International Municipal Lawyers Association
2018 Annual Conference
Houston, Texas

Thursday, October 18, 2018

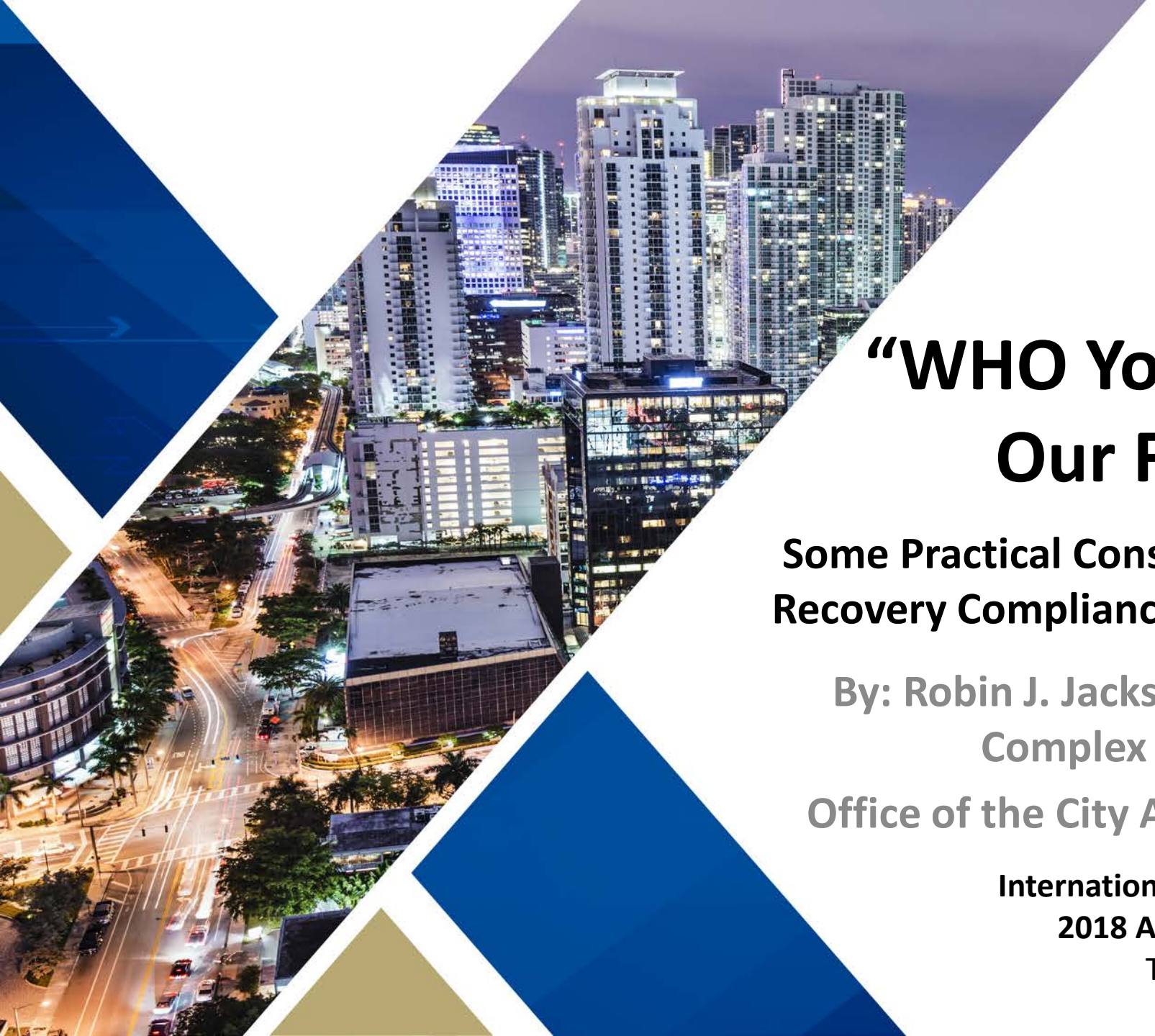
Concurrent Session: Looking in the Rearview Mirror
on the Costliest Natural Disaster Year in U.S. History:

Who You Gonna Call? Our Friend FEMA!

Some Practical Considerations for Disaster Recovery Compliance and Reimbursements

Robin J. Jackson
Division Chief for Complex Transactions,
Office of the City Attorney, City of Miami, Florida

2018 International Municipal Lawyers Association. This information is an informational and educational report distributed by the International Municipal Lawyers Association during its 2018 Annual Conference, held October 17-21, 2018 in Houston, Texas. IMLA assumes no responsibility for the policies or positions presented in the report or the presentation of its contents.



“WHO You Gonna Call? Our Friend FEMA!”

Some Practical Considerations for Disaster Recovery Compliance and Reimbursements

By: Robin J. Jackson, Division Chief for Complex Transactions,

Office of the City Attorney, City of Miami

International Municipal Lawyers Association, Inc.
2018 Annual Conference, Houston, Texas
Thursday, October 18th, 2018
10:45 to 12:15 p.m.

Acknowledgements and Disclaimer

- **Acknowledgements:**
- *Thanks to the City of Miami's Office of Communications and Photographer Jonathan Martell who assisted with debris and wreckage photographs, Procurement Department, Finance Department, Office of Management and Budget, Office of Resilience and Sustainability, Office of Capital Improvements, Department of Real Estate and Asset Management, Department of Parks and Recreation, Urban Search and Rescue, City Attorney, Victoria Méndez, Legislative Division, Chief Assistant City Attorney Rafael-Suarez Rivas, Senior Assistant City Attorney Pablo Velez, Assistant City Attorneys Rachel G. Dooley and Xavier E. Alban, Law Office Manager, Khadijah D. Williams, Litigation Assistants, Tania Mickens and Deborah Bailey, Administrative Assistant II, Shakena Stubbs, and Legal Intern Andrew Zuckerman, rising 3L, University of Miami School of Law, and Editor-In-Chief, Business Law Review.
- ** Thanks to the U.S. Department of Homeland Security, Federal Emergency Management Agency ("FEMA") and Program Delivery Manager Austin Pennington.
- ***Thanks also to the International Municipal Lawyers Association, Inc. ("IMLA") and to the Florida Municipal Attorneys Association ("FMAA") for valuable resources, reference materials, and legislative initiative assistance throughout the years.
- **Disclaimer:** The views expressed herein are solely those of the author in her private capacity and do not in any way represent the views of the City of Miami, Florida, the City Attorneys Office, or of any other governmental entity, office, or department. The author has donated the photocopy paper necessary to provide 200+ copies of this presentation for FMAA handouts.



