Emergency Management - FEMA Reimbursement: A Local Government Perspective

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Overview

“FEMA Reimbursements”

- Subgrants from the State of Florida passed through FEMA’s “Public Assistance” or “P.A.” Program that follows a Major/Presidential Disaster Declaration
- Primary Purpose is to assist States and Local Governments* in restoring damaged facilities to Pre-Disaster Condition and Function.
- Also helps cover the increased costs incidental to undertaking certain Emergency Protective Measures and the Costs of Storm-Related Debris Removal
Legal Authorities and Framework

- **Statutory Authorization** - Robert T. Stafford Emergency Relief and Disaster Assistance Act, As Amended, and Related Authorities [42 U.S.C. 5121-5207]
  - Section 406. “Repair, Restoration, and Replacement of Damaged Facilities.”

- **Regulations**
  - Programmatic - 44 CFR Part 206
  - Administrative - 2 CFR Part 200 et seq

- **Agency Guidance/Publications**
  - FEMA has been working to consolidate what were previously multiple essential publications
  - Currently - FP 104-009-2 “Public Assistance Program and Policy Guide” (April 2017) - is the applicable Programmatic Guide
  - For Stafford Act “Disasters” Declared prior to April, 1st, 2017, previous versions of this document and its preceding documents apply
Availability of Public Assistance Funds

- The “P.A.” Program is made available to States and Eligible Applicants following a Presidential or “Major” Disaster Declaration under the Stafford Act.
  - Generally Covers the Cost to Repair or Replace Eligible Facilities to Pre-Disaster Design and Function in Accordance with Applicable Codes and Standards [“Permanent Work”]
  - Can Also Cover Certain Costs Incurred Before the Declaration Taken to Save Lives, Protect Public Health and Safety, and Prevent Damage to Improved Public and Private Property [“Emergency Work”]
    - This includes the cost of storm-caused debris removal, monitoring, and disposition from public areas, and in special circumstances, private property as well.
Public Assistance “Types” and “Categories”

- Public Assistance is Organized into two Types and seven Categories of Eligible Work
  - Types
    - Emergency Work (Contains Categories A & B)
    - Permanent Work (Contains Categories C through G)
  - Categories
    - Category A - Debris Removal
    - Category B - Emergency Protective Measures
    - Category C - Roads and Bridges
    - Category D - Water Control Facilities
    - Category E - Buildings and Equipment
    - Category F - Utilities
    - Category G - Parks, Recreational Areas, and Other Facilities
Focus: “Emergency Work”

- **Category A - Debris Removal**
  - Debris removal activities, such as clearance, removal, and disposal, are eligible as Category A if the removal is in the public interest based on whether the work:
    - Eliminates immediate threats to lives, public health, and safety;
    - Eliminates immediate threats of significant damage to improved public or private property;
    - Ensures economic recovery of the affected community to the benefit of the community at large

- **Category B - Emergency Protective Measures**
  - Emergency protective measures conducted before, during, and after an incident are eligible if the measures:
    - Eliminate or lessen immediate threats to lives, public health, or safety;
    - OR Eliminate or lessen immediate threats of significant additional damage to improved public or private property in a cost-effective manner
Focus: “Permanent Work”

- Cat C - Roads and Bridges - Repair, Replacement, or Improvement of Damaged Roads, Bridges, Culverts, etc.
- Cat D - Water Control Facilities - Repair or Restoration of Non-Federal Channels, Coastal Shoreline Protection Structures, etc.
- Cat E - Buildings and Equipment - Repair or Replacement of Facilities, their Systems, Contents, and Various Types of Equipment
- Cat F - Repair or Replacement of Sanitary Sewer, Potable Water, Electricity Generation/Transmission Infrastructure
- Cat G - Parks, Recreational, Other - Recreational Facilities, Publicly-Owned Facilities that do not Fit into Other Categories
Public Assistance Project Lifecycle

- **Disaster Strikes!** - Respond and Track Force Account Labor, Equipment and Damage to Municipal/County Infrastructure
- **Declaration Granted** - Begin Assembling and Organizing Damage, Insurance, and Force Account Labor/Equipment Information
- **Applicant Briefing** - Initial P.A. Meeting Held Jointly by FEMA and FDEM - Bring your 90-49s (Request for Public Assistance)
- **Kickoff Meeting** - Be Ready to Describe Your “Damages”; Assign Staff to Assist FEMA and FDEM with Writing Project Worksheets (“PWs”)
- **Site Visits and PW Development** - Work with FDEM/FEMA to Agree on Scope and Costs; Clear Applicable Reviews and Receive Approval
- **Implement, Monitor, and Manage the Work** - Follow Reporting Requirements and Stay Within the Scope. Always Inform FDEM/FEMA of ANY CHANGEs Prior to Implementing Them
- **Reimbursement and Closeout** - Submit All Documentation and Receive Payments or Adjustments Based on Actual Costs
Strategy for Success with P.A.

