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Thank you for the opportunity to provide comments regarding the GC Cost Cert ("GCCC") during the 2016 Rule Development process. While we understand and appreciate FHFC goals, we are currently in underwriting on several new developments and are working through these issues with our General Contractors ("GC") to revise the construction contracts in accordance with these requirements and wanted to offer some feedback to consider.

1. It is our opinion that **purchasing costs of appliances, blinds, shades and carpeting should generate the customary 14% GC Fee**, as these items fall within the customary Scope of the Work of the GC. The GC is specifically equipped with dedicated staff to handle the complicated coordination efforts of these items in a multimillion dollar construction project, and is better equipped to assume and resolve any potential or related liabilities regarding these items.

If a GC is not fairly compensated for these material costs[1], the GC will not source these items, nor handle the storage or coordination efforts of same, and will be forced to disclaim all responsibility. In turn the Owner will be forced to source these items directly from various suppliers, find adequate bonded storage, ensure continuous security and handle coordination of the installation. The Owner will also be responsible for any subsequent liability for owner-provided items failing to work with items the GC has provided (e.g. plumbing, electric, etc.), and for future warranty claims on those items. We think this is inequitable and clearly not in the best interest of the development and all stakeholders.

Please note the following:

1. GC's have bulk buying capabilities necessary to achieve better prices and products[2].
2. A 14% GC Fee is not all "GC Profit", but rather accounts for General Conditions and Overhead[3] as well, and pays for miscellaneous costs that Owner will otherwise have to assume from the project budget such as:
    a. Storage and security costs, which is significant in terms of space[4] and avoiding theft[5];
    b. Site-exclusive Personnel: The GC, not the Owner, is the party who employs staff located on site (e.g. Project Managers, Superintendents, etc.). Consider the potential coordination problems if these are now considered Owner items:
        i. Ordering errors/exclusions: Owner is far less experienced in supplying materials;
        ii. Delivery and on site acceptance of product: Owner cannot check if material is delivered as ordered and not defective;
        iii. Timing: Owner does not know precisely *when* to order for a staggered building delivery; and

[1] Appliances in a typical LIHTC development cost approx. $300K and flooring covering usually cost approx. $100K.
[2] There are some products that Owner might not even be able to access.
[3] As you know, the 14% GC Fee is composed –as per Rule 67-21.014(2)(r)- out of General Requirements (usually 6%), Overhead (usually 2%) and GC Profit (usually 6%).
[4] Consider the storage volume, and corresponding costs, for an average LIHTC community: 600 appliances; 125,000 SF of pallets of flooring coverings; and blinds for 500 windows of different shapes and sizes.
[5] Appliance theft is a major liability and a GC is much better equipped to mitigate that liability (e.g. GC will be very careful to ensure they have placed doors and installed door locks *before* the appliances are installed.

    iv. Liability: Owner is not an expert in the various trades and is not equipped to troubleshoot and solve a problem in the event an appliance does not work properly or malfunctions[6].
3. GC Profit and overhead can be used to absorb additional costs incurred[7]. If these are Owner items, the hard cost contingency will be used up faster.
4. IMPORTANT: Owner items will not benefit from insurance/warranty protections that the GC provides[8]:
    a. Performance & Payment Bond, which:
        i. protects Owner and Lenders against mechanic's liens; and
        ii. provides 5 years of coverage for construction defects after completion; and
    b. GC's Completed Operations Coverage premium, which further extends coverage for construction defects.

In fact, the carve-out of the 14% GC Fee will not achieve a true 14% in hard cost savings. If these items remain as GC items, the GC guarantees that price (Guaranteed Maximum Price) to the Owner, with no liability or risk to the Owner or the project budget.

2. As of today, there is **<u>no written rule</u>** regarding a fee exclusion in F.A.C. Chapter 67. Further, there is no written information on the GC Cost Cert instruction and the carve-out of the 14% GC Fee is only inferable from the GC Cost Cert Excel sheet.[9]

Additionally, these proposed exclusions affect the substantial rights of others[10] and therefore, they should be clearly enumerated in writing so as to not negatively impact the expectations of third parties. Examples of third parties affected by the lack of a written rule:

1. Lenders and Equity Providers: What type(s) of insurance should they be requiring? What is the level of risk they should assume for these items in underwriting?

