEMA, constitutes the "Covered Conduct" for purposes of this Stipulation;

WHEREAS, the Parties have, through this Stipulation, reached a mutually agreeable resolution addressing the claims asserted against the City in the Complaint for the Covered Conduct;

NOW, THEREFORE, upon the Parties' agreement, IT IS HEREBY ORDERED that:

**TERMS AND CONDITIONS**

1. The Parties agree that this Court has subject matter jurisdiction over this action and consent to this Court's exercise of personal jurisdiction over each of them.
2. Defendant admits, acknowledges and accepts responsibility for the following conduct:
  - a. In May 2014, the City submitted the PW to FEMA.
  - b. The PW sought reimbursement from FEMA in the amount of \$12,758,664, for the replacement of certain NYCDOT vehicles that the City claimed were damaged to a state beyond repair as a direct result of Sandy. The City attached to the PW a list of the relevant vehicles together with the dollar amount that the City was seeking in reimbursement for each such vehicle.
  - c. In support of the PW, the City submitted to FEMA a certification from a NYCDOT Deputy Commissioner stating that "[a]ll vehicles and equipment identified in the attached vehicle and equipment damage list were damaged as a direct result of Superstorm Sandy to a state beyond repair," and "the vehicle and equipment damaged and associated quantities presented to FEMA . . . accurately represents the losses incurred as a result of Superstorm Sandy."

- d. However, the list of vehicles for which the City was seeking reimbursement included a number of vehicles that were not “damaged as a direct result of Sandy to a state beyond repair.” In fact, a number of the vehicles that the City included in the PW had not been operational prior to Sandy.
- e. Prior to making the above-referenced PW submission and certification to FEMA, neither the City nor NYCDOT undertook a sufficient review to ascertain:
  - i. whether all of the vehicles listed in the PW had been operational and in use prior to Sandy; or
  - ii. whether the amounts presented to FEMA as part of the City’s request for reimbursement accurately represented the losses that had been incurred by the City as a result of Sandy.
- f. The Deputy Commissioner from NYCDOT who signed the certification stating that the vehicles identified in the PW “were damaged as a direct result of Superstorm Sandy” lacked personal knowledge about the vehicles sufficient to make a certification about how and when they were damaged and did not personally undertake or direct others to undertake any investigation of the vehicles prior to signing the certification.
- g. FEMA relied on the City’s certification in connection with the PW and approved the PW in its entirety, authorizing the payment of \$12,758,664 of FEMA funds, which was the full amount that the City was seeking for each of the vehicles listed in the PW.

- h. As a result of the City's false certification, FEMA authorized reimbursement to the City for significant costs that were ineligible for reimbursement because the vehicles at issue had not actually been damaged by Sandy as represented by the City.
- i. Had FEMA been aware of the City's false certification, FEMA would not have authorized reimbursement to the City for the ineligible vehicles.
- j. In June 2014, less than one month after the City submitted the PW to FEMA, a NYCDOT employee (the "NYCDOT Employee") sent an e-mail to the same Deputy Commissioner who had submitted the certification in support of the PW, stating that certain of the vehicles for which the City had sought reimbursement from FEMA — specifically, certain paving vehicles (the "ineligible paving vehicles") — were "junk for years ...."
- k. Following FEMA's initial approval of the PW, but after the City received the June 2014 e-mail from the NYCDOT Employee stating that the PW sought reimbursement for the ineligible paving vehicles, the City submitted to FEMA an amended version of the PW ("Version 1") that continued to seek reimbursement for the ineligible paving vehicles and also included a request for an additional \$683,145.37 in reimbursement funds. In support of Version 1 of the PW, the City relied on the same certification from the NYCDOT Deputy Commissioner that had been submitted with the original PW.
- l. FEMA approved Version 1 on the basis of the City's false certification.

- m. Prior to the City becoming aware of an investigation by the SDNY into the PW, the City did not inform FEMA that it should not receive reimbursement for the ineligible paving vehicles described in the NYCDOT Employee's June 2014 e-mail, which had been included in the PW and Version 1 of the PW, to support a reimbursement claim of \$2,282,135 for five paving vehicles.
- n. It was not until after becoming aware of SDNY's investigation into the City's claims regarding vehicles allegedly damaged by Sandy, including the ineligible paving vehicles, that the City took steps to notify FEMA that the City was not entitled to \$3,196,376 it had requested and been allocated by FEMA for vehicles identified in the PW and Version 1, including the five ineligible paving vehicles plus an additional two paving vehicles.

3. Within thirty (30) days of the Effective Date (defined below in Paragraph 24), the City shall amend Version 3 of the PW solely to request that FEMA de-obligate an additional \$1,177,396.66 from the federal funds currently available to the City under Version 3 (the "De-Obligation Amount").

