



2020 Public Works
Officers Institute & Expo

**Public Contracting Requirements:
*Emergency Preparedness and Federal and State
Reimbursement***

T. Steven Burke, Jr., Of Counsel, Meyers Nave
Eric Casher, Principal, Meyers Nave
Jason Nutt, Assistant City Manager, Director of
Transportation and Public Works, City of Santa Rosa
Robert M. Pesapane, Director, Recovery Division, FEMA
Region IX



Presentation Overview

- FEMA Public Assistance Program and Keys to Relief Recovery
- Federal and State Contract Procurement and Avoiding Pitfalls In Reimbursement
- Local Preparation For Disaster Response and Tips for Setting Up Your Emergency Operations Center
- In the Aftermath: Managing Risk After Disaster



FEMA Public Assistance Program & Keys to Relief Recovery

Disaster Recovery



Return individuals and communities to normal function
with minimal suffering and disruption of services

Individual Assistance

Public Assistance

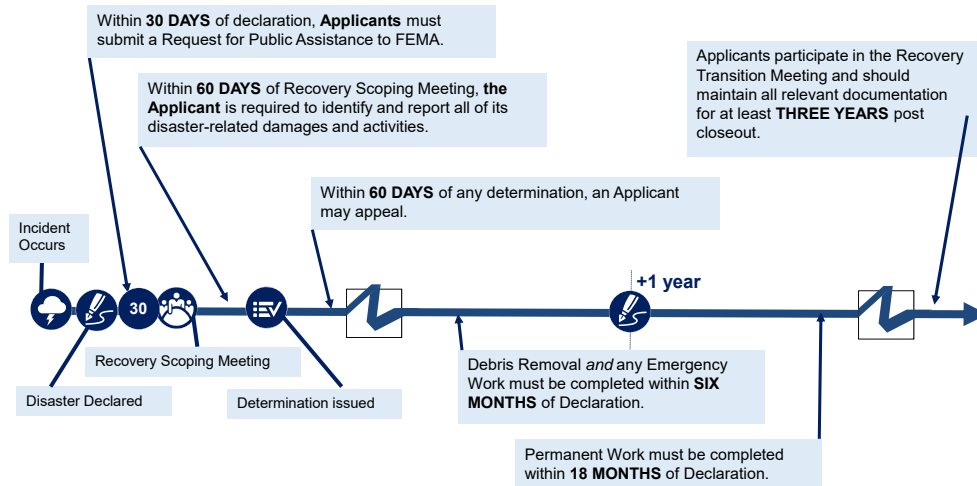
Hazard Mitigation

Public Assistance



- Federal assistance to state or local governments and eligible non-profit organizations
- Emergency protective measures and debris removal
- Repair, restoration or reconstruction of disaster-damaged public facilities and infrastructure

PA Timelines & Deadlines



PA Application Deadlines



PA program rules and regulations have established deadlines for requests, submissions, work completion, and appeals that Applicants must meet.

*A Request for Public Assistance must be submitted to FEMA through the Recipient, within **30 days** of the designation of the declared disaster.*

The Applicant to identify and report all disaster-related damage, emergency work activities, and debris quantities to FEMA within **60 days** of the Recovery Scoping Meeting.

Any determination related to Federal assistance may be appealed. The appeal must be submitted to the recipient within **60 days** from receipt of the notice of action which is being appealed.

Time Limitations for Completion of Work (from Date of Disaster Declaration)

Type of Work	Completion Deadlines
Debris Removal	6 months
Emergency Work	6 months
Permanent Work	18 months

Procurement

Contracts

- Applicants must comply with Federal procurement standards at 2 CFR Part 200 as a condition of receiving PA funding for contract costs for eligible work.
- State and Territorial government applicants must follow the same policies and procedures they would use for procurement with non-Federal funds.
- Non-State Applicants (Tribal and local governments and PNPs) must use their own documented procurement procedures that reflect applicable State, Territorial, Tribal, and local government laws and regulations and meet the minimum criteria of 2 CFR Part 200.

Procurement

- FEMA reimburses costs incurred using three types of contract payment obligations: fixed-price, cost-reimbursement, and, to a limited extent, time and materials (T&M).
- The Applicant must include required provisions from 2 CFR Part 200 in all contracts awarded and maintain oversight to ensure contractors perform according to the conditions and specifications of the contract and any purchase orders.
- Generally, FEMA does not recommend applicants pursue T&M contracts.

