



U.S. Department
of Transportation

**Federal Highway
Administration**

Florida Division

545 John Knox Road, Suite 200
Tallahassee, Florida 32303

(850) 942-9650

January 16, 2009

In Reply Refer To: HPO-FL
Re: Emergency Relief (ER)
Program Requirements
2009 Guidance

Ms. Stephanie C. Kopelousos
Secretary of Transportation
Florida Department of Transportation
605 Suwannee Street
Tallahassee, Florida 32399-0450

Attention: Mr. Brian Blanchard, Chief Engineer

Dear Ms. Kopelousos:

The purpose of this letter is to update you on the FHWA Florida Division's procedures regarding administration of the ER program. The following sections provide information that supplements the FHWA policy letter issued on July 16, 2008, which should now be familiar to all participants in the ER program. As part of an outreach effort in summer 2008, FHWA personally met with members of your staff in each District and in Central Office, which created an opportunity for feedback on administration of the ER program. Suggestions for new ideas and clarifications that resulted from the stakeholder sessions were discussed at FHWA and further policy guidance is provided below.

Deadline for Submission of Invoices

General consensus from FDOT was that guidance on a timeline by which local agencies can submit invoices is strongly preferred since that would give FDOT some leverage in keeping their accounting books more up-to-date and would help them to close out projects more effectively. It should be noted that the federal regulations do not contain any provisions to deny reimbursement when there is sufficient documentation, no matter how long after an event. After considering the request, FHWA has established a timeline in coordination with the FDOT Office of Comptroller to require that submission of invoices for ER work should occur within 2 years after initial Fiscal Management Information System (FMIS) project authorization date for Emergency work, and submission of invoices for permanent work should occur within 4 years after initial FMIS authorization date. The FMIS project authorization date for emergency work is the date the Governor (or President) declared the state of emergency.

Detailed Damage Inspection Report (DDIR) Documentation

FDOT suggested that revising DDIRs for cost changes alone may be redundant since cost increases are requested utilizing electronic modification request through the FMIS. Revising the DDIR for cost changes duplicates this effort. After careful consideration, FHWA has determined to require documented

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Ms. Stephanie C. Kopelousos
January 16, 2009

revision of DDIRs only when a scope change occurs. Since the DDIRs are no longer being revised for cost changes, all documentation that supports any increase in the amount originally estimated on the DDIR must be provided at the time of any requests to FHWA for FMIS authorizations or modifications.

On August 19, 2008, an email was shared with all emergency management contacts in Central Office and the Districts which outlined the systematic approach to writing DDIRs for all future storms. Tropical Storm Fay provided an opportunity to test the standardized approach for both FHWA and FDOT. Based on that and prior experience the major criteria for writing DDIRs includes the following:

- The FHWA must have a Governor's declaration of state of emergency (or a Presidential declaration will suffice) to invoke the ER program and there must be a minimum of \$700,000 in statewide damage to federal-aid roadways.
- FHWA requires separate DDIRs be written for site-specific damage (roadway pavement damage, embankment washout, culverts, bridge damage, lighting, etc.). Sites cannot be combined to meet the \$5,000 minimum damage threshold. The scope of work shall be detailed and major pay items are listed on the DDIR.
- If there is widespread damage, write DDIRs for the following individual categories: countywide debris, signs or signals. The scope of work shall be item-specific on the DDIR. Note that FHWA will only write countywide (combining of sites to meet the \$5000 threshold) DDIRs for counties that experienced widespread damage. FHWA will use the list of counties generated by FEMA as eligible for Categories A-G as criteria for determining the occurrence of widespread damage.
- ◆ If the emergency work is already underway the DDIR should be accompanied by a signed contract that includes all the federal requirements; such as FHWA 1273 physically attached to the contract, Buy America (if applicable), Davis-Bacon (if applicable), etc.
- ◆ Write a separate DDIR for emergency work and for permanent work (except for site-specific roadway repair work where both work types are present). The site limits will be determined at the discretion of the FHWA Transportation Engineer for each DDIR.
- ◆ A single DDIR can be written to include both public agency in-house force account construction work and contract work. However, in an attempt to make cost estimates as clear as possible, include a line item on the DDIR showing the estimated in-house construction costs. Design or CEI may be estimated as a percentage of the total damage estimate.

Electronic Records for ER Program

Financial records and supporting documentation shall be retained, for a minimum of 3 years after project completion in accordance with requirements set forth in 49 CFR Part 19. This requirement may be satisfied through the use of electronic media. In addition to meeting federal record retention requirements, FDOT must also ensure that they and local agencies follow the State of Florida's Records Management Program requirements.

First Pass Timing Definition for Debris Removal

Several of the District staff indicated they needed further clarification from FHWA on the duration of first pass completion after the initial first push operation. The first pass is meant to be accomplished as one continuous operation on the same section of roadway before relocating the clean up operation team to the next section or site. FHWA allows different types of debris (vegetative, white goods, etc.) to be picked

Ms. Stephanie C. Kopelousos
January 16, 2009

up over a period of a few days, but it should not extend over several weeks. The FHWA Transportation Engineer will make the final determination on this issue.

Pre-event Contracts

Much discussion centered on the section of the July 16, 2008, letter that dealt with pre-event contracts. FHWA reiterates that they have approved the use of pre-event contracts (based on scopes developed by the FDOT State Maintenance Office for statewide application) for cut & toss and debris removal, three types of signals and generators, and permanent lighting or signal repair. However, FHWA has not yet received for review a standard state-wide scope for pre-event contracts for CEI monitoring or for signs. In addition, the use of electronic debris monitoring for the ER program has not been approved. Although there have been several staff discussions and vendor demonstrations, the FDOT has not submitted any data analysis, including cost comparisons, or a standard statewide scope for FHWA's review and approval.

