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Looking Forward: FEMA Flood and Disaster Programs React to Increasing Disaster Costs and Budget Pressure

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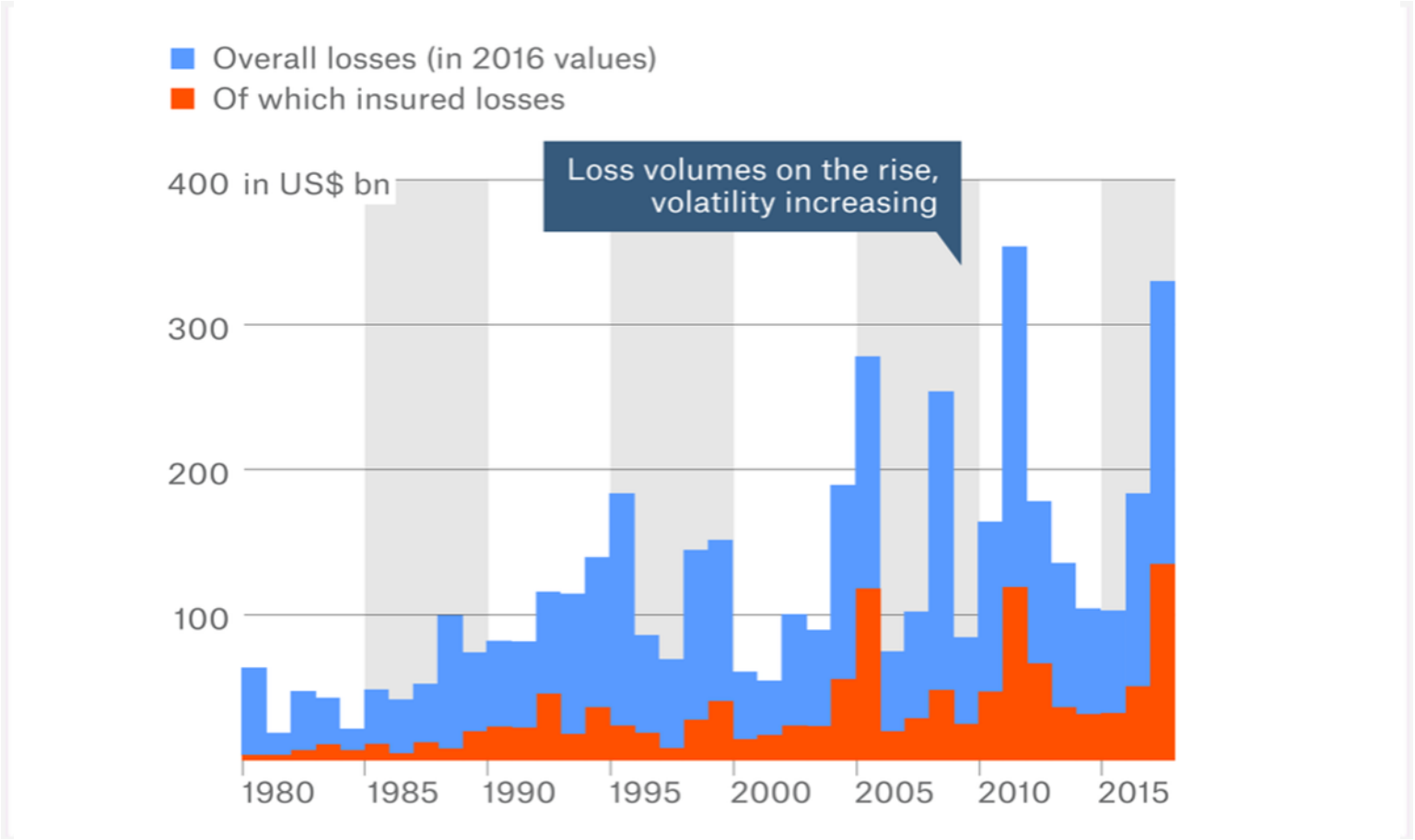
Escalation of Catastrophic Losses in U.S. 1980 - 2017



