The FEMA Appeal and Arbitration Process

Danielle Aymond
Of Counsel
Baton Rouge
daymond@bakerdonelson.com

Wendy Huff Ellard
Shareholder
Jackson
wellard@bakerdonelson.com

Ernie Abbott
Of Counsel
Washington, D.C.
eabbott@bakerdonelson.com
Basic Legal Authority of FEMA’s Public Assistance Program

• Governed by the Robert T. Stafford Disaster Relief and Emergency Assistance Act (the Stafford Act)

• Implemented by Title 44 of the Code of Federal Regulation

• Uniform Grant Requirements or “Uniform Rules” 2 C.F.R. 200, for events December 31, 2014 and forward

• Public Assistance Program and Policy Guide (PAPPG):
  – “comprehensive, consolidated program and policy guidance for Public Assistance program grants”
Success in Retaining Funds Depends On

• Pre-disaster policies and procedures
• Compliance with rules and policies during performance
• Compliance with all deadlines; RPA, Damage Inventory, Appeals
• Documentation of procurements and expenditures segregated by FEMA grants
Federal Disaster Funding: Not What It Used to Be

• OIG and Congressional Pressure to Decrease Costs
• Repetitive Loss – “You Should Know Better”
• [EXTREME] Crack Down on Procurement Compliance
• Creation of:
  – FEMA Procurement Disaster Assistance Team (PDAT)
  – FEMA Appeals and Audits Branch
Increasing Volume of the Stafford Act Law Book and FEMA Lawyers 2001 – 2018
Primary Authority: Stafford Act Sec. 423

- The Stafford Act – Section 423 / 42 U.S.C. § 5189a:
  
a) **Right of Appeal** – Any decision regarding eligibility for, from, or amount of assistance under this title **may be appealed within 60 days** after the date on which the applicant for such assistance is notified of the award or denial of award of such assistance.

  b) **Period for Decision** – A decision regarding an appeal under subsection (a) of this section **shall be rendered within 90 days** after the date on which the federal official designated to administer such appeals receives notice of such appeal.

  c) **Rules** – The President shall issue rules which provide for the **fair and impartial** consideration of appeals under this section.
FEMA Appeals Decisions: Not What They Used to Be

- Length of FEMA Decision/Determination
- Increased Formality
- Prevalence of Citations/FNs
- **CRITICAL** Focus on Deadlines and Process
- Grantee Deadline Compliance – Recent Focus
- Greater Focus on Consistency
- Second Appeal Consideration – Increased Deference to Region *so increased importance of First Appeal
- Establishment of Administrative Record
Summary

• The Right to Appeal can be VERY beneficial

• BUT you must comply with all requirements

• Submit a well reasoned, well documented position
Summary of FEMA Appeal Authority

- All flows from primary authority, Stafford Act Sec. 423
- 44 C.F.R. § 206.206 – Public Assistance Appeals
- 44 C.F.R. § 206.440 – Public Assistance Hazard Mitigation
- FEMA PA Appeals Fact Sheet, April 2017
- PA Appeals Database (not controlling but heavily relied upon by FEMA)
Typical Appeals Issues / Examples

- Denial of RPA
- Denial of Scope of Work
- Refusal of Costs
- Time Extension Denials
- Closeout Deobligations
- Hazard Mitigation Grant Program (HMGP) Proposal Denials
FEMA Appeal Process Overview

First Appeal – Region

• Applicant MUST file with Grantee within 60 days of earliest receipt of FEMA Determination
• Grantee to send Recommendation to FEMA within 60 days of receipt

Second Appeal – HQ

• Applicant MUST file with Grantee within 60 days of earliest receipt of FEMA First Appeal Denial
• Grantee to send Recommendation to FEMA within 60 days of receipt

Arbitration

• Applicant MUST file with Grantee, FEMA, and CBCA within 60 days of First Appeal Denial, OR
• May withdraw Appeal and file 180 days after Grantee submission to FEMA, as long as prior to final decision
FEMA’s Appeal Deadlines: The are virtually non-existent

• Technically, FEMA has 90 days from receipt of the Appeal to make a decision, but
  – there is no enforcement mechanism (except now Arbitration at 180 days), and
  – the 90-day processing timeline for the appeal resets upon receipt of the information or passing of the deadline to respond.
First Appeal: 3 minimal requirements

- The appeal **shall** contain:
  - documented justification supporting the appellant’s position;
  - specifying the monetary figure in dispute;
  - the provisions in federal law, regulation, or policy with which the appellant believes the initial action was inconsistent.
First Appeal

- The applicant should include a current email address to receive electronic correspondence.