One of the requests that FDOT made was for FHWA to further define the meaning of "consistent with scope" from Page 3 of July 16, 2008, letter. Consistent means that the contract contains all the same basic criteria as the state standard scope includes.

Verbal Contracts, Small Purchases, Purchase Orders

A question about the use of verbal contracts has come as a result of the ER audits. The FHWA will not accept verbal contracts for eligible work. FHWA will only reimburse work outlined in a contractual document that includes a scope of work, estimated cost or actual unit cost. (The final version of this letter may be expanded to describe the use of purchase orders and how the federal "small purchase" procedures limit of \$100,000 fixed in 41 USC 403(11) is applied to the ER program.)

Consultant Acquisition

There were many questions about the hiring of consultants. Consultant services, in order to be eligible for reimbursement under the FHWA ER program, must be procured by public agencies in accordance with FDOT Procedure No. 375-040-130, Emergency Procurement During Governor Declared Emergencies or by following the normal process for "Acquisition of Professional Services." Professional consultant services which are permissible under Emergency Procurement Procedure No. 375-040-130 are:

A. New contracts after the event occurs: If FHWA reimbursement will be requested, at least three (3) quotes/proposals should be obtained, but in no way should it prevent, hinder, or delay necessary action in coping with an emergency. During emergencies, many of the formal procurement steps may be expedited in order to speed up the execution of the contract. FHWA recognizes after a major disaster there may be situations where there is only time to obtain quotes from a single firm.

B. Existing professional services contracts: Existing contracts may be used to provide for emergency services if the emergency service required falls within the original intent of the contract, or the scope of services/specification specifically addressed providing for emergency situations. An existing contract may be utilized if: a) The existing contract was procured by the normal federal-aid procedures and processes for federal-aid work; b) The existing contract was federalized, thus already performing federal-aid work, not only state funded work; c) a separate task order with scope and cost must be established d) the emergency services are authorized in accordance with FDOT Procedure No. 375-040-130.

Ms. Stephanie C. Kopelousos
January 16, 2009

C. Pre-event contracts: Consultant pre-event contracts, such as for CEI services, may be eligible for FHWA reimbursement under the ER program if procured using the standard professional services procedure. However, FHWA must review and approve the standard scope developed for statewide use, as has been done for other types of pre-event contracts. To date these have not been submitted to the FHWA.

CEI services for monitoring debris removal must be established utilizing the processes described above. FHWA has not approved the use of a "contractor" acquisition process, described by one District, to acquire companies doing disaster relief that do not meet the criteria for "professional engineering firms". To date, no information describing or justifying this method has been provided to the FHWA.

The cost method used by one District of paying average costs by position plus 15% is not acceptable since it conflicts with federal regulations. For cost plus contracts, they require the consultant be paid actual audited costs for labor and overhead expenses.

When local agencies hire consultants they must be in conformance with 23 CFR 172 and the "Brooks Act," (competitive negotiation) in title 40 USC, section 1101-1104; since it applies to local agencies the same way it applies to state agencies. To help ensure compliance it is expected that the FDOT standard boilerplate for contract requirements (such as discrimination, non-lobbying provisions, etc.) be followed by local agencies when they hire consultants. As a point of clarification, the FHWA 1273 applies only to construction contracts; thus, it does not apply to professional services such as CEI monitoring contracts for roadway construction, debris removal, sign and signal repair. In no cases can the consultant providing inspection be hired by a contractor, but must be independently hired by the public agency.

Local Agency Force Account

As part of discussions in the Districts, FDOT asked for guidance on how local agency force account (in-house) construction work should be estimated, if not by percentage. By definition, force account is the actual cost of labor, equipment, and materials expended by the local or state agency. Thus, percentage estimates are not allowed by FHWA and the agencies electing to participate in the ER program should provide labor equipment and materials estimated cost and for invoicing purposes to claim the actual costs set up a tracking mechanism to provide detailed information as outlined above.

Clarification of DCE Memo 22-08

After the issuance in August 2008 of DCE Memo 22-08, several requests for clarification were directed to both FDOT Central Office and FHWA. It should be noted that the first section of FDOT DCE Memo 22-08 is intended to describe the use of regular federal-aid funds to repair damage. The discussion dealing specifically with ER eligibility is described in Section 7.

Summary

FHWA recommends that this guidance be shared with all FDOT employees who may be involved with the ER program and urge that it is shared with FDOT's local agency partners throughout the state. FHWA will pursue dissemination of recent updates in the ER program to FEMA. An updated version of Frequently Asked Questions (FAQ) document developed by the FHWA Florida Division is enclosed to serve as another resource for participants in the ER program. It includes discussion of a number of other issues raised during statewide visits with FDOT staff which were not addressed in this letter. The FAQ is found at the following web link: <http://www.fhwa.dot.gov/fldiv/erpfaq.htm>.

Ms. Stephanie C. Kopelousos
January 16, 2009

FDOT is encouraged to update their internal FDOT ER Manual to be consistent with the FHWA ER Manual (August 2003 version) and FAQ document.

If you have any questions please contact Mr. Chris Richter or Ms. Monica Gourdine at (850) 942-9650.

Sincerely,

/s/
For: Martin C. Knopp, P.E.
Division Administrator

Enclosure

cc: Messrs. Henry Lewis, James Jobe, and Chuck Rohling, FDOT (MS-21)
Mr. Jason Wheeler, (MS-53)