Munich Re

Source: Munich Re NatCatSERVICE

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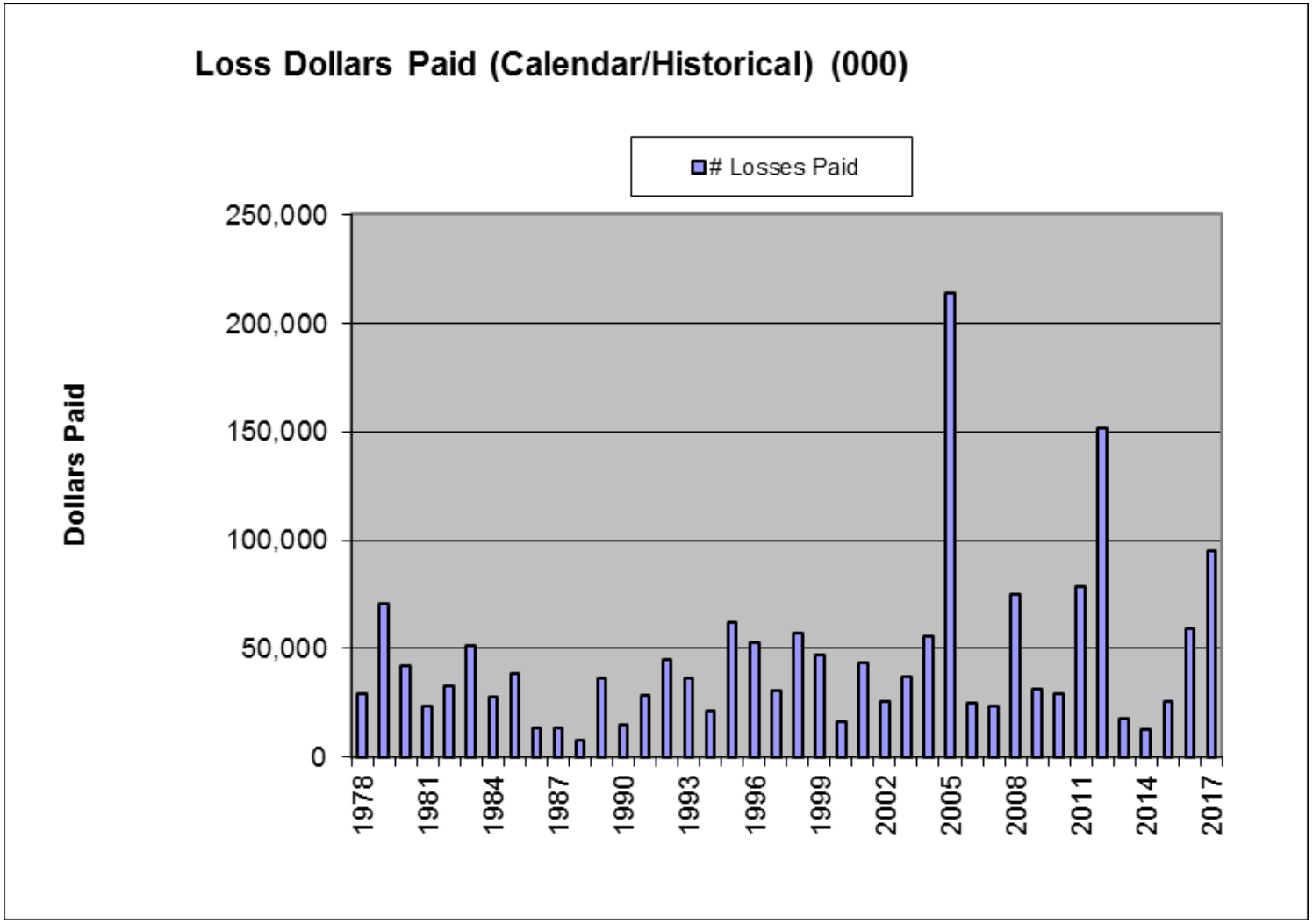
Escalation of Flood Insurance Losses – National Flood Insurance Program, 1978-2017



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FEMA Disaster Grant Programs

- **'Unlimited Funds' for eligible costs:**
  - Public Assistance Program
    - Includes §406 Mitigation as part of repair
  - Individual Assistance Program

- **Limited Funds, Competitive Grants**
  - Mitigation Programs:
    - §203 Pre-disaster Mitigation

      DRRA ALERT
    - §404 Hazard Mitigation Grant Program
    - NFIP: National Flood Mitigation Fund



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FEMA Public Assistance Program

Triggered by Presidential Declaration

- Local governments, including special districts and public power entities, are eligible

- Cost share grants: “Not less than 75%” of the “net eligible costs” of performing “eligible work”

Grants based on eligibility, not competitive proposals

Are eligibility **determinations more stringent**?

