

# DISASTER RECOVERY

Adjusters International Disaster Recovery Consulting — FEMA recovery issues for decision-makers and leaders

**TODAY**

## Determining Eligibility



### EDITOR'S NOTE

*This issue of Disaster Recovery Today focuses on the methods for presenting disaster-related costs to FEMA to obtain a favorable decision on eligibility. This step is the fourth in a nine-step process identified by Adjusters International to respond to a declared disaster.*

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—Sheila E. Salvatore, Editor

### Methods for presenting disaster-related costs to FEMA to obtain eligibility

By Jeff Shaw

In the third issue of *Disaster Recovery Today*, we discussed the categorization of disaster-related damages and costs in a manner sufficient to satisfy not only FEMA, but also insurance carriers and other federal agencies (OFAs). Once damages have been properly categorized, they must also be deemed eligible by FEMA

before financial assistance can be obtained. This issue focuses on the methods for presenting disaster-related costs to FEMA to obtain a favorable decision on eligibility.

#### **Applicant Eligibility**

Before determining the costs that are reimbursable from FEMA, it is necessary to first determine



whether your organization is eligible for Public Assistance. Eligible applicants are:

- ▶ State government agencies, such as departments of transportation, environment, or parks;
- ▶ Local governments, such as a county, city, town, special district or regional authority, village, or borough;
- ▶ Indian tribes or authorized tribal organizations and Alaskan native villages; or
- ▶ Private nonprofit (PNP) organizations<sup>1</sup> or institutions that own or operate facilities that provide certain services of a governmental nature.<sup>2</sup>

### **General Work Eligibility**

If your organization is eligible for public assistance, FEMA relies on the following tests to determine what is eligible work:

1. Required as a result of the event.
2. Caused by the event (no pre-existing damage or negligence).
3. Located within the designated disaster area.
4. The legal responsibility of an eligible applicant.

### **TEST #1**

#### **Required as a Result of the Event:**

This test is typically weighed against emergency costs (Categories A & B) and is subject to varying interpretations. Historically it has been used to determine the eligibility of costs such as:

- ▶ Safety inspections
- ▶ Emergency transportation
- ▶ Temporary relocations
- ▶ Force account labor
- ▶ Purchases and rentals
- ▶ Emergency contracts



While one might assume that an applicant would not arbitrarily take on extraordinary work unless it was required to achieve a prompt response and recovery following a disaster, this alone is not sufficient to satisfy FEMA's eligibility requirements. Often how an applicant describes what was done and the reasons for doing it will be key determining factors.

For example, if FEMA is told that emergency inspections were conducted to determine the extent of damage, they would likely be deemed ineligible, as damage assessments are to be absorbed by FEMA's administration allowance. However, if the inspections were made to determine whether the facility was unfit for occupancy, they would be viewed as safety inspections and therefore be eligible.

Because this criteria is very broad, it is extremely important to succinctly define the what, why, where, how, and by whom for every task for which an applicant hopes to seek reimbursement. It is equally important to further support a claim with all pertinent documentation, such as damage photographs or condemnation notices.

First and foremost, applicants know best what needs to be done in the immediate aftermath of a disaster. However, it is not uncommon for those efforts to be questioned by FEMA months, or even years, after an event. If an applicant clearly believes that their efforts were required as the result of an event, and FEMA and the state do not agree, the applicant must be prepared to appeal that determination in accordance with CFR 44 206.440 (Appeals).

<sup>1</sup> PNP eligibility is heavily scrutinized and involves numerous factors. To determine whether your organization is eligible, please refer to FEMA policy 9521.3 at [http://www.fema.gov/government/grant/pa/9521\\_3ap.shtm](http://www.fema.gov/government/grant/pa/9521_3ap.shtm)

<sup>2</sup> FEMA Public Assistance Guide



## TEST #2

**Caused by the Event  
(No pre-existing damage or negligence):**

While this requirement might seem self-explanatory, this area is often subject to disagreement between applicants and FEMA. The following are examples of questions that may be asked to satisfy this requirement:

► In the case of debris in a stream: Was all or some of the debris generated by the event? To satisfy FEMA requirements, applicants must show through maintenance records that they normally maintain and keep the stream free of debris. In the absence of such a plan, there must be photographic evidence that the debris was a result of the event and that the debris was a hazard.

► Where a building suffered severe roof damage: Were all attempts made to mitigate damage to the interior via tarps or other coverings? It is the applicant's responsibility to make every effort to minimize losses.

The same would also be the case for a flooded building where it was necessary to pump water and dehumidify the area to minimize mold damage. This does not mean, however, that an applicant needs to undertake measures that are not cost-effective, such as dehumidifying a building that was completely engulfed by floodwaters.

