

# PUBLICATION

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## Changes to the FEMA Public Assistance Program and Policy Guide: Remedies for Procurement Noncompliance

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December 28, 2020

The latest version of FEMA's Public Assistance Program and Policy Guide (PAPPG), applicable to incidents declared on or after June 1, 2020, removes language that existed in prior versions confirming FEMA's policy to approve the reasonable cost of eligible work in the case of noncompliance with federal procurement requirements. This change gives FEMA greater latitude to impose harsh penalties, including denial of all contract costs, and indicates FEMA may be doubling down on its propensity to impose strict compliance with these requirements following recent disasters.

### Remedy for Procurement Noncompliance

2 C.F.R. Part 200 establishes the steps an applicant for Public Assistance funding must follow in order to properly procure eligible work. Given the high focus on strict compliance, applicants must follow all requirements, including but not limited to:

- Providing free and open competition;
- Using an appropriate method of procurement, considering the size and scope of work;
- Documenting all steps of the procurement process;
- Taking affirmative steps to assure the use of disadvantaged business when possible, including small and minority firms, women-owned business enterprises, and labor surplus firms; and
- Including all required contract provisions.

When an applicant materially fails to comply with any provision of the federal procurement requirements, 2 C.F.R. § 200.338 provides that FEMA may disallow all or part of the cost of the action that is not in compliance. FEMA has broad discretion to approve or deny all – **or none** – of the costs associated with the improper procurement action.

FEMA publishes the PAPPG to promote consistent application of the statutes and regulations implementing the Public Assistance program. While policy contained in the PAPPG does not carry the same force as statute or regulation, only the Assistant Administrator of Recovery may modify or waive the application of Public Assistance policy.

For disasters declared prior to June 1, 2020, the PAPPG Version 3.1 provides that, "[i]n the case of noncompliance with Federal procurement requirements, FEMA determines a reasonable cost for the eligible work completed based on all available information and documentation." FEMA's practice has been mostly consistent with this policy; in cases where reasonable costs were not obligated, the Civilian Board of Contract Appeals and FEMA Second Appeals have consistently reversed such decisions and awarded reasonable costs.

In recent years, the practice of providing reasonable costs has come under scrutiny from the Department of Homeland Security Office of Inspector General. In a fiscal year 2017 summary of audit reports, the OIG found that "FEMA remains ineffective at holding grant recipients accountable for properly managing disaster relief

funds . . ." This finding is based largely on FEMA's obligation of reasonable costs in numerous instances where applicants failed to comply with federal procurement regulations.

The new version of the PAPPG, Version 4, applicable to disasters declared on or after June 1, 2020, appears to eliminate the prescriptive reasonable cost remedy for procurement noncompliance in favor of the broad discretion authorized by 2 C.F.R. § 200.338. Specifically, the language from Version 3.1 has been replaced in Version 4 with the following:

*In the case of noncompliance, FEMA applies an appropriate remedy in accordance with its authorities. FEMA has determined an appropriate remedy under these circumstances is to either deny all costs associated with the contract or, if sufficient information is provided to substantiate a reasonable amount for the eligible work completed, FEMA may reimburse the portion of the costs it determines are reasonable and allowable based on all available information and documentation provided.*

With the elimination of the policy to consistently obligate the reasonable costs for completed work in the event of procurement noncompliance from PAPPG Version 4, compliance with federal procurement regulations is more important than ever to receive and keep FEMA Public Assistance funding. For more information or assistance with complying with FEMA's procurement regulations, please contact [Chris Bomhoff](#) or any member of [Baker Donelson's Disaster Recovery and Government Services Team](#).