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Eligible Work

Required by/caused by a declared major disaster or emergency

Located in a county that is declared for public assistance

Legal responsibility of eligible applicant

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Federal Disaster Funding: Not What it Used to Be

- OIG and Congressional Pressure to Decrease Costs
- Repetitive Loss – Insurance and "You Should Know Better"
- [**EXTREME**] Crack Down on Procurement Compliance
- Appeals Process – More Formal
- FEMA's New Delivery Model
  - Used for Hurricane Irma and all disasters after September 12, 2017
  - Utilizes "Grants Manager" and "Grants Portal" web-based tracking
  - Utilizes "Consolidated Resource Centers" (CRCs) – "centralized locations where subject matter experts are staffed to process grant applications across multiple disasters."
- **MORE LAWYERS**

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The “Lawyer-ification” of Disaster Recovery

- FEMA had 35 lawyers in 2000. FEMA has over 250 lawyers 2018
- State entities increasing staff – OIG and FEMA Imposed Liability
- Increased Congressional interest – Audits and Investigations
- Creation of FEMA Procurement Disaster Assistance Team (PDAT)
- Creation of FEMA Appeals and Audits Branch



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“Net Eligible Cost” and Improvements

Grants based on actual cost as determined by accounting reconciliation/closeout after construction.

- Forces very extensive federal oversight to assure no fraud, gold-plating, unreasonable cost contracts

FEMA funds rebuilding of facilities per:

- Design of facility prior to disaster but
- Consistent with “applicable codes and standards in effect prior to disaster,” or
- **DRRA ALERT** – for disasters declared on or after August 1, 2017, the latest published editions of codes and standards; and
- Mitigation measures “required by Regional Administrator” – Section 406 Mitigation

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Stafford Act § 428

FEMA and Applicant reach agreement on eligible cost prior to grant award. FEMA funds rebuilding of facilities per:

- Agreement based on careful review of damage, eligibility, mitigation
- FEMA reimbursement capped at agreed-to amount (no appeals!)
- Cost savings (total cost below agreed-to amount) can be retained for mitigation or other 'eligible' purposes
- Issues:
  - Scope of Audit
  - OIG review
- **DRRA ALERT** - Sec. 1207 amends 428; estimates certified by a prof. licensed eng. and accepted by FEMA Administrator are presumed reasonable



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Insurance and Disaster Assistance

- Stafford Act Section 312: General Prohibition re Duplication of Benefits
- Stafford Act 311: Obtain and Maintain Requirement
- 44 C.F.R. 206.250-253: PA Insurance Requirements:
  - Confirms reduction for actual and anticipated proceeds
  - Mandatory NFIP Reduction
  - Implements Obtain and Maintain Requirement
- FEMA Strategic Plan: Increase Incentives for Broader Insurance Coverage

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Insurance: Actual or Anticipated Reduction

- For the first disaster, FEMA will “fund” your deductible
- Initial reduction may be an estimate, the amount FEMA “anticipates” you might receive
- Requirement that you use reasonable efforts to pursue amount “available”
- Allocation of proceeds for eligible and ineligible covered costs
- Ask for consideration of legal costs incurred – reduction should be net actually received

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Insurance: Obtain and Maintain

- All grants are conditioned on applicant obtaining and maintaining insurance to cover future similar losses
  - Compliance checked in any subsequent disaster
- Must comply or risk denial/deobligation of ALL funding
  - Applies to buildings, contents, equipment, and vehicles
  - Based on eligible costs prior to any reductions
  - Subject to amount "reasonable and necessary"
  - **TIP**: Create a tracking document to capture all amounts for later use.
- Aggregate policies, sublimits, insurance pool issues