Documentation



TIP: Proper documentation *is invaluable* to support future claims, particularly those involving hazard mitigation.

- The Applicant must maintain all source documentation supporting project costs.
- To facilitate closeout and audits, the Applicant should file all documentation pertaining to each project with the corresponding Project worksheet as the permanent record of the project.
- Records are subject to audit by State auditors, FEMA, the U.S. Department of Homeland Security Office of Inspector General, and the U.S. Government Accountability Office.

Environmental & Historical Preservation

- FEMA must review each PA project to ensure the work complies with applicable Federal EHP laws, regulations and executive orders.
- The type, level, and length of EHP review will depend on the scope of work and the potential to impact sensitive environmental, historic or cultural resources.
- EHP may put conditions on a grant to avoid potential impacts to sensitive resources. It is the Applicant's responsibility to comply with these conditions.



Insurance

- Actual or anticipated insurance proceeds will be deducted from the eligible project costs for facilities that are insured.
- As a condition of Public Assistance funding, all Applicants are required to obtain and maintain insurance coverage on all insurable facilities.
- For flood damaged facilities located within a Special Flood Hazard Area that are not covered by flood insurance, Federal assistance will be reduced by the maximum flood insurance proceeds that would have been payable had the facility been insured.



Record Keeping



The Recipient and the Applicant must keep all financial and program documentation for **3 years after** the date of the Recipient's final Financial Status Report (FSR). All records are subject to audit by the Federal government.



During the Recovery Transition Meeting, FEMA will work with the Applicant to:

- Ensure all claimed damage is sufficiently and accurately documented
- Discuss record retention requirements
- Discuss questions or concerns

Disaster Financial Management

- **Good news...**there are many government and private sector/nonprofit resources and programs that aid jurisdictions to respond and recover.
- **But...**
 - Navigating the various eligibility requirements and applications process – many of which change frequently – is challenging.
 - Improper financial management and program operations often lead to audits, deobligation of funding, or other legal repercussions.

Example Issues

- Incomplete Paperwork
- Missing documentation
- Misunderstanding of eligibility
- Misunderstanding of program rules
- Improper management of funds
- Inability to apply for and manage grants

Example Impacts

- Delayed funding
- Delayed cost reimbursement
- Audits requiring payback of funds
- Inability to access critical funding streams

Tools Available

- **Procurement Rules Online**
www.ecfr.gov 2 C.F.R. §§ 200.317-326
- **FEMA Public Assistance Program and Policy Guide (PAPPG)**
<https://www.fema.gov/>
- **System for Award Management**
www.SAM.gov
- **Procurement Disaster Assistance Team**
www.fema.gov/procurement-disaster-assistance-team
 - PDAT Resources: Contract Provisions Template, Webinar Series, Field Manual, Brochure

Federal & State Contract Procurement and Avoiding Pitfalls In Reimbursement

Keys to Federal and State Reimbursement

1. Start the planning process now and be prepared before a disaster strikes
2. Consult legal counsel and be familiar with nuances of federal and state contract procurement
3. Multiple benefits to preparing federalized agreements now



Early Preparation is Key

Practical and Procedural Considerations

- Adopt emergency procurement procedures and update procurement policies
- Develop federalized contracts for construction and professional services, and purchasing
 - Store electronically



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Considerations for Federal Contracting



- Time and materials contracts should be avoided
 - T&M Contracts must include “not to exceed” clause
- Local hire and local preference policies **not** permitted in federal contracting
- Understand difference between “mandatory” federal provisions and “miscellaneous” provisions

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Reimbursement with State Funds

Contracting Tips

- Understand the application process and forms
 - Cal OES 89, 126 and 130
- How to reconcile state and federal law contract requirements?
 - Example: *Davis Bacon v. CA prevailing wage*
- Record Retention Requirement
 - 3 years from start date of retention period identified in Cal OES “audit waiver” letter



Cal OES
GOVERNOR'S OFFICE
OF EMERGENCY SERVICES

www.caloes.ca.gov

Mailing Address:
3650 Schriever Ave.
Mather, CA 95655

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Benefits of Developing Federalized Agreements Now

- Better prepared to take advantage of non-FEMA related sources of federal funding
- FTA, and other sources of federal funding may be available depending on the type of project and urgency of need
- Opportunity to get familiar with federal contract requirements now to be best prepared to avoid hiccups in the event of an emergency



