



2021 Public Works
Officers Institute & Expo

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

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Presentation Overview

- 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



Types of Disasters



Earthquake



Fire



Flood



Pandemic – COVID-19

Federal & State Contract Procurement and Avoiding Pitfalls In Reimbursement

Disaster Recovery

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

Individual Assistance

Public Assistance

Hazard Mitigation



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

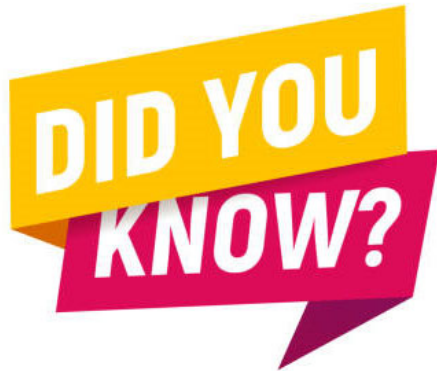
Early Preparation is Key

Practical and Procedural Considerations

- Adopt emergency procurement procedures and update procurement policies
- Develop federalized contracts for construction and professional services, and purchasing
 - Store electronically, thumb drives, weather proof box (i.e. safe)



Considerations for Federal Contracting

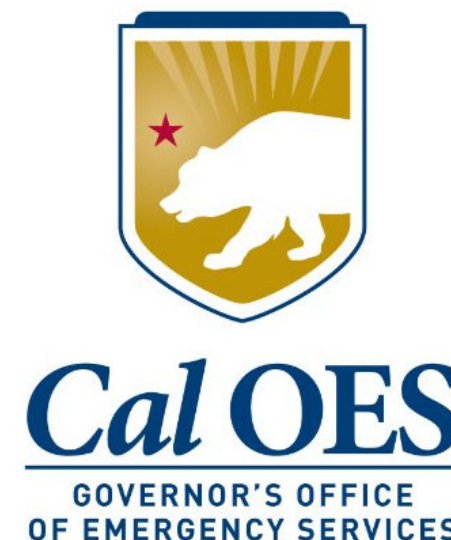


- Time and materials contracts should be avoided
 - T&M Contracts must include “not to exceed” clause
- Local hire and local preference policies **not** permitted in federal contracting
- Understand difference between “mandatory” federal provisions and “miscellaneous” provisions