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Insurance: Repetitive Loss

- Second Loss: FEMA will deduct the entire previously required insurance amount from otherwise eligible funding.
  - For same type of loss
  - For same facility
- FEMA Policy FP 206-086-1; June 29, 2015
- OIG-17-50-VR; June 9, 2017:

  FEMA's Lack of Process for Tracking Public Assistance Insurance Requirements Places Billions of Tax Dollars at Risk

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Insurance: Mandatory NFIP Reduction

- Property located in an SFHA must be insured.
- FEMA will deduct the amount payable under a SFIP
  - $500,000 for building / $500,000 for contents
  - “building” = a structure with two or more outside rigid walls and a fully secured roof, that is affixed to a permanent site
  - Mandatory NFIP Reduction
  - Should get “credit” for any actual flood insurance proceeds received
- **DRRA ALERT** – Sec. 1207 provides that the Mandatory NFIP Reduction can only be applied once per campus for disasters declared 2016-2018

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State and Federal Audits

- **Audits by both federal and state agencies**
  - State – acting as sub-grantor to local governments, and responsible for proper use of funds (including state cost share
  - Federal: Office of Inspector General (OIG)
    - Present preliminary report at OIG closeout meeting
    - Opportunity to respond to findings
    - Recommendation to FEMA program staff – may recommend disallowance of funds already spent
    - An OIG Audit cannot itself be appealed; a FEMA "Deobligation" based on OIG audit findings can be appealed

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WARNING

“Discretionary Program”

Stafford Act, §305: “The Federal Government shall not be liable for any claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Federal Government in carrying out the provisions of this Act.”



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Disputes in Public Assistance Program

- **Basic eligibility for assistance**
  - Applicant eligibility: tribe, local government, non-profit
  - Scope of damage, cause of damage
  - Repair vs. Replacement: 50% rule
  - Relocation
- **Reasonable cost and procurement**
  - Competitive bids/illegal forms of contract
  - Change orders
  - Failure to provide proper preferences: minorities, local preference
  - Deductions: Insurance, other assistance
- **After closeout: Deobligation of funds spent**
  - OIG audit
  - Change in FEMA policy

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Administrative Appeals: What Can Be Appealed

- **Applicants can appeal from "any determination previously made related to an application for or the provision of Federal Assistance"**
  - A Project Worksheet written for less than amount applicant contends is eligible
  - A letter deobligating funds before they are spent
  - A letter requesting return of funds already spent

- **Applicants cannot appeal from:**
  - Oral Guidance
  - Audits of the Inspector General – but "Deobligations" based on OIG audit findings can be appealed

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Administrative Appeals: When to Appeal

"within 60 days from receipt of a notice of the action being appealed"

- **Do not miss regulatory appeal deadlines:**
  - Even if you are still informally "discussing" with FEMA staff
  - Be sure you can document the date of receipt
  - Can you defer your administrative appeal until grant closeout?

- FEMA will now deny appeal based on grantee delay in transmittal – they must meet deadlines too!



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Administrative Appeals: How to Appeal

- **Minimum Requirements**
  - "In writing"
  - "To Regional Director" (First Appeal)
  - "Through the State"
  - With "documented justification…specifying:
    - The monetary figure in dispute
    - The provisions in federal law, regulation, or policy" inconsistent with decision.



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FEMA Public Assistance Program Appeals
Before Hurricane Sandy

- **Two levels of appeal**
  - First level appeal: to Regional Administrator
  - Second level appeal: to Headquarters Assistant Administrator for Recovery

- **FEMA encouraged** Applicant to provide new information to FEMA at any time – even at second appeal

  - **Based** on theory that FEMA wants to provide every dollar of assistance that is eligible, and is always willing to accept new information demonstrating eligibility

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FEMA Public Assistance Program Appeals
Now

- **Still two levels of appeal**
  - First level appeal: to Regional Administrator
  - Second level appeal: to Headquarters
- **No new information on second appeal:**
  - **Based** on theory/philosophy that Applicant should provide FEMA all information in support of eligibility on first appeal.
  - "Administrative Record" closes upon issuance of first appeal determination. **DRRA Alert – this may change.**
  - Forces increased engagement at first appeal level – "ALL IN"



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Building the Administrative Record