4. Defendant shall pay to the Government within thirty (30) business days of the Effective Date the sum of \$4,126,227.34 (the "Paid Amount"). Of the \$4,126,227.34, \$0 is restitution. The Paid Amount shall be paid in accordance with instructions to be provided by the Financial Litigation Unit of the United States Attorney's Office for the Southern District of New York.

5. The De-Obligation Amount and the Paid Amount are together the "Settlement Amount" for purposes of this Stipulation.

6. Defendant agrees to cooperate fully and truthfully with the United States' investigation of individuals and entities not released in this Stipulation. Upon reasonable notice, Defendant shall encourage, and agrees not to impair, the cooperation of its directors, officers, and employees, and shall use its best efforts to make available, and encourage, the cooperation of former directors, officers, and employees for interviews and testimony, consistent with the rights and privileges of such individuals. Defendant further agrees to furnish to the United States, upon request, complete and unredacted copies of all non-privileged documents, reports, memoranda of interviews, and records in its possession, custody, or control concerning any investigation of the Covered Conduct that it has undertaken, or that has been performed by another on its behalf.

7. Subject to the exceptions in Paragraphs 9 and 13 below (concerning excluded claims and bankruptcy proceedings), and conditioned upon Defendant's full compliance with the terms of this Stipulation, including full payment of the Paid Amount to the United States pursuant to Paragraph 4 above and full compliance with the City's obligations regarding the De-Obligation Amount pursuant to Paragraph 3 above, the United States releases the City and all its agencies and departments, including its subsidiaries and corporate predecessors, successors and assigns, from any civil or administrative monetary claim that the United States has for the Covered Conduct, including any such claim that is based on the amendment to Version 3 that is described in Paragraph 3 above, under the FCA, the Civil Monetary Penalties Law, 42 U.S.C. § 1320a-7a, the Program Fraud Civil Remedies Act, 31 U.S.C. § 3801-3812, and the common law theories of fraud, payment by mistake, and unjust enrichment. For avoidance of doubt, this Stipulation does not release any current or former officer, director, employee, or agent of the City from liability of any kind.



8. The City fully and finally releases the United States, its agencies, officers, employees, servants, and agents from any claims (including attorneys' fees, costs, and expenses of every kind and however denominated) that the City has asserted, could have asserted, or may assert in the future against the United States, its agencies, officers, employees, servants, or agents related to the Covered Conduct and the United States' investigation, prosecution and settlement thereof. For avoidance of doubt, nothing in this Stipulation bars the City from creating and submitting to FEMA the amended version of the PW referenced above in paragraph 3, or from obtaining funding from FEMA under that amended PW.

9. Notwithstanding the releases given in Paragraph 7 above, or any other term of this Stipulation, the following claims of the Government are specifically reserved and are not released by this Stipulation:

- a. any liability arising under Title 26, United States Code (Internal Revenue Code);
- b. any criminal liability;
- c. except as explicitly stated in this Stipulation, any administrative liability, including but not limited to the suspension and debarment rights of any federal agency, including FEMA;
- d. any liability to the United States (or its agencies) for any conduct other than the Covered Conduct;
- e. any liability based upon obligations created by this Stipulation; and
- f. any liability of individuals.

10. Defendant shall be in default of this Stipulation if Defendant fails to make the required payment set forth in Paragraph 4 above on or before the due date for such payment, or if

it fails to comply materially with any other term of this Stipulation that applies to it (“Default”). The Government shall provide written notice to the City of any Default in the manner set forth in Paragraph 23 below. Defendant shall then have an opportunity to cure the Default within ten (10) calendar days from the date of delivery of the notice of Default. In the event that a Default is not fully cured within ten (10) calendar days of the delivery of the notice of Default (“Uncured Default”), interest shall accrue at the rate of 12% per annum compounded daily on the remaining unpaid principal balance of the Settlement Amount, beginning ten (10) calendar days after mailing of the notice of Default. In the event of an Uncured Default, Defendant shall agree to the entry of a consent judgment in favor of the United States against Defendant in the amount of the Settlement Amount as attached hereto as Exhibit A. The United States may also, at its option, (a) rescind this Stipulation and reinstate the claims asserted against Defendant in the Government Complaint; (b) seek specific performance of this Stipulation; (c) offset the remaining unpaid balance of the Settlement Amount from any amounts due and owing the City by any department, agency, or agent of the United States; or (d) exercise any other rights granted by law, or under the terms of this Stipulation, or recognizable at common law or in equity. The City shall not contest any offset imposed or any collection undertaken by the Government pursuant to this Paragraph, either administratively or in any Federal or State court. In addition, Defendant shall pay the Government all reasonable costs of collection and enforcement under this Paragraph, including attorneys’ fees and expenses. In the event that the United States opts to rescind this Stipulation pursuant to this Paragraph, the City shall not plead, argue, or otherwise raise any defenses under the theories of statute of limitations, laches, estoppel, or similar theories, to any civil or administrative claims that relate to the Covered Conduct.