Practical Ways to Think About FEMA Reimbursement Compliance for Your City's Properties and Facilities

- 1. Who, What, Where, When, Why, How, and How Much $$
- 2. Past, Present, Future
- 3. Peeling Back Layers of the Onion
- 4. THINK AUDIT(S) NOW and THANK FEMA!!!
- 5. Sharks in the Water, Money on the Land, Sharks Coming Ashore, To Bite Your Hand!
- 6. So, How You Gonna Call OUR FRIEND FEMA?

  . . . Start with the Notices of Declarations of Emergency

I. Notices of Declarations of Emergency: Federal, State, Local

(A). <u>Federal Level Establishes:</u>

- 1. **WHY** the Disaster is declared, **WHEN** the Federal Disaster Assistance Begins, and Sets Timing for **WHEN** Disaster Assistance Ends
- 2. **WHERE** Assistance is Available and **WHO** Can Access: Which States and Counties
- 3. **WHAT** Types of Assistance Will Become Available Under Which Grants and Federal Programs and **WHO** are the contacts

  <u>See</u> **Hurricane Irma Example in Bibliography: Notice of the Presidential declaration of a major disaster for the State of Florida** 82 Fed. Reg. 44192 (issued Sept. 10, 2017), pursuant to authority under:

  - **Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 et seq.**
  - **Executive Order 12148--Federal emergency management. Exec. Order No. 12,148, 44 Fed. Reg. 43239 (July 20, 1979).**

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy And Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the Microbiology, Infectious Diseases and AIDS Initial Review Group Microbiology and Infectious Diseases B Subcommittee.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Microbiology, Infectious Diseases and AIDS Initial Review Group, Microbiology and Infectious Diseases B Subcommittee MID–B October 2017.

Date: October 16–17, 2017.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda North Marriott Hotel & Conference Center, 5701 Marinelli Road, Bethesda, MD 20852 (Telephone Conference Call).

Contact Person: Ellen S. Buczko, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institutes of Health/NIAID, 6700B Rockledge Drive, MSC 7616, Bethesda, MD 20892–7616, 301–451–2676, *ebuczko1@niaid.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: September 15, 2017.

Natasha M. Copeland,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2017–20078 Filed 9–20–17; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4337–DR; Docket ID FEMA–2017–0001]

Florida; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Florida (FEMA–4337–DR), dated September 10, 2017, and related determinations.

DATES: The declaration was issued September 10, 2017.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated September 10, 2017, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the "Stafford Act"), as follows:

I have determined that the damage in certain areas of the State of Florida resulting from Hurricane Irma beginning on September 4, 2017, and continuing, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the "Stafford Act"). Therefore, I declare that such a major disaster exists in the State of Florida.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Individual Assistance, assistance for debris removal and emergency protective measures (Categories A and B) under the Public Assistance program in the designated areas, Hazard Mitigation throughout the State, and any other forms of assistance under the Stafford Act that you deem appropriate subject to completion of Preliminary Damage Assessments (PDAs). Direct Federal assistance is authorized.

Consistent with the requirement that Federal assistance is supplemental, any Federal funds provided under the Stafford Act for Public Assistance, Hazard Mitigation, and Other Needs Assistance will be limited to 75 percent of the total eligible costs. For a period of 30 days from the start of the incident period, you are authorized to fund assistance for emergency protective measures, including direct Federal assistance, at 100 percent of the total eligible costs. Federal funding for debris removal will remain at 75 percent.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The time period prescribed for the implementation of section 310(a), Priority to Certain Applications for Public Facility and Public Housing Assistance, 42 U.S.C. 5153, shall be for a period not to exceed six months after the date of this declaration.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Justo Hernández, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Florida have been designated as adversely affected by this major disaster:

Charlotte, Collier, Hillsborough, Lee, Manatee, Miami-Dade, Monroe, Pinellas, and Sarasota Counties for Individual Assistance.

All 67 counties in the State of Florida for debris removal and emergency protective measures (Categories A and B), including direct federal assistance, under the Public Assistance program.

All areas within the State of Florida are eligible for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Brock Long,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2017–20134 Filed 9–20–17; 8:45 am]

BILLING CODE 9111–23–P



I(B). State Level and Intergovernmental Level: Set Forth State Authorities and Compliance Provisions to Assist Local Governments:

- **State of Florida Office of the Governor Executive Order Number 17-235 (Emergency Management – Hurricane Irma)** (Sept. 4, 2017)**.**
  - **A.** **Article IV, Section 1(a) of the Florida Constitution.**
  - **B.** **Florida Statutes** 252.36(1)(a). Emergency management powers of the Governor.
  - **C.** **Florida Statutes** 252.365 Emergency coordination officers; disaster-preparedness plans.
  - **D.** **Florida Statutes** 252.3655 Natural hazards interagency workgroup.
  - **E.** **Florida Statutes** 252.33 Limitations.
  - **F.** **Emergency Management Assistance Compact Florida Statutes** 252.921-933.
  - **G.** **Florida Statutes** 252.46 Orders and rules
  - **H.** **Florida Statutes** 120.54 Rulemaking.
  - **I.** **Florida Statutes** 252.38 Emergency management powers of political subdivisions.
  - **J.** **Florida Statutes** 110.120 Administrative leave for disaster service volunteers**.**
  - **K.** **Florida Statutes** 316.545 Weight and load unlawful; special fuel and motor fuel tax enforcement; inspection; penalty; review**.**
  - **L.** **Florida Statutes** 320.0715 International Registration Plan; motor carrier services; permits; retention of records.
  - **M.** **Florida Statutes** CHAPTER 207 TAX ON OPERATION OF COMMERCIAL MOTOR VEHICLES.
  - **N.** **Florida Statutes** 465.0275 Emergency prescription refill.
  - **O.** **Florida Statutes** 252.37 Financing.
  - **P.** **Florida Statutes** 501.160 Rental or sale of essential commodities during a declared state of emergency; prohibition against unconscionable prices.
  - **Q.** **Florida Statutes** 501.204 Unlawful acts and practices.
  - **R.** **Florida Statutes** 252.359 Ensuring availability of emergency supplies.
  - **S.** **Florida Statutes** CHAPTER 893 DRUG ABUSE PREVENTION AND CONTROL.
  - **T.** **State of Florida Executive Order Office of the Governor Disaster Preparedness 80-29. April 14, 1980.**
  - **U.** **Florida Statutes** 420.9073 Local housing distributions.