► Where a building has suffered structural damage: Were any of the damages pre-existing? This is one of the most difficult arguments to overcome; yet if a building was

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habitable—despite being in less than pristine condition before the event—but after the event is uninhabitable, it stands to reason that a significant portion of the damages can be attributed to the event. The extent and cost of damages should be determined by someone qualified not only to assess the damage, but to effect the repairs. Again, any evidence supporting the condition of the facility prior to the event (e.g., photographs, renovation plans, permits, etc.) is crucial in the development of your position.

► Where a truck is damaged while removing debris: Was the damage due to driver negligence? Often applicants fail to go through their normal accident reporting procedure. If you typically fill out accident reports and photograph the scene, it is important to also do so after a disaster. This is generally sufficient to prove your position to FEMA.

When applying this test, it is imperative that applicants control the inspection process and ensure that only those qualified to answer



questions about pre-existing conditions interact with FEMA.

### TEST #3

#### Located Within the Designated Disaster Area:

Following the declaration of a major disaster, FEMA will designate the counties in a state that are eligible for assistance and the various levels of assistance that will be available. A damaged facility or the work performed must be in the designated county to be eligible for Public Assistance.

If the damaged facility is located within a declared county but the entity having the legal responsibility for the facility is from a non-declared area, the damaged facility will still be eligible. If an entity from within the declared area has a damaged facility located outside the declared area, that facility will not be eligible even if damaged by the same event.

Depending on the damage and response activities, some counties may be declared for emergency work only (Categories A & B), while others may receive assistance for emergency and permanent work (Categories A-G).

### TEST #4

#### The Legal Responsibility of an Eligible Applicant:

As with eligible facilities, the work performed must be the legal responsibility of the applicant at the time of the disaster in order to be eligible. Ownership of a facility is generally sufficient to establish responsibility for work undertaken to repair the facility.

If an applicant leases a facility as a tenant, however, repairs to that facility are not eligible unless the lease states that the lessee is responsible for such repairs. In this case, a copy of the lease agreement should be provided to FEMA to determine responsibility. Although the lease usually contains general repair and maintenance language, responsibility for damage resulting from a disaster may not be established. In the absence of any mention in the lease, the owner of the facility will be assumed responsible for the repair.



For certain types of facilities, disaster assistance is the responsibility of a federal agency other than FEMA. Public Assistance is not available for the permanent repair of such

## It is imperative that applicants control the inspection process and ensure that only those qualified to answer questions about pre-existing conditions interact with FEMA.

While this may seem straightforward, other variables often factor into the decision-making process. If a building was under construction or was being significantly renovated, a contractor involved may have legal responsibility for the facility. Also, in those situations where a formal lease is not present, but responsibility for the facility has been agreed upon, applicants may need to display how similar situations were addressed in the past, when there was no FEMA involvement.

Another issue that falls within the legal responsibility area is whether the repairs fall under the jurisdiction of other federal agencies (OFAs).

facilities and is limited in nature to emergency work. When a request is made for Public Assistance for a facility whose repair FEMA considers to be under the authority of another federal agency, the specific federal agency with responsibility will be asked to review the request and advise FEMA whether the work is eligible. If the work falls outside the statutory authority of that agency, FEMA may consider providing assistance for the work under the Stafford Act.

However, the other federal agency may determine the work is not eligible for assistance because:

- ▶ the agency does not have funds for that particular program at that time, or



► the work is the responsibility of the applicant, either by statute or by agreement with the agency.