- Pre-Event - Get Organized
  - Inventory Assets and Critical Infrastructure
  - Reproduce Copies of all Insurance Policies; Ensure Appropriate Coverage
  - Ensure Emergency Declaration/Proclamations Code/Ordinance is Consistent with Program Language
  - Prepare for Post-Disaster Procurement
  - Familiarize Finance Section with the Accounting and Grant Management Aspects of the Program

- The “Event’ and Going Forward
  - Track Force Account Labor
  - Where Feasible, Document Damage and Effects of Event
  - Follow Federal Procurement Policies
  - Look for Opportunities to Improve Facilities/Infrastructure or Include Hazard Mitigation in PWs.
  - Monitor and Actively “Work” Your PWs.
  - Keep a Record of All Meetings and Inspections with FEMA or FDEM Representatives
Specific Focus: Documentation

- Single Most Important Thing Entities Can Do to Ensure a Robust Recovery through P.A.
- Pre-Event
  - Document (with Photos and Date Stamps) Condition of Facilities, Equipment, and Infrastructure
    - Include Location, Maintenance and Repair Logs
  - Review Local Policies and Procedures in Light of Stafford Act Requirements
- Common Scenarios for Documentation Issues:
  - Force Account Labor and Equipment Usage
  - Overtime Policies for Certain Employees
  - Pre-Disaster Capacity of a Facility
  - “Deferred Maintenance”
  - Procurement Policies and Non-Competitive Contracts
Specific Focus: Emergency Proclamations

- Entities Should Ensure that the Language in their Emergency Proclamations Align with FEMA's and Florida Statutory and Regulatory Requirements
  - Clearly Defining the “Emergency” and “Exigent” Circumstances
  - Identifying Legal Responsibility and Scope of Authority

- Examples and Samples:
  - See Samples in the Accompanying Exhibits to this Presentation
Specific Focus: Disaster/Emergency Procurement

- Most Common Basis for FEMA Seeking to Recoup Funding from Applicants
- FEMA Focuses on:
  - Full and Open Competition
  - Type and Management of Contracts
  - Piggybacking on Existing Contracts
  - Required Contractual Clauses
  - Documentation of Procurement History and Conformance with Existing Written Procedures

- Examples of Recent Issues:
  - FEMA’s Public Assistance Appeals Database
    - [https://www.fema.gov/appeals](https://www.fema.gov/appeals)
Specific Focus: Insurance

- FEMA acts as the Insurer of Last Resort:
  - It Expects Applicants to Obtain and Maintain Adequate Levels of Insurance
  - Anticipated Insurance Proceeds are Deducted from PWs at Approval
  - Would-Be Value of Flood Insurance is Deducted for the Special Flood Hazard Areas ("Flood Zones")
  - Necessity for Understanding Post-Disaster Insurance Requirements for FEMA-Funded Improvements
Specific Focus: FEMA Determinations and Appeals

- Develop and Maintain Relationships with FDEM – it is your Advocate for Solving Problems and Challenging FEMA Decisions
- FEMA Project Specialists are Granted A Great Deal of Discretion to Make Eligibility Decisions, Resulting High Variability within the Same Field Operation
- Do Not Sign a PW that You Believe is Incorrect or Omits Important/Eligible Items or Wrongly Deducts Funding

- Understand FEMA’s Chain of Command within the Field Operation; Request Meetings with Supervisors for Pending Adverse Determinations
  - Informal Meetings and Conversations can Often Resolve Issues
- Nearly All Official FEMA Decisions/Determinations are Appealable:
  - First Appeal is to the FEMA Regional Administrator
  - Second Appeal is to the FEMA [HQ] Assistant Administrator for Recovery
Specific Focus: FEMA Determinations and Appeals, contd.

- Important Aspects to FEMA Programmatic Appeals:
  - Keep it Simple - Follow FEMA’s Guidance in Preparing Appeals (see list of important documents)
  - Meet Deadlines - FEMA is not Required to Grant an Extension of Time for an Applicant to Submit an Appeal; Give FDEM Adequate Time to Review and Process for Your Entity
  - Understand the Requirements and their Purpose

- Do...
  - Know the Respective Burdens in Place:
    - Applicant to Provide Adequate Documentation Demonstrating Eligibility, and Why FEMA’s Determination was in Error
    - FEMA to Make Determinations that are Not Arbitrary, Capricious, etc.

- Do Not...
  - Throwing Paper and Volume at FEMA Will not Work
  - Assume a FEMA Specialist’s Opinion Binds the Agency on Final Eligibility
Concluding Thoughts:

- County/Municipal Attorneys are Not Typically Tasked with Monitoring or Implementing the P.A. Program, But the Nature of Our Positions Inevitably Draw us into the Process.


- Consider Pre-Qualifying Disaster Recovery-Focused Contractors:
  - Get Prepared to Track Your Force Account Labor and Equipment
  - Have Experts on Call to Help with Initial Disputes on Eligibility
  - Realize the ROI and Value Added from Having Subject Matter Experts Available
  - Structure RFP to Ensure the Contractor will be Adequately Staffed to Provide Timely and Effective Performance