I(B). Continued: State Level and Intergovernmental Level: Set Forth State Authorities and Compliance Provisions to Assist Local Governments:

- **Intergovernmental Coordination: Florida Statutes 252.31 – 252.60 Emergency Management General Provisions:** Establish guidelines, schedules, and processes for municipalities to coordinate with the State of Florida Division of Emergency Management and the statewide program of emergency management: WHO, WHAT, WHERE, WHEN, WHY, HOW, and HOW MUCH; Past, Present, Future . . .
- See **State Example of Federally-Funded Subaward and Grant Agreement in Bibliography**: AUDIT(S); WHO, WHAT, WHERE, WHEN, WHY, HOW, and HOW MUCH; Past, Present, Future . . .

I(C). City Level: Establishes WHO has WHAT Authority and Powers, WHEN, and for WHAT Purposes:

See Example in Bibliography: Declaration of Emergency, City of Miami (September 8, 2017)**.**

1. Charter of the City of Miami §4(g) and (g)(3):

- (g) *Powers and duties of mayor.* The mayor shall serve as the chief executive officer and head of the city government with the following specific powers and duties:
  - * * (3) In time of public danger or emergency, the mayor may declare a state of emergency as provided in state law and may with the consent of the city commission, take command of the police and maintain order and enforce the laws.

Peeling Back Layers of the Onion: Disaster Recovery Rules, Regulations, Guidelines, Etc., More, more, more ingredients than your “stew” can combine . . .



II. FEMA Helpful Practical Information

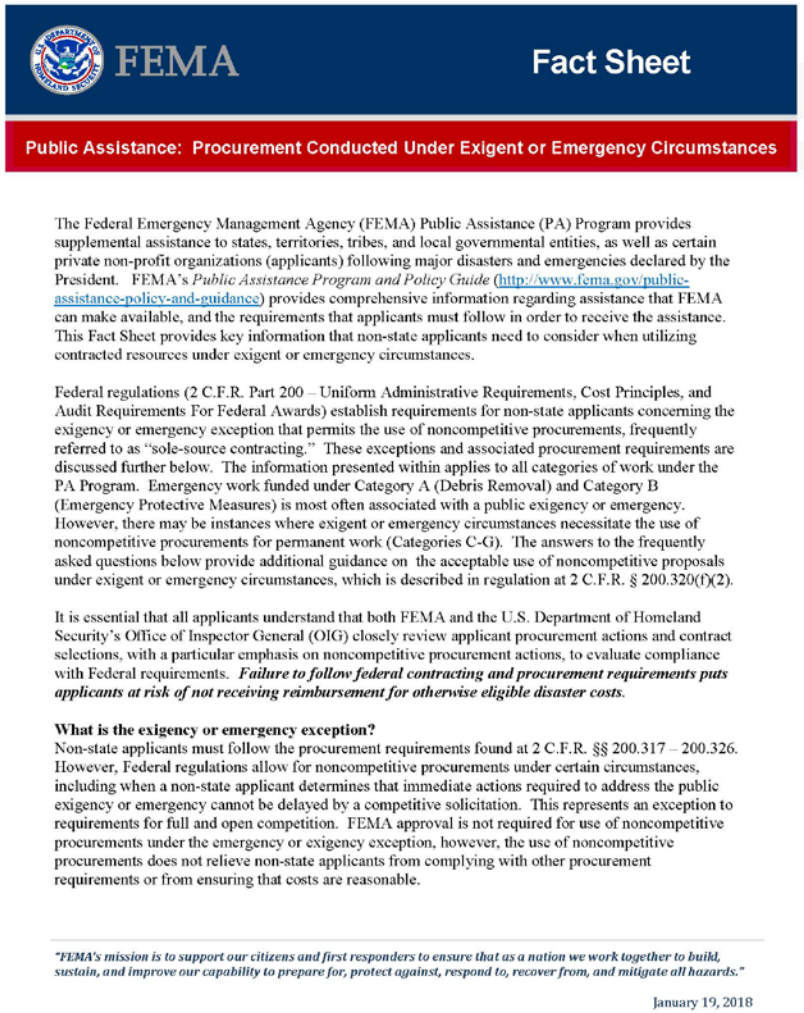
(A) FEMA Fact Sheet Public Assistance: Procurement Conducted Under Exigency or Emergency Circumstances (January 19, 2018). See below and in Bibliography.

(B) FEMA Public Assistance and Program Guide https://www.fema.gov/media-library/assets/documents/111781

(C) FEMA Public Assistance and Program Guidelines specifics on important dates for current and future disaster timelines. See below email and attachments.

(D) Example Form Letter to remove items from any earlier FEMA Damage Inventory List. See below slide.

II(A). FEMA Fact Sheet



FEMA **Fact Sheet**

Public Assistance: Procurement Conducted Under Exigent or Emergency Circumstances

The Federal Emergency Management Agency (FEMA) Public Assistance (PA) Program provides supplemental assistance to states, territories, tribes, and local governmental entities, as well as certain private non-profit organizations (applicants) following major disasters and emergencies declared by the President. FEMA's *Public Assistance Program and Policy Guide* (http://www.fema.gov/public-assistance-policy-and-guidance) provides comprehensive information regarding assistance that FEMA can make available, and the requirements that applicants must follow in order to receive the assistance. This Fact Sheet provides key information that non-state applicants need to consider when utilizing contracted resources under exigent or emergency circumstances.