- The applicant must submit the first appeal to the grantee/recipient (State), who will forward the first appeal to the applicable FEMA Region.

- Pursuant to 44 C.F.R. § 206.206(c), the applicant must submit the first appeal to the grantee/recipient within 60 days of receiving FEMA’s eligibility determination.

- FEMA’s first review is regarding the timeline.
Deadlines are Critical

• “The Recipient forwarded the Applicant’s first appeal outside of the regulatory 60-day timeframe; therefore, the appeal was untimely. Additionally, the direct submission of an appeal by the Applicant to FEMA does not comply with the proper appeal procedures and cannot be considered a timely appeal. Thus, the appeal is denied.” (City of White Sulphur Springs, Jan. 2019)
“According to the Administrative Record, the Applicant received notice of the first appeal decision by way of a certified letter on October 15, 2018. However, it did not submit its second appeal until December 20, 2018. This was after the 60-day timeframe required by FEMA’s regulations, making the Applicant’s second appeal untimely. For this reason, I am denying this appeal.” (YMCA of the Capital Area, April 2019).
Drafting the Appeal: Appeal Resources

✓ FEMA Second Appeal Database
✓ GAO reports, Red Book
✓ DHS OIG Reports
✓ Case law (There are a few FEMA PA court cases)
✓ Legislative Intent
✓ Other Federal Agency Decisions
✓ CBCA Decisions
✓ Pricing Guides (when reasonable cost is an issue)
The Administrative Record

- The Administrative record is all documents and materials directly or indirectly considered by FEMA and relied upon in making a PA eligibility determination and subsequent first appeal decisions.

- FEMA will only initially provide the Administrative Record Index. (Recovery Directorate Appeals Manual, p. 15).

- “If an applicant requests the entire record or portion of the record, it shall be provided.”

- ASK FOR IT!

- BUILD ON IT!!
Appeal Evidence
Building the Administrative Record

- Emails
- Logs
- Photos
- New statements/affidavits
- Meeting notes
- Local law
- Subrecipient policies
- Pre-storm documents
After Submittal: The RFI Process

• *Basic RFI:* A request for specific information needed to consider the appeal. It should be made in writing, provide sufficient detail to describe the type of documentation needed, and include a deadline for response.

• In general, the *Basic RFI* typically has a **30-day deadline** from receipt to respond. The *Basic RFI* deadline may be extended at the *Regional Administrator’s* discretion. The 90-day processing timeline for the appeal resets upon receipt of the information or passing of the deadline to respond.
RFIs

• **Old Rule:** The RA must issue a Final RFI to explain the basis for the likely denial of the appeal.

• **New Rule:** Because the Applicant may submit additional information with a second appeal and FEMA may request additional information during the review of a second appeal, Final RFIs are no longer required prior to issuing first appeal determinations.

  – **Except:** if the RA intends to issue a new determination in an appeal response (i.e., deny assistance that was not at issue in the eligibility determination that prompted the first appeal).
First Appeal Denied?
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Second Appeal: 
Repeat First Appeal Process

• Same requirements for basic content.

• Must be submitted to the grantee/recipient within 60 days of receipt of the first appeal decision.

• Grantee/recipient will forward the second appeal to the appropriate FEMA Regional Administrator within 60 days of receipt.

• The Regional Administrator will then forward the second appeal to FEMA Headquarters for review and decision.

• **NOTE**: Apparent change in consideration of Second Appeals – deferential standard.
Second Appeal Decision
End of the Road

• Generally, FEMA will **not** reconsider *second appeal* decisions. FEMA will reconsider a *second appeal* decision only in rare and exceptional circumstances where substantial fairness and justice requires such a review.

• Possibility for Judicial Review in some circumstances.
FEMA Arbitration: Katrina and Rita

• ARRA Sec. 601 in 2009:
  Notwithstanding any other provision of law, the President shall establish an arbitration panel under the Federal Emergency Management Agency public assistance program to expedite the recovery efforts from Hurricanes Katrina and Rita within the Gulf Coast Region. The arbitration panel shall have sufficient authority regarding the award or denial of disputed public assistance applications for covered hurricane damage under Section 403, 406, or 407 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170b, 5172, or 5173) for a project the total amount of which is more than $500,000.