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Contracting Takeaways

1. Develop federalized agreements for FEMA and other sources of federal funding
2. Consult legal counsel and be familiar with the requirements of federal and state contract procurement to avoid pitfalls



Local Preparation for Disaster Response & Tips for Setting Up Your Emergency Operations Center

EOC - Logistics

Logistics Organization

- Separate purchasing into two primary activities
 - Hotels, food and perishable
 - Generators, fuel and durable
- Recommended to have a tracking book
 - Did not during 2017 Tubbs Fire and had to go back and reconcile all purchases with 213s
- Dedicate a Health & Safety Officer to manage EOC staff needs
 - Stress management tools
 - First aid supplies



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EOC Procurement Management

- Use 213s to keep detailed records of all procurements
 - Number of vendors called
 - Who made vendor selection
 - Price and cost analysis
 - Highlighting procurements over \$250,000
- Do not use Time & Materials contracts; standard bidding process ensures Federal compliance



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Emergency and Federal Contracts

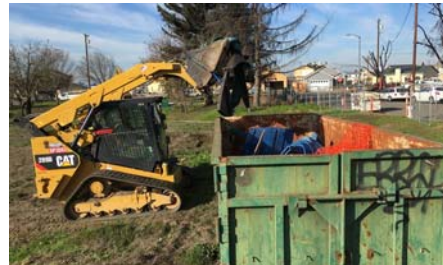
- Prepare and maintain contracts with appropriate federal language
 - During a disaster, you may be able to expand on existing federal contracts to deliver emergency services
 - Have boiler plates approved by your agency's attorney available in EOC
- FEMA acknowledges that you may use the contract provisions from your agency if more restrictive than FEMA's
- During the declaration of a local emergency by Council include language noting the adoption of rules
- Develop a written standard of conduct



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Key Disaster Contracts

- Hazmat
- Fuel
- Janitorial
- Disaster support services
 - Port-o-potties
 - Neoprene gloves
 - N95 or dust masks
 - Booties
- Tower lights and generators
- General contractor
- Debris removal services
- Sandbags, sand and gravel materials



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Example 1 – Burned HDPE Storm Drains

- We were able to modify existing general contract with federal language during the event to address emergent issues
 - Burned/melted storm drain pipe
 - Limited timeframe for use
 - Ultimately issued RFB for completion of the work
 - Followed by standard competitive process
 - Used time and materials due to exigency
 - Agreed to same labor and material rates of original contract



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Example 2 - Fuel

- Based on the scale of the Tubbs Fire (2017) and Kincade Fire (2019)
 - Found it was easier not to have a specific emergency contracts
 - County has precedence within the Operational Area
 - Determined ordering through mutual aid agreement preferable
 - Difficult to determine drop sites



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Example 3 – Food Services



- Food needs to be managed by a certified food handler
- Must track all eligible employees
- Found that food trucks were key solution
 - No on-site food handler required
 - Ordering based on a total possible head count on a per unit cost
 - Staff must sign-in
 - Ensures proper documentation

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Example 4 – Re-Entry / Re-Population

- Developed a list of supply needs
 - Portable lighting
 - Port-o-potties
 - Buckets
 - Gloves
 - Masks
- Printing notices, entry vouchers and risk warnings



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In the Aftermath: Managing Risk After Disaster

Managing Risk After the Disaster

- FEMA Clawback
 - Guidelines and Audits
 - Duplication of Benefits
- Dealing with Claims
 - Agency as Defendant
 - Agency as Plaintiff
- Looking Forward
 - Hazard Mitigation Grants



Guidelines and Audits

Adherence to Guidelines is Essential

Failure to follow could result in complete de-obligation of the grant – even if the funds were spent to accomplish the purpose of the grant.

TIP – Familiarity in advance with the administrative requirements and guidelines will reduce the risk of inadvertent error.

Right to Appeal

May appeal any FEMA determination within 60 days

Two levels of appeal for Public Assistance funds and Hazard Mitigation Grant Program funds

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Guidelines and Audits

- Closeout Deadlines

- The agency must submit, no later than 90 calendar days after the end date of the period of performance, all financial, performance, and other required reports
- Must be completed no later than one year after final reports.