Federal regulations (2 C.F.R. Part 200 – Uniform Administrative Requirements, Cost Principles, and Audit Requirements For Federal Awards) establish requirements for non-state applicants concerning the exigency or emergency exception that permits the use of noncompetitive procurements, frequently referred to as "sole-source contracting." These exceptions and associated procurement requirements are discussed further below. The information presented within applies to all categories of work under the PA Program. Emergency work funded under Category A (Debris Removal) and Category B (Emergency Protective Measures) is most often associated with a public exigency or emergency. However, there may be instances where exigent or emergency circumstances necessitate the use of noncompetitive procurements for permanent work (Categories C-G). The answers to the frequently asked questions below provide additional guidance on the acceptable use of noncompetitive proposals under exigent or emergency circumstances, which is described in regulation at 2 C.F.R. § 200.320(f)(2).

It is essential that all applicants understand that both FEMA and the U.S. Department of Homeland Security's Office of Inspector General (OIG) closely review applicant procurement actions and contract selections, with a particular emphasis on noncompetitive procurement actions, to evaluate compliance with Federal requirements. ***Failure to follow federal contracting and procurement requirements puts applicants at risk of not receiving reimbursement for otherwise eligible disaster costs.***

What is the exigency or emergency exception?
Non-state applicants must follow the procurement requirements found at 2 C.F.R. §§ 200.317 – 200.326. However, Federal regulations allow for noncompetitive procurements under certain circumstances, including when a non-state applicant determines that immediate actions required to address the public exigency or emergency cannot be delayed by a competitive solicitation. This represents an exception to requirements for full and open competition. FEMA approval is not required for use of noncompetitive procurements under the emergency or exigency exception, however, the use of noncompetitive procurements does not relieve non-state applicants from complying with other procurement requirements or from ensuring that costs are reasonable.

"FEMA's mission is to support our citizens and first responders to ensure that as a nation we work together to build, sustain, and improve our capability to prepare for, protect against, respond to, recover from, and mitigate all hazards."

January 19, 2018

II(A).FEMA Fact Sheet

PA Procurement Conducted Under Exigent or Emergency Circumstances

When referring to procurement activity, FEMA defines both exigency and emergency as situations that demand immediate aid or action. The difference between the two is that:

- In the case of an ***exigency***, there is a need to avoid, prevent or alleviate serious harm or injury, financial or otherwise, to the applicant, and use of competitive procurement proposals would prevent the urgent action required to address the situation. Thus, a noncompetitive procurement may be appropriate.
- In the case of an ***emergency***, a threat to life, public health or safety, or improved property requires immediate action to alleviate the threat.

While emergency conditions generally are short-lived, exigent circumstances can exist for a period of weeks or months.

Exigency Example: A tornado impacts a city in June and causes widespread and catastrophic damage, including damage to a city school. The city wants to repair the school and have it ready for use by the beginning of the school year in September. The city estimates, based on past experience, that awarding a contract using a sealed bidding process would require at least 90 days, and the city's engineer estimates that the repair work would last another 60 days. This would extend the project beyond the beginning of the school year. Rather than conducting a sealed bidding process, the city—in compliance with State and local law—wants to sole source with a contractor it has contracted with previously. The City can demonstrate that this constitutes an "exigent circumstance" because use of a sealed bidding process would cause an unacceptable delay and thus procurement by non-competetive methods was necessary based on the particular situation.

Emergency Example: Severe weather impacts a city and causes widespread and catastrophic damage, including loss of life, widespread flooding, loss of power, damage to public and private structures, and millions of cubic yards of debris across the city, leaving almost the entire jurisdiction inaccessible. The city needs to begin debris removal activities immediately to restore access to the community, support search and rescue operations, power restoration, and address health and safety concerns. Under these circumstances, the city may find it necessary to award noncompetitive contracts to address threats to life, property and public health.

When does the exigency or emergency exception apply and for how long?
Use of the public exigency or emergency exception *is only permissible during the actual exigent or emergency circumstances*. Exigency or emergency circumstances will vary for each incident, thus it is difficult to determine in advance or assign a particular time frame when noncompetitive procurements may be warranted. Exigent or emergency circumstances may exist for two days, two weeks, two months or even longer in some cases. Non-state applicants must ensure that work performed under the noncompetitively procured contracts is specifically related to the exigent or emergency circumstance in effect at the time of procurement. Importantly, because the exception to competitive procurement is available only while the exigenct or emergency circumstances exist, applicants should, upon awarding a noncompetitive contract, immediately begin the process of competitively procuring similar goods and services in order to transition to the competitively procured contracts as soon as the exigent or emergency circumstances cease to exist.

FEMA may review a non-state applicant's justification that exigent or emergency circumstances warrant an exception to competitive procurement. If the agency determines that exigent or emergency

A. FEMA Fact Sheet

circumstances did not exist or did not preclude a non-state applicant from adhering to competitive procurement requirements, FEMA may disallow all or part of the non-state applicant's cost related to the contract. (2 C.F.R. 200.338)

What documentation is required to support the use of the exigency or emergency exception?
While FEMA approval is not required to use noncompetitive procurement proposals under the emergency or exigency exception, non-state applicants must document and provide justification for the use of the exigenct or emergency exception. A list of elements that applicants may wish to include as part of its written justification can be found at the end of this Fact Sheet. The justification must be included in the non-state applicant's records for each Public Assistance-funded project.