- Can include anything on first appeal – even newly created information
  - Cost of price analysis to support reasonableness
  - Affidavits to support approvals, process, cost
  - Expert reports to support damages
  - Letters from local officials to support code compliance
  - Photos, compliance records, emails, meeting minutes
- FEMA issues “Request for Information” or “RFI” – 30 day deadline
  - MUST send anything else you want considered
  - Can request copies of items you don’t have
  - Ensure Record is complete

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FEMA Public Assistance Program
Arbitration

Hurricanes Katrina and Rita: to CBCA

- Deadline: 30 days from receipt of adverse decision
- De novo (new facts and argument can be presented)
- Project at issue must be greater than or equal to $500,000

SRIA Arbitrations: to Coast Guard ALJ Panel

- "On the record review" – arbitrary, capricious, abuse of discretion, contrary to law
- Amount in dispute $1,000,000 or more

DRRA ALERT – Sec. 1219 Right of Arbitration

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FEMA Public Assistance Program
DRRA Sec. 1219 Arbitration

- Amends Section 423 of the Stafford Act
- Dispute of more than $500,000 or $100,000 for “Rural Areas”
- Disasters that occurred after January 1, 2016
- Conducted by CBCA
- Consider all original and additional information
- File any time after completion of first appeal but before determination is issued on second appeal
- FEMA likely to issue rule for implementation

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DRRA ALERT
Sec. 1216 – Statute of Limitations

- Amends Section 705(a) of the Stafford Act
- Notwithstanding the Debt Collection Act
- Establishes 3 year SOL that begins at the project level "report for project completion as certified by the grantee"
- Applicable to disasters declared on or after January 1, 2004
- Terminates any pending recoupments
- Does not invalidate administrative actions "completed" before DRRA

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Judicial Review

Second Appeal decisions are final agency determinations.

- FEMA decisions NOT to provide funding; a FEMA decision to award grant is almost always discretionary
- FEMA decisions to DEOBLIGATE funding already awarded and spent:
  - Section 705 of Stafford Act
    - (a) and (b) – three-year statute of limitations
    - (c) – protection of state and local governments in certain circumstances.
  - South Florida Water Management District v. FEMA
- Section 323 Right to Appeal
- Section 325 Notice and Comment

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Working with Congress on Disasters

- **Do your homework**
  - Know the facts, issues, laws, regulations, etc.
  - Know the member (e.g. committee assignments, seniority)
- **This is NOT partisan**
- **You will know when to get help**
- **Start low and then work high**
  - Start with district staff and FEMA JFO before you go to D.C.
- **Save your big guns for when you need them**



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Updates on Disaster Recovery Reform Act (DRRA)

- Bipartisan legislation that:
  - Increases federal investment in pre-disaster mitigation
  - Increases caps on a range of disaster costs
  - Institutes several specific changes/reforms
- House version passed in 2017; House attached bill in 2018 to the Federal Aviation Administration (FAA) Reauthorization Bill (H.R. 4)
- No Senate committee bill reported out. Negotiations between House and Senate managers.
- No conference report.
- Passed overwhelmingly by Senate and House

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Key Components of DRRA

- Establish fixed reimbursement rates for DAC and Management Costs—up to 15% for hazard mitigation and 12% for essential assistance; repair, restoration, and replacement; debris removal; and transportation assistance
- Require the FEMA Administrator to streamline information collection processes for grant applications and make the process less burdensome/ time consuming
- Trigger the 3 year statute of limitation under § 705(a) to begin at the State's submission of the final expenditure report for the project, rather than for the disaster
  - Applies to deobligations pending at the time of enactment
- Establish an arbitration process for disputes regarding eligibility for federal assistance, or requirements to repay assistance

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TIPS For Dealing With FEMA

#5

- Be straightforward and ethical; develop a positive relationship.

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TIPS For Dealing With FEMA (continued)

#4

- Understand FEMA eligibility code words.

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TIPS For Dealing With FEMA (continued)

#3

- Don’t give up on the first denial; FEMA may be wrong.

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TIPS For Dealing With FEMA (continued)

#2

- Do not ignore procurement requirements.

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TIPS For Dealing With FEMA (continued)

#1

- Document work, contracting procedures, FEMA promises.

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