11. Defendant waives and shall not assert any defenses Defendant may have to any criminal prosecution or administrative action relating to the Covered Conduct that may be based in whole or in part on a contention that, under the Double Jeopardy Clause in the Fifth Amendment of the Constitution, or under the Excessive Fines Clause in the Eighth Amendment of the Constitution, this Stipulation bars a remedy sought in such criminal prosecution or administrative action.

12. Defendant represents and warrants that it has reviewed its financial situation, that it is currently not insolvent as such term is defined in 11 U.S.C. § 101(32) and that it reasonably believes that it shall remain solvent following payment to the Government of the Settlement Amount. Further, the Parties warrant that, in evaluating whether to execute this Stipulation, they (a) have intended that the mutual promises, covenants, and obligations set forth constitute a contemporaneous exchange for new value given to Defendant, within the meaning of 11 U.S.C. § 547(c)(1); and (b) have concluded that these mutual promises, covenants, and obligations do, in fact, constitute such a contemporaneous exchange. Further, the Parties warrant that the mutual promises, covenants, and obligations set forth herein are intended to and do, in fact, represent a reasonably equivalent exchange of value that is not intended to hinder, delay, or defraud any entity to which Defendant was or became indebted to on or after the date of this Stipulation, within the meaning of 11 U.S.C. § 548(a)(1).

13. If within 91 days of the Effective Date of this Stipulation or any payment made under this Stipulation, Defendant commences any case, action, or other proceeding under any law relating to bankruptcy, insolvency, reorganization, or relief of debtors or a third party commences any case, action, or other proceeding under any law related to bankruptcy, insolvency, reorganization, or relief of debtors (a) seeking an order for relief of Defendant's

debts, or seeking to adjudicate Defendant as bankrupt or insolvent; or (b) seeking appointment of a receiver, trustee, custodian, or other similar official for Defendant or for all or part of

Defendant's assets, Defendant agrees as follows:

- a. Defendant's obligations under this Stipulation may not be avoided pursuant to 11 U.S.C. § 547, and Defendant shall not argue or otherwise take the position in any such case, action, or proceeding that (i) Defendant's obligations under this Stipulation may be avoided under 11 U.S.C. § 547; (ii) Defendant was insolvent at the time this Stipulation was entered into; or (iii) the mutual promises, covenants, and obligations set forth in this Stipulation do not constitute a contemporaneous exchange for new value given to Defendant.
- b. If any of Defendant's obligations under this Stipulation are avoided for any reason, including, but not limited to, through the exercise of a trustee's avoidance powers under the Bankruptcy Code, the Government, at its option, may rescind the release in this Stipulation and bring any civil and/or administrative claim, action, or proceeding against Defendants for the claims that would otherwise be covered by the release in Paragraph 7 above.

Defendant agrees that (i) any such claim, action, or proceeding brought by the Government would not be subject to an "automatic stay" pursuant to 11 U.S.C. § 362(a) as a result of the case, action, or proceeding described in the first sentence of this Paragraph, and Defendant shall not argue or otherwise contend that the Government's claim, action, or proceeding is subject to an automatic stay; (ii) Defendant shall not plead, argue, or otherwise raise any defenses under the theories of statute of limitations, laches, estoppel, or

similar theories, to any claim, action, or proceeding that is brought by the Government within 60 calendar days of written notification to Defendant that the release has been rescinded pursuant to this Paragraph, except to the extent such defenses were available on [the date any underlying suit was filed or the first day covered by any tolling agreement protecting the United States' claims, whichever provides the fullest protection for the United States]; and (iii) the Government has a valid claim against Defendant in the amount of the Settlement Amount and the Government may pursue its claim in the case, action, or proceeding described in the first sentence of this Paragraph, as well as in any other case, action, or proceeding.

- c. Defendant acknowledges that the agreements in this Paragraph are provided in exchange for valuable consideration provided in this Stipulation.

14. Defendant agrees to the following:

- a. Unallowable Costs Defined: All costs (as defined in the Office of Management and Budget (“OMB”) Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards published at 2 C.F.R. §§ 200 *et seq.*; the Department of Health and Human Services adoption of the OMB Guidance provided at 45 C.F.R. § 75, subpart E *et seq.*; the Federal Acquisition Regulation, 48 C.F.R. § 31.205-47 where applicable; or otherwise as specified by federal statutes, regulations or the terms and conditions of a Federal award) incurred by or on behalf of Defendant, including its present or former officers, directors, employees, and agents in connection with:

- (1) the matters covered by this Stipulation;
- (2) the United States' audit(s) and civil investigation(s) of matters covered by this Stipulation;
- (3) Defendant's investigation, defense, and corrective actions undertaken in response to the United States' audit(s) and civil investigation(s) in connection with matters covered by this Stipulation (including attorneys' fees);
- (4) the negotiation and performance of this Stipulation; and
- (5) any payment Defendant makes to the United States or the De-Obligation Amount made pursuant to this Stipulation;

are unallowable costs for government contracting purposes and under the Medicare Program, Medicaid Program, TRICARE Program, and Federal Employees Health Benefits Program (FEHBP) (hereinafter referred to as "Unallowable Costs").