Do any Federal procurement requirements apply if a non-state applicant is sole sourcing a contract under exigent or emergency circumstances?
Yes, non-state applicants must comply with the following requirements, regardless of whether exigent or emergency circumstances exist:

- Contracts must include the required contract clauses (2 C.F.R. 200.326 & Appendix II);
- Contracts must include the Federal bonding requirements if the contract is for construction or facility improvement (2 C.F.R. 200.325);
- Contracts must be awarded to a responsible contractor (2 C.F.R. 200.318(h));
- The non-state applicant must complete a cost or price analysis to determine that the cost or price of the contract is fair and reasonable; (2 C.F.R. 200.323(a) and (b));
- The use of cost-plus-percentage-of-cost contracting is prohibited (2 C.F.R. 200.323(c)).
- Use of time and materials contracts must comply with 2 C.F.R. 200.318(j)

What if the non-state applicant wants to use a pre-awarded or pre-existing contract in an exigency or emergency, and that contract does not comply with the Federal procurement requirements?
If a pre-awarded or pre-existing contract is not in compliance with the Federal procurement requirements (e.g., the contract was not fully and openly competed, or the six affirmative socioeconomic contracting steps were not completed (2 CFR 200.321)), it may still be possible to use the contract for the duration of the exigency or emergency. FEMA recommends that applicants review the list of procurement requirements above and take actions to modify pre-awarded or pre-existing contracts where applicable. In addition, applicants must prepare the appropriate documentation to justify the use of a noncompetitively procured contract.

Can non-state applicants use Time and Materials (T&M) contracts in an exigency or emergency?
Yes, but only under certain circumstances. FEMA advises against the use of T&M contracts and generally limits the use of these contracts to a short time period where the scope or duration of the work is unclear. T&M contracts do not incentivize contractors to control costs or maximize labor efficiency. FEMA may reimburse costs incurred under a T&M contract only if all of the following apply:

- No other contract was suitable;
- The contract has a ceiling price that the contractor exceeds at its own risk; and
- The applicant can demonstrate it provided a high degree of oversight to obtain reasonable assurance that the contractor used efficient methods and effective cost controls.

II(A). FEMA Fact Sheet

Can a non-state applicant award cost-plus-a-percentage-of-cost contracts or contracts with a percentage-of construction-cost method in an exigency or emergency?
No. This prohibition applies to all work, regardless of the circumstances (2 C.F.R. § 200.323(d)).

Can non-state applicants use *piggyback* contracts in an exigency or emergency?
Piggyback contracting occurs when one entity assigns the contractual rights it has in a contract to a non-state applicant. Generally, FEMA discourages piggyback contracts because the original contract pertains to the needs of the original entity, with a specific scope of work for that entity. While there may be circumstances when piggybacking is permissible, in almost all instances, the scope of work would need to be changed to include the needs of a non-state applicant, and changes to the scope of work are generally not permitted as there is not likely to be full and open competition for the expanded scope of work. However, during emergency and exigency circumstances, non-state applicants may be able to piggyback another entity's contract and expand the scope of a contract for the period of the emergency or exigency circumstance.

Note that a non-state applicant may choose to enter into a separate contract with the same contractor as another entity, using the same terms and conditions as in that other entity's contract, with only a change in the scope of work and the associated costs. However, this is sole-source contracting rather than piggyback contracting and it must meet the requirements for noncompetitive procurement under exigency or emergency circumstances as described elsewhere in this Fact Sheet.

If a non-state applicant is contemplating the use of piggyback contracting, they should contact their state or territory liaison to request FEMA assistance with contract review.

Can States use Time and Materials (T&M) or Cost Plus Percentage of Cost contracts in an exigency or emergency?
2 C.F.R. § 200.317 requires state applicants to follow: (1) the same policies and procedures they use for procurements using non-Federal funds; (2) 2 C.F.R. §200.322 (procurement of recovered materials); and (3) 2 C.F.R. §200.326 (required contract provisions). These requirements apply regardless of whether exigency or emergency circumstances exist. For purposes of the federal procurement requirements, states are defined as the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, the Commonwealth of Northern Mariana Islands, and any agency or instrumentality thereof except for local governments. Tribal governments are not considered to be States when applying federal procurement standards required by 2 C.F.R. Part 200.

States must ensure that they are in compliance with the cost principles in 2 C.F.R. §§200.400 – 200.474, including ensuring that costs are reasonable, as defined in 2 C.F.R. § 200.404. While the federal procurement rules do not prohibit the use of T&M contracts and Cost Plus Percentage of Cost contracts by state entities, FEMA discourages states from using these contracts because they generally lack provisions that control costs and maximize efficiency in performing work. FEMA and the OIG closely scrutinize these types of contracts for cost reasonableness.

Although T&M contracts are discouraged, there may be instances where T&M contracts are appropriate in the short term for activities such as debris removal, emergency power restoration, or other immediate actions required to address emergency health and safety threats. States entering into T&M contracts are encouraged to include language in the contract that specifies a ceiling price and limits the duration of the

II(A). FEMA Fact Sheet

contract to a short time period, thus providing the state time to develop a scope of work and transition to the more competitive procurement procedures.

Additional Information and Resources

Non-state applicants should consult as soon as possible after a declared disaster with all appropriate parties, including legal counsel, to review their procurement policies, actions and contracts against federal procurement requirments. Non-state applicants also should contact their State or Territory liaisons to request assistance with any procurement activity concerns.

Detailed procurement and contracting information is available on the FEMA website at www.fema.gov/procurement-disaster-assistance-team. FEMA's *Public Assistance Program and Policy Guide* is available at (http://www.fema.gov/public-assistance-policy-and-guidance), and the Code of Federal Regulations referenced in this guidance can be accessed at www.eCFR.gov.

II(A). FEMA Fact Sheet

Suggested Elements for Noncompetitive Procurement Justification

1. Identify which of the four circumstances listed in 2 C.F.R. § 200.320(f) justify a non-competitive procurement:
   (1) The item is available only from a single source;
   (2) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;
   (3) The Federal awarding agency or pass-through entity expressly authorizes noncompetitive proposals in response to a written request from the non-Federal entity; or
   (4) After solicitation of a number of sources, competition is determined inadequate.

2. Provide a brief description of the product or service being procured, including the expected amount of the procurement.