- Disaster Recovery Reform Act of 2018 - Statute of Limitations

- Changes the statute of limitations to run from the closeout of individual projects and not final closeout of *all* projects as previously interpreted.
- FEMA is now prohibited from initiating any action to recover assistance after "the date that is 3 years after the date of transmission of the final expenditure report for project completion as certified by the grantee."

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Guidelines and Audits

Safe-Harbor for Approved Project Worksheets

- Stafford Act Section 705(c)
 - Prohibits FEMA from seeking reimbursement of when all three of the following criteria are met:
 - Payment was made via an approved agreement specifying the costs.
 - The purpose of the grant was accomplished.
 - Costs were reasonable.

This policy does not apply where appeal, arbitration, or dispute resolution rights are exhausted and FEMA has made a final administrative decision.



Section 705(c) does not apply to matters in which actual costs are less than the amount approved in the Project Worksheet and the amount is not in dispute.

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Guidelines and Audits

Case Example

- Private Property Debris Removal (PPDR) by Local Agency
 - Typically not authorized for FEMA reimbursement
 - Only authorized when eligible applicant can document:
 - Public Interest
 - Legal responsibility and authority
 - Unconditional Authorization
 - Indemnification and Hold Harmless
 - Must Not Duplicate Other Benefits



Document the source, volume, destination, and authority for each load of debris removal at the time – recreating such will be next to impossible.



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Duplication of Benefits

Stafford Act

- FEMA cannot duplicate benefits from other sources and must reduce or de-obligate the amount of funding received from another source for the same work (42 U.S.C. §5155).
- Includes recovery from third parties.

Examples:

- Insurance proceeds
- Nonfederal grants and cash donations
- Third party liability
- Other federal awards

Disaster Recovery Reform Act of 2018

- Authorizes the President to waive certain duplication of benefits if waiver is in the public interest and will not result in waste, fraud, or abuse.

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Duplication of Benefits

Commercially Reasonable Efforts

- The Ninth Circuit found that the word “available” in Section 312(c) refers to:
 - (1) money actually received by the FEMA aid applicant; or
 - (2) any money it would have obtained if the applicant had acted in a “commercially reasonable manner.” *Hawaii ex rel. Attorney Gen. v. FEMA*, 294 F.3d 1152, 1161 (9th Cir. 2002).
- In *Hawaii*, the Circuit found that “practical considerations such as risk, cost and uncertainty are inherent in the more usual concept of availability.” *Id.* at 1162.

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Clawback Examples

- PG&E Bankruptcy Fund for Northern California Fires
 - FEMA has \$3.9 billion dollar claim for costs of firefighting, public infrastructure repairs, debris removal, mitigation, direct housing, rental assistance and crisis counseling.
 - CalOES has an additional \$2.3 billion including FEMA funds it disbursed.
 - A hearing on objections to these claims was recently held.
 - Likely subject to further litigation.
- SoCal Edison
 - FEMA received \$81.4 million from two settlements for the 2017 Thomas Fire and 2018 Woolsey Fire.



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Dealing with Claims

Agency as Plaintiff

- Recovery of Agency Damages
 - Public Works – Rehabilitation and Repair of Infrastructure
 - Importance of detailed records
 - Working with agency counsel and experts

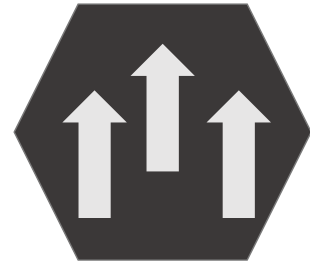
Agency as Defendant

- Defense of Agency's Policies and Practices
 - Public Works – Design and Maintenance of Infrastructure
 - Building the historical record

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Looking Forward

- Disaster Recovery Reform Act of 2018
 - Code Implementation and Enforcement (Section 1206)
 - Removal of Alternate Project Funding Reduction
 - Additional Funding for Hazard Mitigation Grant Programs
- Building Working Relationships with FEMA and CalOES



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Questions and Discussion



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Presenters

T. Steven Burke, Jr., Of Counsel, Meyers Nave

e-mail: tsburke@meyersnave.com

Eric S. Casher, Principal and Chair of Public Law Group, Meyers Nave

e-Mail: ecasher@meyersnave.com

Jason Nutt, Assistant City Manager, Director of Transportation & Public Works,
City of Santa Rosa

e-mail: jnutt@srcity.org

Robert M. Pesapane, Director, Recovery Division, FEMA Region IX

e-mail: robert.pesapane@fema.dhs.gov