• 44 C.F.R. 206.209
FEMA Arbitration: DRRA Arbitration

- DRRA (Pub. L. 115-254), Sec. 1219
- Amends Stafford Act Sec. 423 to provide permanent right of arbitration
- Available for ALL events declared after January 1, 2016
- Harvey, Florence, Irma, Maria, Michael, Louisiana Great Floods, California Fires, many more…
DRRA Arbitration: When Available

- The **amount at issue** must be more than $500,000;
- More than $100,000 for “rural areas” of less than 200k outside of urbanized area: www.ruralhealthinfo.org/am-i-rural#;
- MUST have **timely filed** a First Appeal;
- Not yet received a Second Appeal Determination
DRRA Arbitration: When Available

- Negative First Appeal Response: File within 60 days
- First Appeal pending > 180 days: Withdraw First Appeal and request Arbitration
Summary of FEMA Arbitration Authority

- DRRA (Pub. L. 115-254), Sec. 1219
- CBCA Rules: Federal Register 84 FR 29085
- FEMA Arbitration Fact Sheet, Dec. 2018
- FEMA has advised more regulations coming!
Arbitration Process: What We Know Now

• Will be conducted by the Civilian Board of Contract Appeals (CBCA), https://cbca.gov/.

• Arbitration requests must be filed simultaneously to Grantee/Recipient, FEMA Region, and CBCA at cbca.efile@cbca.gov.

• May include any additional information that you want.
Arbitration: Process After Filing

• Request will be **docketed** almost immediately – this will include your assigned Docket #, Panel, and Panel Chair.

• The Panel will hold a **scheduling conference** within 14 calendar days of docketing.

• FEMA shall file its **response** within 30 days of receipt of docketing.

• **Motions are strictly limited.**
Arbitration: The Hearing and Decision

- Hearing may be live or, if agreed by all parties, on a written record (a paper hearing).
- Will begin within **60 calendar days** after the initial conference.
- All Panel members will attend a live hearing in Washington, D.C. A single panel member may conduct a live hearing elsewhere.
Arbitration Review Standard

• The CBCA conducts FEMA arbitrations *de novo*, meaning that the CBCA is not required to defer to FEMA’s decision or to accept FEMA’s fact-finding, but can accept additional information and argument and make its own decision on the merits of each case.

• Decision typically issued within 60 calendar days of when the record is closed.
# Arbitration vs. Second Appeal

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<th>Appeal Process</th>
<th>Arbitration</th>
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<tr>
<td>No transparency at First Appeal level</td>
<td>All decisions published on CBCA website</td>
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<td>No time limits enforced against FEMA</td>
<td>FEMA held to strict response time limits by the court</td>
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<td>FEMA is the fact finder and arbiter</td>
<td>Conducted outside of the agency and decided through a quasi-judicial process before a neutral panel</td>
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<td>Costs may be reimbursable as a direct administrative cost (or now under the DRAA as management costs)</td>
<td>Costs are borne entirely by the applicant and not reimbursable at any point – and likely much higher than appeal costs</td>
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*Second appeals now do allow additional information not included in the first appeal*  
Arbitrations allow additional information not included in the first appeal
Judicial Review

• For arbitrations **only** under 9 USC 10.
• Second Appeal decisions are final agency determinations.
• FEMA decisions **NOT** to provide funding; a FEMA decision to award any grant is discretionary.
• FEMA decisions to **DEOBLIGATE** funding already awarded and spent may be reviewable under Stafford Act Sec. 705.
  ▪ (a) – Statute of Limitations; DRRA Section 1216(c) – three-year statute of limitations for **project**
  ▪ (b) – Retroactive Deobligation - protection of state and local governments in certain circumstances
    – *South Florida Water Management District v. FEMA* (S.D. Fla. 2014)
5. Appeal/Arbitration Best Practices

- Do not rely on FEMA to always follow “the process.”
- Maintain positive relationships. Try to work it out first, but keep your options in mind. When “end” in sight, be strategic.
- Document all communications with FEMA. Receipt of the FEMA decision is critical. \textbf{NEVER} miss a filing deadline.
- Monitor the grantee/recipient. Confirm they have received your Appeal and all referenced Attachments and confirm and document that they forward within 60 days of receipt.
- Make it easy for FEMA/CBCA. Present a nice, neat, rationale position – with all necessary legal citations and support to get a \textbf{YES}!
Questions?
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