3. Explain why a noncompetitive procurement is necessary. The justification should explain the nature of the public exigency or emergency, including specific conditions and circumstances that clearly illustrate why procurement other than through noncompetitive proposals would cause unacceptable delay in addressing the public exigency or emergency. (Failure to plan for transition to competitive procurement cannot be the basis for continued use of noncompetitive procurement based on public exigency or emergency).

4. State how long the non-competitively procuremed contract will be used for the defined scope of work, and the impact on that scope of work should the the noncompetitively procured contract not be available for that amount of time (e.g., how long do you anticipate the exigency or emergency circumstances will continue; how long will it take to identify your requirements and award a contract that complies with all procurement requirements; or how long would it take another contractor to reach the same level of competence).

5. Describe the specific steps taken to determine that full-and-open competition could not have been used, or was not used, for the scope of work (e.g., research conducted to determine that there were limited qualified resources available that could meet the contract provisions).

6. Describe any known conflicts of interest and any efforts that were made to identify possible conflicts of interest before the noncompetitive procurement occurred. If no efforts were made, explain why.

7. Include any other information justifying the use of noncompetitive procurement in the specific instance.

NOTE: A separate justification is required for each instance of noncompetitive procurement.

II (C) FEMA Public Assistance and Program Guidelines specifics on important dates for current and future disaster timelines:

From: Pennington, Austin [mailto:austin.pennington@fema.dhs.gov]
Sent: Tuesday, July 10, 2018 4:12 PM
To: Blanco, Jorge <JoBlanco@miamigov.com>; Jackson, Robin Jones <RJonesJackson@miamigov.com>
Subject: FEMA important dates and deadlines

Good Afternoon Robin and Jorge,

Attached are two excerpts from the Public Assistance Program and Policy Guide. The two files attached outline some important dates for this, or any disaster the City of Miami may face in the future. For the file named "Identifying and Reporting Damages PAPPG.pdf" (page 135 of the PAPPG), its outlines a time period of 60 days from the "kick-off", or, Recovery Scoping Meeting to identify and report all the damages. For Irma in particular, our Scoping Meeting took place on October 25th, 2017. This put the 60 day deadline at December 24th, 2017.

The other file named "Project Deadline Dates PAPPG.pdf" (page 142-143 of the PAPPG) outlines time periods for projects to be completed. These dates include 6 months from the declaration date to complete temporary repairs and all other emergency work. As well, there is time window of 18 months from the declaration date to complete permanent repairs. For Hurricane Irma, the declaration date was September 10th 2017, making March 10th 2018 the cut-off date for temporary, and March 10th 2019 the cut-off for permanent repairs.

I hope this email helps as far as defining "milestones" in recovery. Please let me know if you have any questions.

-Austin Pennington
Program Delivery Manager 4337DR-FL
(202) 213-5230
Austin.Pennington@FEMA.DHS.gov



F. Exit Briefing

FEMA and the Recipient conduct an Exit Briefing with the Applicant when project formulation is complete and all claimed damage is documented.

FEMA uses this meeting to:

- Ensure all claimed damage is sufficiently and accurately documented
- Discuss record retention requirements
- Explain deadlines for completion of work and appeals
- Review EHP compliance issues
- Transition primary point-of-contact from field personnel to the Recipient
- Discuss questions or concerns

III. Project Deadlines

FEMA only provides PA funding for work completed and costs incurred[316] within regulatory deadlines (See Figure 17). The deadline for Emergency Work is 6 months from the declaration date. The deadline for Permanent Work is 18 months from the declaration date.[317]

Deadlines for Completion of Work	
Type of Work	Months
Emergency Work	6
Permanent Work	18

Figure 17. Regulatory Project Deadlines

If the Applicant determines it needs additional time to complete the project, including direct administrative tasks related to the project, it must submit a written request for a time extension to the Recipient with the following information:

- Documentation substantiating delays beyond its control;
- A detailed justification for the delay;
- Status of the work; and
- The project timeline with the projected completion date.[318]

The Recipient has authority to extend deadlines for individual projects based on extenuating circumstances. It may extend Emergency Work projects by 6 months[319] and Permanent Work projects by 30 months.[320] FEMA has authority to extend individual project deadlines beyond these timeframes if extenuating circumstances justify additional time.[321]

With exception of debris removal operations funded under the Accelerated Debris Removal Procedure of the Alternative Procedures Pilot Program, FEMA generally considers the following to be extenuating circumstances beyond the Applicant's control:

- Permitting or EHP compliance related delays due to other agencies involved
- Environmental limitations (such as short construction window)

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[316] 2 CFR § 200.309 and 44 CFR § 206.204(d)(2).
[317] 44 CFR § 206.204(c)(1).
[318] 44 CFR § 206.204(d)(2).
[319] The Recipient may not grant time extensions on debris removal projects funded under the Accelerated Debris Removal Alternative Procedure.
[320] 44 CFR § 206.204(c)(2)(ii).
[321] 44 CFR § 206.204(d).



- Inclement weather (site access prohibited or adverse impact on construction)

FEMA generally considers the following to be circumstances within the control of the Applicant and not justifiable for a time extension:

- Permitting or environmental delays due to Applicant delays in requesting permits
- Lack of funding
- Change in administration or cost accounting system
- Compilation of cost documentation

Although FEMA only provides PA funding for work performed on or before the approved deadline, the Applicant must still complete the approved SOW for funding to be eligible.[322] FEMA deobligates funding for any project that the Applicant does not complete. If the Applicant completes a portion of the approved SOW and the completed work is distinct from the uncompleted work, FEMA only deobligates funding for the uncompleted work. For example, if one project includes funds for three facilities and the Applicant restores only two of the three facilities, FEMA only deobligates the amount related to the facility that the Applicant did not restore.

Table 11 indicates the information that the Applicant should submit to support a request for a time extension.