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



www.caloes.ca.gov

Mailing Address:
3650 Schriever Ave.
Mather, CA 95655

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



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



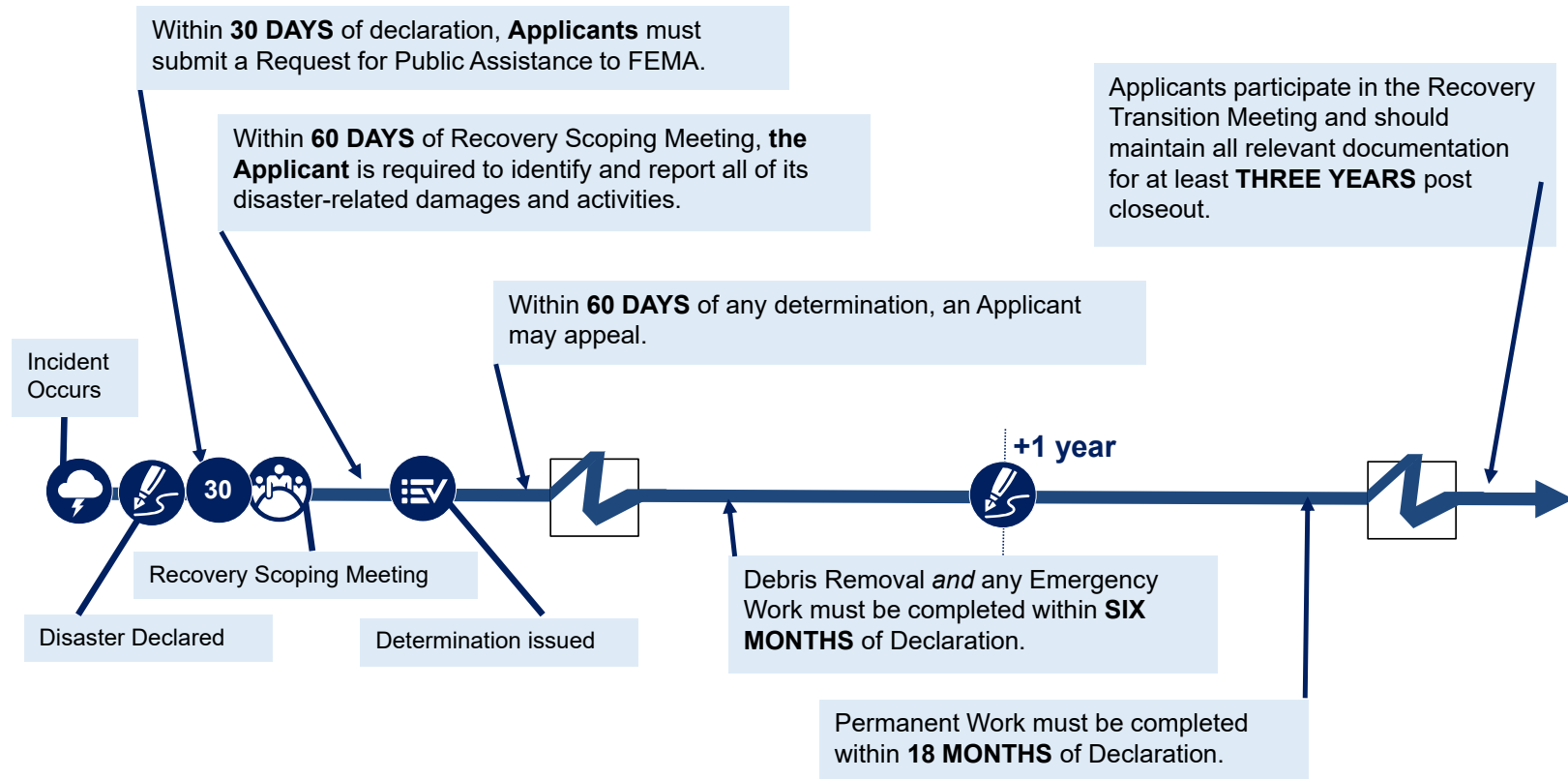
Local Preparation for Disaster Response & Tips for Setting Up Your Emergency Operations Center

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



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



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



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



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



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.

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



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



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

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



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
 - Other Relief Funding



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

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."

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.

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.



Insurance and Duplication of Benefits

- 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.



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.

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.

Examples:

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

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.

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.



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

Risk Management



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.

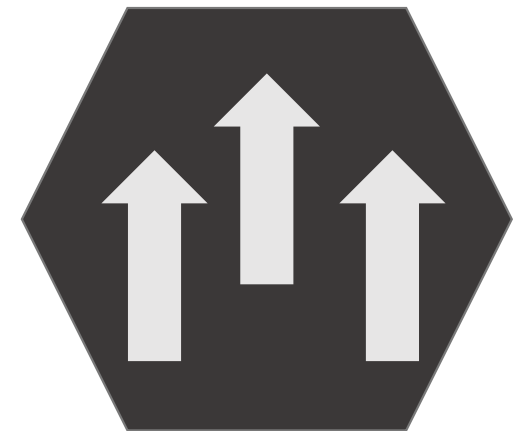


During the Recovery Transition Meeting, FEMA will work with the Applicant to:

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

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
- CARES Act
- American Rescue Plan



CARES Act

- Established the \$150 billion Coronavirus Relief Fund FOR States and eligible units of local government
- Eligible local governments include a county, municipality, town, or other unit of general government below the State level with a population > 500,000
 - Relief funds for non-eligible local government units flowed through the state
- CARES Act requires that the payments from the Coronavirus Relief Fund only be used to cover expenses that—
 1. Are necessary expenditures incurred due to the public health emergency with respect to the Coronavirus Disease 2019 (COVID-19);
 2. Were not accounted for in the budget most recently approved as of March 27, 2020 (the date of enactment of the CARES Act) for the State or government; and
 3. Were incurred during the period that begins on March 1, 2020, and ends on December 31, 2021.

American Rescue Plan

- Congress passed President Joe Biden's \$1.9 trillion coronavirus relief package
→ Includes \$350 billion in financial assistance for state and local governments.
- Governments can use the funds to respond to the public health emergency, cover related costs and replace lost revenue.



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
- **CARES Act**
<https://home.treasury.gov/policy-issues/cares/state-and-local-governments>

Questions and Discussion



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