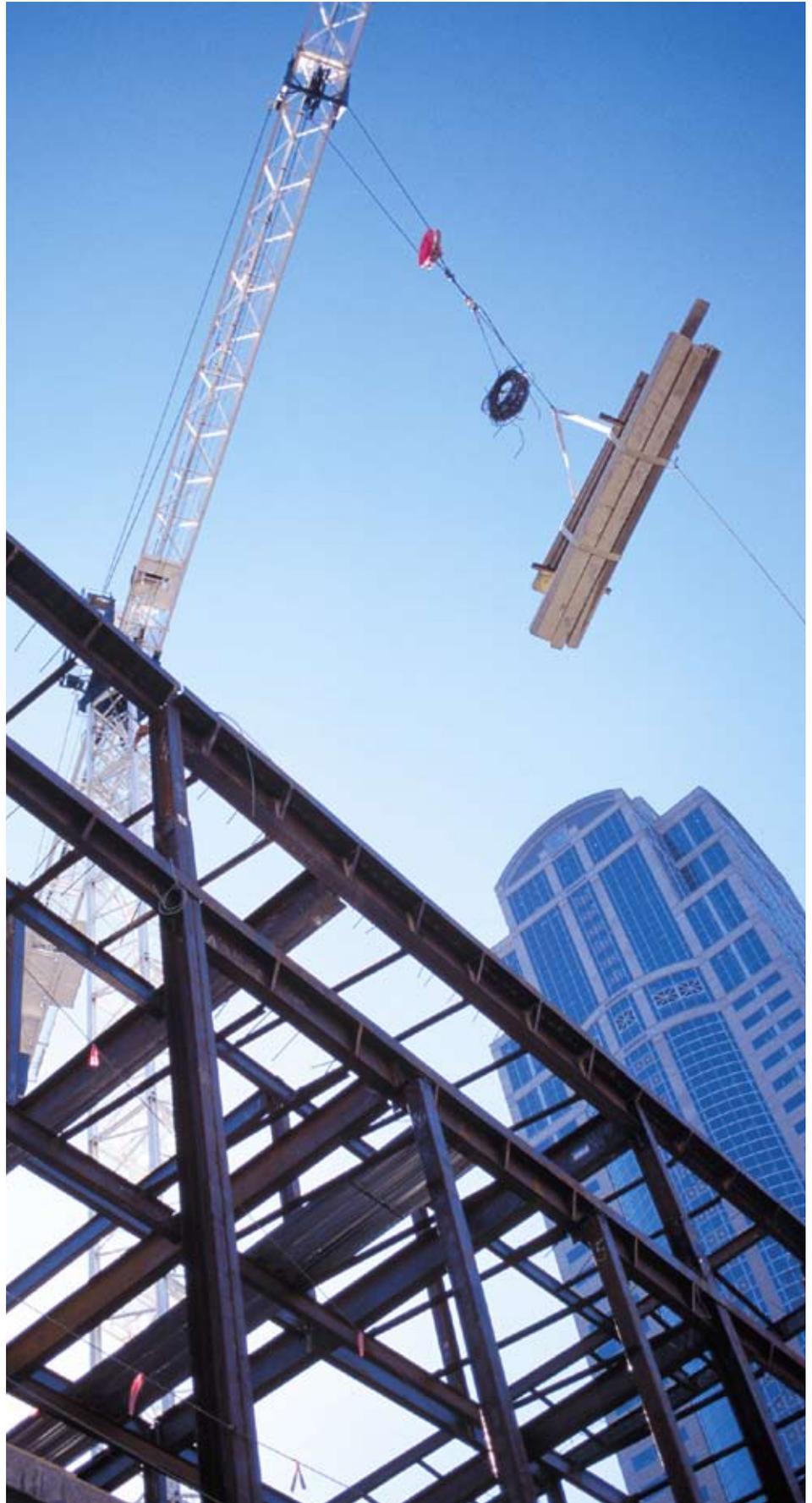
If either of the above reasons applies, Public Assistance will not be available because the work falls under the authority of the other agency and the eligibility was determined under that agency's regulations.

FEMA assistance generally is not available if another agency's program can reimburse an applicant for work done by that applicant. Since some agencies must perform the work or get a contract for the work themselves, and are not authorized to reimburse an applicant, an applicant may find that the work it did cannot be reimbursed. While denial of payment by itself is not a basis for requesting Public Assistance from FEMA, if there is an emergency need FEMA may consider assistance for unreimbursed emergency work that has been done or paid for by the applicant. If the work is not emergency work, it is not eligible for Public Assistance.

The following are federal agencies that often have authority to provide disaster assistance:

- U.S. Army Corps of Engineers (USACE)
- Department of Agriculture — Natural Resources Conservation Service (NRCS)
- Federal Highway

Administration (FHWA)  
Once the above factors are addressed satisfactorily, FEMA will determine whether the facility was being actively used and for what purpose. If the facility was





abandoned, and there were not formal plans for its renovation and use, they will likely determine the facility ineligible. Also, if the facility was being utilized for purposes other than its intended use, FEMA will only provide repairs to support that function. An example of this would be an old county garage being used to store maintenance equipment: FEMA would repair/replace only the cost of the same square footage being used for storage purposes.

### **Eligible Costs**

Once eligible work is established, the next hurdle is to verify that the costs incurred are eligible for reimbursement.

Not all costs incurred by an eligible applicant are eligible for Public Assistance funding. Eligible costs are costs that:

- ▶ Are reasonable and necessary to accomplish the eligible work.
- ▶ Comply with federal, state, and local requirements for procurement.
- ▶ Do not include (or are reduced by) insurance proceeds, salvage values, and other credits.

The eligible cost criteria apply to all direct costs, including salaries, wages, fringe benefits, materials, equipment, and contracts awarded for eligible work.

Prior to FEMA's arrival, applicants are often forced to make decisions on the spot. Unfortunately, some of these decisions allow for subsequent second-guessing on issues such as procurement, reasonable costs, and actual performance. As discussed in earlier issues of *Disaster Recovery Today*, any pre-disaster

## **rea•son•able - being in accordance with reason, fairness, duty, or prudence**

preparation, such as pre-selecting qualified contractors, will help reduce future problems.