2. Independent CPAs performing the GCCC audit: What are the parameters of exclusions a CPA should consider? How should a GC organize the cost backup (invoices) for them?

3. GC: What should or should not be included in their scope of work? Is it equitable for a GC to wait until after substantial completion for discretionary interpretations?

Currently, for all parties involved (including guarantors and insurance companies), the lack of a written rule renders this policy too unclear and unpredictable, as there are too many different interpretations which could apply to the same situation.

3. **<u>Conclusion: Given the substantial impact of these GC Fee exclusions, they should not be enforced</u>**. These exclusions should first be codified in Chapter 67 in writing and be

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[6] All involved will point the finger at each other: supplier, hauling crew, installation crew, plumber, electrician, etc.
[7] GC Profit is not all income/return to the GC and is often used to absorb mistakes.
[8] Builder's Risk insurance (Owner obtained) contains many exceptions when it comes to covering Owner items.
[9] A written rule would help identify the intent of the exclusion, define the excluded items and identify to what extent they should be excluded, all of which will clarify many of the issues above and result in better compliance with the rule.
[10] Other third parties that are not in the primary relationship between Administration (FHFC) and Applicant.

adopted after a formal Rule Development process has discussed them. Verbal explanations provided in a workshops and phone clarifications are seemingly insufficient in order to create rules with a material impact.

4. Irrespective of the above, if FHFC chooses to proceed to apply the GC Fee exclusions, any possible ***retroactive* effect should be avoided** to the greatest extent possible. For example, it has been mentioned that FHFC will be extending the carpeting fee exclusion to all flooring coverings. If that is the case, it should only apply to applications submitted *after* such exclusion is formerly issued in *writing*.

Also, FHFC has mentioned that developments submitted prior to October 2014 must comply with GC Fee exclusions because of the signed Applicant Certification: "The Applicant agrees to utilize the most current version of the Final Cost Certification Application Package (FCCAP) as part of the Non-Competitive Housing Credit final allocation process."[11] Applicant reasonably could have interpreted the above to mean: 'most current at the time of this Application', interpretation in accordance with Ch. 67 F.A.C. rules then valid[12].

5. Therefore, we respectfully **recommend** the following:

1. GCCC rules and forms should be designed to mirror the HUD GCCC form which does not contain GC Fee exclusions. This form is well known by various professionals (i.e. accountants, lawyers, GCs), it has been in use for over 40 years and contains well developed case law and representations there included have good certification content[13];
2. If FHFC insists on proceeding with a GC Fee exclusion policy, do not apply any of the GC Fee exclusions until such rules have been clearly codified in Chapter 67, and apply only to applications submitted after those new rules have been formally adopted. In that case, we recommend that:
    a. Such newly adopted GC Fee exclusion rules, if any, should only be for usual Owner Items like FF&E[14];
    b. GCCC audit process should be stipulated in Chapter 67, not just instructions; and
3. In any case: modify the GCCC Excel form (Rev Oct-14) by reissuing a new revision that deletes the GC Fee exclusion items (lines 407 to 436), and clarifies in its instructions that such new revision should only be used for developments that applied to RFAs due after October 2014.

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[11] This language is from Section 16.a.4(4)(i) of Exhibit A of RFA 2014-111, for which applications were due September 18, 2014 and the Non-Competitive 67-21 Rules (effective 7-16-13) and Package (Rev. March 2013) apply to those Non-Competitive Housing Credits.

[12] For RFA 2014-111 developments, the Final Cost Cert package of Jan-2013 should apply and be used, even for developments not yet completed today, as per Rule 67-21.027(6) [effective from 7-16-13 until 2-2-15].

[13] BTW, LIHTC developments that also have HUD financing will be force to pay twice for the different GC Certs for FHFC and HUD, each with a cost of $12k+, which would be an added cost if both can't be merged.

[14] Because FF&E items could be included in the GC's Scope of Work, they should not generate 14% GC Fee.