



U.S. Department
of Transportation

**Federal Highway
Administration**

Florida Division

**545 John Knox Road, Suite 200
Tallahassee, Florida 32303**

(850) 942-9650

June 16, 2009

In Reply Refer To: **HPO-FL**
Re: Emergency Relief (ER)
2009 Policy 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 Emergency Relief 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.



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Detailed Damage Inspection Report (DDIR) Documentation

FDOT suggested that revising DDIRs for cost changes alone may be redundant since cost increases are requested utilizing the electronic modification request through the FMIS. Revising the DDIR for cost changes duplicates this effort. Therefore FHWA will revise 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 listed on the DDIR.
- If there is widespread damage, DDIRs may be written for the following individual categories on a county-wide basis: debris, signs or signals. The scope of work shall be item-specific on the DDIR. Note that FHWA will only write county-wide (combining of sites to meet the \$5000 threshold) DDIRs for counties that experienced widespread damage. For this determination, FHWA will utilize the list of counties that are eligible for Federal Emergency Management Agency (FEMA) Public Assistance Grant Categories A-G.
- 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. Estimated FDOT indirect costs will not be shown on the individual DDIRs.

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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 up over a period of a few days, but it should not extend over several weeks. FHWA recognizes that HazMat operations might be required as a separate operation. The FHWA Transportation Engineer will make the final determination on these issues. Please refer to the Florida Division's *Frequently Asked Questions* (FAQ) for additional requirements regarding debris removal.

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 for local contracts was 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. A purchase order may be used as a contract if the cost of the work is less than \$100,000 per federal small purchase requirements in 49 CFR 18.36.

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Consultant Acquisition

There were many questions about the hiring of consultants. Consultant Engineering 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:

1. 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.

2. 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.

3. 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 established state procedures. 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. Therefore, any pre-event consultant contract runs the risk of being determined ineligible if all of the federal aid requirements have not been met.

CEI services for monitoring debris removal should 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". We understand this to be a service contract that provides qualified staff to perform monitoring and management for debris removal and does not involve any construction inspection or sampling and testing. To date, no information describing or justifying this method has been provided to the FHWA for review.

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, federal regulations require that the consultant be paid actual audited costs for labor and overhead expenses.

When local agencies hire consultants to perform engineering services they must be in conformance with 23 CFR 172 and the "Brooks Act," (competitive negotiation) in title 40 USC,

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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, the CEI 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 the estimated cost of labor, equipment and materials. After the work has been completed they are allowed to invoice and claim for reimbursement the actual costs incurred. It is required they set up an adequate tracking mechanism to provide the detailed information as outlined above.

Insurance and the ER Program

If there is insurance coverage for damage, the ER Program can not pay for items covered by the insurance. We expect the agencies to pursue insurance first. FDOT will need to show there are additional costs not supported by a pending insurance claim and then that documentation will be attached to the DDIR. The DDIR amount will be for the difference between storm damage and insurance claim. The practice of refunding the ER program back when claims are finalized is an unacceptable practice. If insurance will not pay for all eligible damage, the ER program can pay for the remaining balance as long as it is for ER eligible work.

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. It is FHWA's position that a roadway under construction should be treated the same as a roadway with an inherent deficient condition unless a roadway segment cross section has been completed in conformance with the project's contract requirements. Therefore, FHWA generally will NOT reimburse for fixing damages on active construction projects with ER funding unless damage occurs on a segment of the roadway in which the cross section has been completed. Regular federal aid funds may still be used for the repairs provided the repair work is determined to be outside the requirements of the construction contract, thus it is not the contractor's responsibility to make the repairs at no additional cost under the contract terms.

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Summary

FHWA recommends that this guidance be shared with all FDOT employees who may be involved with the ER program, and urge that it be shared with FDOT's local agency partners throughout the state. Additionally, the Florida Division has also developed on-line web-based training which can be found at <http://www.fhwa.dot.gov/fldiv/index.htm> and clicking the "Emergency Relief Online Training" link. This training covers the major topics of discussion regarding the Emergency Relief program for Florida, and includes discussions on Debris issues, Detailed Damage Inspection Reports (DDIRs), eligible vs. ineligible items, and Emergency Repairs vs. Permanent Repairs. The training is 89 minutes long, with two optional videos that would add an additional 19 and 22 minutes to the viewing time. The above link also has the most current version of the Emergency Relief FAQ, which is a living document that gets updated periodically.

FHWA will pursue providing dissemination of updates for the ER program to FEMA.

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 Mr. Chad Thompson at (850) 942-9650.

Sincerely,

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

cc: Messrs. John Fain, James Jobe, and Chuck Rohling, FDOT (MS-21)
Mr. Anthony Broom, (MS-53)