Table 11. Information to Support Time Extension

Information to Support Time Extension

Request should be submitted prior to current approved deadline, be specific to one project, and include the following information with supporting documentation:
☐ Dates and provisions of all previous time extensions
☐ Construction timeline / project schedule in support of requested time
☐ Basis for time extension request:
• Delay in obtaining permits
  ○ Permitting agencies involved and application dates
• Environmental delays or limitations (e.g., short construction window, nesting seasons)
  ○ Dates of correspondence with various agencies
  ○ Specific details
• Inclement weather (prolonged severe weather conditions prohibited access to the area, or adversely impacted construction)
  ○ Specific details
• Other reason for delay
  ○ Specific details

IV. Project Funding

The PW contains the information necessary for authorized FEMA personnel to review and approve the SOW and costs. If approved, FEMA obligates the Federal share of the eligible

[322] 44 CFR § 206.204(d)(2).



A. Identify and Report Damage

The Applicant is required to identify and report all of its disaster-related damage, Emergency Work activities, and debris quantities to FEMA within 60 days of the Kickoff Meeting.[308] FEMA may extend the deadline for identifying and reporting damage if the Recipient submits a request in writing with justification based on extenuating circumstances beyond the Recipient's or Applicant's control.[309] For example, if a site is inaccessible, FEMA may extend the deadline for that site.

FEMA and the Recipient conduct site inspections with the Applicant to validate, quantify, and document the cause, location, and details of the reported damage and debris impacts and identify EHP issues and hazard mitigation opportunities within this 60-day period. Table 7 lists information that FEMA may request to determine the eligibility of damage claimed.

FEMA, the Recipient, and the Applicant should reach agreement on the disaster-related damage description and dimensions, emergency protective measures, and debris impacts before proceeding with SOW development.

Expedited Funding

If an Applicant has an immediate need for Emergency Work funding, FEMA may provide funding based on estimated costs provided the Applicant substantiates its legal responsibility for the work and provides a detailed description of the activities, a cost summary, and sufficient documentation to substantiate that the work is eligible and the cost estimate is reasonable. If the funding is related to debris removal, the Applicant must also provide debris quantities, locations, and documentation to substantiate environmental compliance. FEMA must validate the eligibility of the debris quantities and locations. FEMA will not provide funding based on estimated costs for a debris removal project funded under the Accelerated Debris Removal Alternative Procedure (Chapter 2:VI.A.1.a).

Table 7. Documentation to Support Damage Claim

Documentation Supporting Immediate Threats, Debris Impacts, or Damage
The following information is obtained, or validated, during the site inspection (not an all-inclusive list).
☐ The Information listed in Table 6, if not previously provided
For Emergency Work:
☐ Description of immediate threat
☐ Records demonstrating presence of immediate threat (e.g., technical reports, safety inspector report, photographs)
☐ Additionally, for debris specifically: • Actual debris quantities by type • For waterway debris, documentation supporting pre-and post-incident levels, such as waterway soundings

[308] 44 CFR § 206.202 (d)(1)(ii).
[309] 44 CFR § 206.202 (f)(2),

II (D). Example of Form Letter to remove items from any earlier FEMA Damage Inventory List(s).

On Letterhead Stationary of Your City and Your Appropriate City Official:

Date: _____

To: Name:_____

Title: FEMA Program Delivery Manager

(Email and Address)

RE: Your City, Particular Disaster Name

Dear _____:

Please remove the following item(s) below from the Damage Inventory List, as the City of _____ will not be seeking FEMA reimbursement for the following damage:

Damage #	Category	Name of Location/Facility	Damage Type	Removal Reason(s)

If you have any questions, please contact (Name) _____, (Title) _____ at (Phone Number) _____ or (email) _____. Thank you.

(Closing, Name, Address)

Past, Present, Future: WHO owns WHAT, WHERE, and WHEN? WHO insures WHAT, WHERE and WHEN?



Past, Present, Future:

- Did the sidewalk need repairs before the Disaster?
- Was the repair project already in the Capital Plan?
- WHO “owns”/insures/maintains sidewalk, right of way, curb, street, drainage, water and sewer?



III. State Examples

- **See in Bibliography:** Federally-Funded Subaward and Grant Agreement

IV. City Examples (See Disclaimers):

A. See in Bibliography: City of Miami Reimbursement Resolution:

1. Attaches initial FEMA Disaster Inventory List, Insurance Coverage List, and "Other Damages" List in combined Excel Spreadsheet

2. Authorizes related amendments to Budget and Capital Plan

3. Ratifies, Confirms, and Approves actions in preparations for, during, and after Disaster

4. Authorizes acceptance and appropriations of future FEMA/State Grants and Insurance Proceeds

B. See in Bibliography: City of Miami Resolution Waiving the Competitive Bidding Procedures - Emergency Repairs and Exigency Repairs

C. "Dual Track" Resolution for FEMA Procurement and Regular State/Local Law Procurement

D. "Piggybacks" on existing Federal compliant contracts

Peeling Back the Layers of the Onion NOW, Before Your City goes under FEMA Audit(s) in 3 to 4 Years and Possibly “Other” Audit(s)



V. Yes, REALLY, the Audits are Coming to Your City!

(A) Audit Requirements for Federal Awards 2 C.F.R. Part 200 Subpart F (§§200.500-200.521).

(B) State Audit(s) pursuant to Federally-Funded Subaward and Grant Award Agreement(s).

(C) Other State, Foundation, Corporate Grant Audits.

(D) Audits related to tax-exempt and taxable bonds, loans, and lease/purchase agreements.

So THANK FEMA NOW for helping Your City to prepare up front, in the beginning! WHY? To Protect Public Trust, To Protect Public Assets, To Avoid Fraud and Other Liabilities from . . .

