

**PREPARING FOR “HURRICANE FEMA”
APPLICANT BEST PRACTICES ASSOCIATED WITH FEMA’S PUBLIC ASSISTANCE PROGRAM**

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Abstract

Funded through the Robert T. Stafford Act, FEMA is the lead federal agency for providing financial disaster recovery support following significant natural disasters. Through FEMA’s Public Assistance or “PA” Program, FEMA makes grant funding available to reimburse eligible work and costs for certain types of entities where those work and costs are the direct result of the declared disaster. This presentation focuses on several of the administrative and regulatory aspects or requirements of the PA Program that have traditionally served to complicate or hamper applicants’ ability to recover FEMA PA Funding. Referred to hyperbolically as “Hurricane FEMA,” a broad range of administrative and regulatory requirements can often act to make FEMA’s PA Program seem more akin to a second “disaster,” experienced through an administrative and regulatory maze that applicants do not seek to enter. The presenter offers insights and experience as to how to anticipate and avoid adverse consequences from administrative and/or regulatory non-compliance, as well as strategies for recovering from adverse positions to maximize federal reimbursement.

1. Introduction

Likely one of the federal government’s most popular and valuable aid programs, FEMA’s Public Assistance [“PA”] Program provides invaluable and essential financial support to states, local governments, and certain types of non-profit entities following a natural disaster that results in a Presidential or Major Disaster Declaration under the Robert T. Stafford Act [“Stafford”] Act. As with any federal aid program, there must be accountability, oversight, and adherence to rules, regulations, and requirements. FEMA’s PA Program is not exempt from these conditions. Several aspects of the disaster recovery process as administered through the PA Program make it particularly onerous and burdensome for applicants.

Firstly, applicants to did not seek out this funding opportunity. Natural disasters are thrust upon us, and we typically do not elect to experience them in exchange for an opportunity for federal funding. Second, although FEMA has done a commendable job in streamlining and organizing the statutory, regulatory, and agency guidance used to implement the PA Program, the program is far from straightforward to navigate in the best of conditions, let alone following a natural disaster that requires federal aid. The result is, unfortunately, that the disaster recovery process creates an unanticipated and potentially un-funded set of administrative and regulatory burdens that must be traversed prior to receiving federal funding that an applicant typically desperately needs. Further compounding the sense of frustration is that most of the work and costs FEMA may reimburse must be completed/incurred prior to being reimbursed. What often results is that considerable expenses are incurred by an applicant with at least a reasonable expectation of reimbursement, only to find it ran afoul of an administrative and/or regulatory burden it did not realize applied.

Far from a detailed discussion, this presentation serves as a brief introduction and overview of several notable administrative and regulatory issues that commonly work to prevent applicant recovery under

the PA Program. The intention will be to arm the audience with enough understanding of potentially significant issues to take steps now, before a natural disaster [such as a hurricane] to dampen and/or avoid the second disaster, the administrative and regulatory minefield lightly referred to as Hurricane FEMA.

2. Objectives

The presentation focuses on four (4) issues that are found to commonly prevent FEMA from approving otherwise eligible disaster recovery costs:

- ❖ An Applicant's Plans, Policies, and Procedures
- ❖ Documenting Pre-Event Condition of Applicant's Infrastructure
- ❖ Procurement Considerations
- ❖ Dealing with Adverse FEMA Determinations [Denial(s) of Funding]

The presentation concludes with a note on how third-party disaster recovery consultants ["consultants"] fit into the FEMA PA Program and how, or if, they can help applicants otherwise weather the storm.

3. Presentation Subject Matter

The presentation briefly touches on several potentially tricky FEMA PA Program areas where applicants tend to find themselves in a state of administrative or regulatory non-compliance:

An Applicant's Plans, Policies, and Procedures

Several types of "Plans, Policies, and Procedures" can directly impact an applicant's ability to recover certain costs under the PA Program. FEMA will first look to an applicant's insurance policies covering its facilities, vehicles, etc. to ensure that FEMA pays last, resulting in either an anticipatory or actual insurance deduction across one or more project. Applicants that seek reimbursement for certain force account costs such as Overtime for emergency protective measures must ensure that they are paying overtime costs consistent with either state/local law or their own overtime pay policy. Similarly, "Disaster" or "Hazard" pay policy provisions need to be carefully crafted to ensure they are not interpreted as contingent on federal funding/participation and/or in conflict with other laws or policies. Finally, FEMA and the various states will review an applicant's procurement activities to ensure the activities are consistent with the applicant's procurement policy. Common pitfalls and pre-event recommendations are offered for the audience.