- b. Future Treatment of Unallowable Costs: Unallowable Costs shall be separately determined and accounted for by Defendant, and Defendant shall not charge such Unallowable Costs directly or indirectly to any contracts with the United States.
- c. Treatment of Unallowable Costs Previously Submitted for Payment: Within 90 days of the Effective Date of this Stipulation, Defendant shall identify and repay by adjustment to future claims for payment or otherwise any Unallowable Costs (as defined in this Paragraph) included in payments previously sought by Defendant from the United States. Defendant agrees that

the United States, at a minimum, shall be entitled to recoup from Defendant any overpayment plus applicable interest and penalties as a result of the inclusion of such Unallowable Costs on previously-submitted requests for payment. Any payments due shall be paid to the United States pursuant to the direction of the Department of Justice and/or the affected agencies. The United States, including the Department of Justice and/or the affected agencies, reserves its right to audit, examine, or re-examine Defendant's books and records and to disagree with any calculation submitted by Defendant or any of its subsidiaries or affiliates regarding any Unallowable Costs included in payments previously sought by Defendant, or the effect of any such Unallowable Costs on the amounts of such payments.

- d. Nothing in this Stipulation shall constitute a waiver of the rights of the United States to audit, examine, or re-examine Defendant's books and records to determine that no Unallowable Costs have been claimed in accordance with the provisions of this Paragraph.

15. This Stipulation is intended to be for the benefit of the Parties only. The Parties do not release any claims against any other person or entity except as otherwise provided herein.

16. Each Party shall bear its own legal and other costs incurred in connection with this matter, including the preparation and performance of this Stipulation.

17. Any failure by the Government to insist upon the full or material performance of any of the provisions of this Stipulation shall not be deemed a waiver of any of the provisions hereof, and the Government, notwithstanding that failure, shall have the right thereafter to insist upon the full or material performance of any and all of the provisions of this Stipulation.

18. This Stipulation is governed by the laws of the United States. The exclusive jurisdiction and venue for any dispute relating to this Stipulation is the United States District Court for the Southern District of New York. For purposes of construing this Stipulation, this Stipulation shall be deemed to have been drafted by all Parties to this Stipulation and shall not, therefore, be construed against any Party for that reason in any subsequent dispute.

19. This Stipulation constitutes the complete agreement between the Parties with respect to the subject matter hereof. This Stipulation may not be amended except by written consent of the Parties.

20. The undersigned counsel and other signatories represent and warrant that they are fully authorized to execute this Stipulation on behalf of the persons and the entities indicated below.

21. This Stipulation is binding on Defendant's successor entities.

22. This Stipulation may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same Stipulation. E-mails that attach signatures in PDF form or facsimiles of signatures shall constitute acceptable, binding signatures for purposes of this Stipulation.

23. Any notice pursuant to this Stipulation shall be in writing and shall, unless expressly provided otherwise herein, be delivered by hand, express courier, or e-mail transmission followed by postage-prepaid mail, and shall be addressed as follows:

TO THE UNITED STATES:

Jessica Jean Hu  
Assistant United States Attorney  
United States Attorney's Office  
Southern District of New York  
86 Chambers Street, Third Floor  
New York, New York 10007



Email: jessica.hu@usdoj.gov

TO DEFENDANT:

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Corporation Counsel for the City of New York  
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575 Madison Avenue  
New York, New York 10022  
Email: scott.resnik@kattenlaw.com

24. The effective date of this Stipulation is the date upon which the Stipulation is approved by the Court (the "Effective Date").

Agreed to by:

**THE UNITED STATES OF AMERICA**

Dated: New York, New York  
February 20, 2019

GEOFFREY S. BERMAN  
United States Attorney for the  
Southern District of New York

By:



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*Attorney for the United States of America*

**DEFENDANT**

Dated: New York New York  
February 20, 2019

Counsel for Defendant

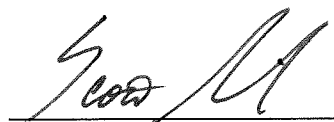
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*Attorneys for Defendant*

SO ORDERED:

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HON.  
UNITED STATES DISTRICT JUDGE

Dated: \_\_\_\_\_, 2019