Sharks in the Water, Money on the Land



VI. Noncompliance

A. No Reimbursement
   - **2 C.F.R. § 200.338 Remedies for noncompliance.**

B. Withholding of other funds
   - **2 C.F.R. § 200.338 Remedies for noncompliance**.

C. Fines and other penalties
   - **Penalties. Stafford Act. Title III. §314 (42 U.S.C. 5157).**

D. Criminal Charges
   - **2 C.F.R. § 200.415 Required certifications.**
   - **Penalties. Stafford Act. Title III. §314(c) Referral to Attorney General (42 U.S.C. 5157).**

VI. Noncompliance Examples

- **No reimbursement/Withholding of Funds:**

OIG-16-97-D, June 8, 2016

DHS OIG audited $69.2m of FEMA Public Assistance grant funding awarded to an electric cooperative in connection with a severe winter storm that occurred in February 2013. It recommended that FEMA recover $51.2m of this funding as the cooperative ***continued to use noncompetitive contracts for work completed during non-exigent circumstances.***
https://www.oig.dhs.gov/assets/GrantReports/2016/OIG-16-97-D-Jun16.pdf

VI. Noncompliance Examples Cont.

- **OIG-16-23-D January 25, 2016**: FEMA Should ***Disallow*** $1.2 Million of $6.0 Million in Public Assistance Program Grant Funds Awarded to the City of San Diego, California Fees unrelated to the disaster
- Costs related to pre-existing damages
- Excessive landfill costs
- Excessive equipment costs

https://www.oig.dhs.gov/assets/GrantReports/2016/OIG-16-23-D-Jan16.pdf

VI. Noncompliance Examples Cont.

OIG-15-141-D (September 9, 2015)

FEMA Should ***Disallow*** $2.78 million of $14.57 million in Public Assistance Grant Funds Awarded to the Township of Brick, New Jersey, for Hurricane Sandy Damages, in connection with **unreasonable debris removal costs.**
https://www.oig.dhs.gov/assets/GrantReports/2015/OIG-15-141-D-Sep15.pdf

VI. Noncompliance Examples Cont.

Failure to Provide Proper Documentation to Support Costs:

OIG-16-115-D (August 10, 2016)

- FEMA Should Suspend All Grant Payments on the $29.9 Million Coastal Retrofit Program Until Mississippi Can Properly Account for Federal Funds. https://www.oig.dhs.gov/assets/GrantReports/2016/OIG-16-115-D-Aug16.pdf

VI. Noncompliance Examples Cont.

- Criminal Penalties
  - **Former St. Tammany Parish Councilman Joe Impastato sentenced to 18 months in prison for [debris-disposal] kickback scheme after Hurricane Katrina**
    http://blog.nola.com/tpnorthshore/2009/05/former_st_tammany_parish_counc_1.html
  - **Former Plaquemines Parish Sheriff Jiff Hingle sentenced to nearly 4 years on corruption charges**
    https://www.nola.com/crime/index.ssf/2013/07/former_plaquemines_parish_sher_2.html
  - **Ex-councilman Jon Johnson sentenced to 6 months in prison**
  - https://www.nola.com/crime/index.ssf/2012/11/ex-councilman_jon_johnson_sent.html

VII. Other Noncompliance Resources

- *"Disaster Fraud"* Presentation by Jonathan J. Rusch, Executive Director, Disaster Fraud Task Force, Deputy Chief for Strategy and Policy, Fraud Section Criminal Division U.S. Department of Justice Trenton, NJ (November 15, 2013). https://nj.gov/comptroller/sandytransparency/links/pdf/doj_disaster_fraud.pdf
- *Second Year Report to the Attorney General*, Hurricane Katrina Fraud Taskforce, Department of Justice. (September 2007). https://www.justice.gov/sites/default/files/criminal-disasters/legacy/2012/07/30/09-04-07AG2ndyrprogrpt.pdf
- *Fifth Anniversary Report to the Attorney General,* Hurricane Katrina Fraud Taskforce, Department of Justice. (September 2010). https://www.justice.gov/sites/default/files/criminal-disasters/legacy/2012/07/30/09-13-10katrinaprogress-report.pdf
- *Breathtaking' Waste and Fraud in Hurricane Aid - The New York Times* (June 27, 2006). https://www.nytimes.com/2006/06/27/washington/27katrina.html
- *Averting a Second Disaster: Avoiding Grant Deobligation*. Ernst & Young LLP. (2017). https://www.ey.com/Publication/vwLUAssets/ey-averting-a-second-disaster-avoiding-grant-deobligation/$File/ey-averting-a-second-disaster-avoiding-grant-deobligation.pdf

VIII. Other Useful Information:

- IMLA's 83rd Annual Conference October 17 - October 21, 2018 Houston, Texas
  - http://www.imla.org/events/conferences/1871-83rd-annual-conferece

- City Resiliency Planning Checklist
  - See next slide

City Resiliency Planning Checklist

CAPITAL PLANNING RESILIENT INFRASTRUCTURE REVIEW

1. BACKGROUND INFO

- ☐ Project involves physical infrastructure at a specific location.
  Address:_____
- ☐ What type of asset or project is being proposed? (e.g., new construction, rehabilitation or modification of existing structure, building(s), fixed equipment, software, roadway structure, utility structure, seawall, park etc)?
  Project/Asset type: _____

2. FLOODING/ENVIRONMENTAL CONSIDERATIONS

- ☐ Project is within the current and/or future coastal high hazard zone (refer to City of Miami Flood Vulnerability map for #9 Category 1 Hurricane with 2 ft of SLR
  http://miamigis.maps.arcgis.com/apps/MapSeries/index.html?appid=b041032436614e8db7d058bd1d54b817)
- ☐ This investment is located in a location that has historically flooded due to high tides, rain and/or storm events.
- ☐ Energy, water, and waste efficiencies/impacts on our natural system have been and will be considered for this investment.
  Describe:_____

3. FACILITY/EQUIPMENT CRITICALITY

- ☐ This site, equipment, or capital investment is critical for disaster response and recovery.
  Describe:_____
- ☐ Disruption to this site or equipment would result in critical service disruptions for City residents.
  Explain:_____
- ☐ This project will result in a necessary redundancy or a redundancy already exists (i.e. this is a backup system or one exists).
  Explain:_____

4. TIMELINE

- ☐ What is the remaining or potential future lifespan of the project?
  Lifespan:_____
- ☐ What are the projected milestones for this project?
  Design/Permitting:_____
  Construction:_____

5. COST

- ☐ What is the estimated total project cost?
  Cost:_____

If any of the highlighted boxes are checked, please submit this completed form to Stephanie Tashiro, Deputy Resilience Officer: stashiro@miamigov.com

DRAFT