Documenting Pre-Event Condition of Applicant's Infrastructure

One of the most essential elements of FEMA's PA Program is the applicant's burden to demonstrate that the work and costs claimed [damages] were the direct result of the declared event [disaster] and not the result of existing damage, deferred maintenance, and otherwise pre-existing condition, or the applicant's own negligence. FEMA's primary guidance document, the Public Assistance Program and Policy Guide [the "PAPPG"], is unfortunately vague in describing the intricacies of the applicant's burden. Armed with ample programmatic discretion, FEMA has the ability to impose the strength of standard of its choosing for a given situation. Without clear text within the PAPPG dictating the standard to be met, applicants often find themselves at the mercy of preconceived notion of a lower-level FEMA Program Delivery Manager ["PDMG"]. Best practices are offered to help applicants create and preserve ample evidence of pre-event condition to sufficiently meet their programmatic burden and continue through the reimbursement process.

Procurement Considerations

Procurement non-compliance is perhaps the most common error made by applicants to the PA Program. It is also one of the least visible, with roughly 10 pages within FEMA's PAPPG devoted to the voluminous regulations found at 2 Code of Federal Regulation ["CFR"] Part 200 et seq. While the regulations and their requirements are not particularly unreasonable, deliberate efforts to foster full and open competition through a detailed procurement process are simply inconsistent with the contracting environment immediately following a significant natural disaster. As a result, applicants to the PA Program often find themselves trying to justify, long after the contracting [and resulting work], why there no competitive procurement was completed to support disaster-related work. The presenter offers strategies for limiting non-compliance and mitigating adverse financial impacts from earlier decisions that cannot be otherwise justified.

Dealing with Adverse FEMA Determinations [Denial(s) of Funding]

Not all costs incurred in support of disaster recovery are eligible for reimbursement under the PA Program. FEMA has the absolute right and broad discretion to determine eligibility and deny requests for reimbursement on a number of program factors. The presenter takes issue with some of the more passive steps taken by FEMA to reach its desired result, no FEMA PA funding, without providing a fair opportunity for applicants to plead their case for eligibility. Where applicants are permitted to enter FEMA's Administrative Appeals Process, they quickly find that FEMA is reviewing its own work and decisions, creating, at a minimum, the appearance of a rigged/less-than-impartial process. This being the case, applicants can and do find success through this process armed with the proper knowledge and qualified support. The presenter shares best practices for staying out of the FEMA Appeals Process, as well as strategies for succeeding where an administrative appeal is required.

Managing Disaster Recovery Consultants

Whether or not to hire [procure!] a disaster recovery consultant has been a remains a divisive topic in the FEMA/Disaster Recovery sphere. FEMA, for its part, believes applicant's consultants are simply a transaction cost on the inevitable result that FEMA ultimately reaches, leaching applicants for a statutorily funded administrative fee. Consultants would have applicants and FEMA believe that they, consultants, are the only line of defense from FEMA simply imposing its will on an applicant and limiting reimbursement for any number of reasons. The truth is probably somewhere in between these positions. Typically staffed by former FEMA and/or state disaster recovery professionals, consultants can provide invaluable experience in the PA Program and critical insight as to how FEMA and the states operate. Having worked for both FEMA and the private sector, the presenter offers a potential division of responsibility and best practices for managing disaster recovery consultants in a cost effective and efficient manner.

4. References

Additional information regarding the topics above can be found at the following links:

- I. **FEMA's Public Assistance Program and Policy Guide, V.4 June, 2022** - https://www.fema.gov/sites/default/files/documents/fema_pappg-v4-updated-links_policy_6-1-2020.pdf
- II. **2 CFR Part 200, et seq** – <https://www.ecfr.gov/current/title-2/subtitle-A/chapter-II/part-200?toc=1>
- III. **FEMA's Procurement Disaster Assistance Team Manual** – https://www.fema.gov/sites/default/files/documents/fema_PDAT-field-manual_102021.pdf