When determining eligible costs, the defining factor will be whether the costs are deemed "reasonable." An applicant will need to prove to FEMA that the cost incurred was appropriate for the work completed. Many factors such as availability of resources, local cost factors, difficulty of the project, and the timing of completion can make costs appear exorbitantly high. Oftentimes, if an applicant can demonstrate that they have paid similar costs for comparable work, FEMA will be satisfied.

Unfortunately, the term "reasonable" is very subjective, often making it difficult to later prove to FEMA that the costs incurred were not excessive, considering the situation at the time the decisions were made. FEMA typically uses estimating programs or compares an applicant's costs to what they have experienced in the past, not always accounting for the extraordinary demands created by a catastrophic event.

Since FEMA often refers to Office of Management and Budget (OMB) A87 on various topics, it is important to point out that OMB A87 aptly defines "reasonable" as it pertains to federal grants as follows: *(taken from the Office of Management and Budget website - 2007)*

**A cost is reasonable if, in its nature and amount, it does not exceed**

that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost. The question of reasonableness is particularly important when governmental units or components are predominantly federally funded. In determining reasonableness of a given cost, consideration shall be given to:

- a. Whether the cost is of a type generally recognized as ordinary and necessary for the operation of the governmental unit or the performance of the federal award.
- b. The restraints or requirements imposed by such factors as sound business practices; arms-length bargaining; federal, state and other laws and regulations; and terms and conditions of the federal award.
- c. Market prices for comparable goods or services.
- d. Whether the individuals concerned acted with prudence in the circumstances, considering their responsibilities to the governmental unit, its employees, the public at large, and the federal government.
- e. Significant deviations from the established practices of the governmental unit which may unjustifiably increase the federal award's cost.

When a disaster occurs, applicants are faced with the task of doing



whatever is necessary to protect property, protect lives, and restore normalcy as quickly as possible. It becomes very difficult sometimes to explain, months later, that what was done was prudent and cost-effective at the time. The key to a favorable recovery is good documentation. It is hard to explain to a FEMA debris specialist that you paid \$42 a cubic yard to remove debris by hand if they view debris removal only as an activity involving large equipment normally ranging from \$12-\$20 a cubic yard. However, if that debris was hand-cleared in a park because heavy equipment could not be operated, then the cost should be considered reasonable.

In addition to good documentation, make sure that the personnel who are best prepared to support your position are available to respond to questions. This can be done by having an internal team in place prior to a disaster who understand what will be needed to recover financially.

As evidenced by the overview

## **If an applicant is claiming an upgrade based on local codes or standards, they must be prepared to demonstrate that the standard existed prior to the event and that it is enforceable.**

given here, eligibility can become very confusing. The confusion is further amplified when project officers from other states add their local interpretations to the mix. Ideally, FEMA will publish disaster-specific guidance memorandums to be followed for each disaster, however, even when they are published, they are not always followed.

Ask for all adverse eligibility rulings in writing, so FEMA's exact reasons can be weighed against current laws and policies. Once this information is obtained, an applicant's first recourse is to advise the state of any disputes and solicit its support. If that

is unsuccessful, ask the on-site state/FEMA personnel to forward the information to the Disaster Field Office level for review, which is often where disputes are resolved. It is extremely important to resolve eligibility and any other disputes "on the ground," as the formal appeals process can be very time consuming and extremely frustrating.

Nobody knows better how to respond to a disaster than the applicant, and the successful applicant is the one who can properly document and justify that response.



# FEMA

## The Idea Behind the Agency

### § 5121. CONGRESSIONAL FINDINGS AND DECLARATIONS {Sec. 101}

a. The Congress hereby finds and declares that:

1. because disasters often cause loss of life, human suffering, loss of income, and property loss and damage; and
2. because disasters often disrupt the normal functioning of governments and communities, and adversely affect individuals and families with great severity;

special measures, designed to assist the efforts of the affected States in expediting the rendering of aid, assistance, and emergency services, and the reconstruction and rehabilitation of devastated areas, are necessary.

b. It is the intent of the Congress, by this Act, to provide an orderly and continuing means of assistance by the federal government to state and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from such disasters by:

1. revising and broadening the scope of existing disaster relief programs;
2. encouraging the development of comprehensive disaster preparedness and assistance plans, programs, capabilities, and organizations by the States and by local governments;
3. achieving greater coordination and responsiveness of disaster preparedness and relief programs;
4. encouraging individuals, states, and local governments to protect themselves by obtaining insurance coverage to supplement or replace governmental assistance;
5. encouraging hazard mitigation measures to reduce losses from disasters, including development of land use and construction regulations; and
6. providing federal assistance programs for both public and private losses sustained in disasters.

(Pub. L. 93-288, title I, § 101, May 22, 1974, 88 Stat. 143; Nov. 23, 1988, Pub. L. 100-707, title I, § 103(a), 102 Stat. 4689.)



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