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Recent Trends in FEMA COVID-19 Appeal and Arbitration Decisions

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Recent Federal Emergency Management Agency (FEMA) second appeal decisions and United States Civilian Board of Contract Appeal (CBCA) arbitration decisions indicate that FEMA is narrowly construing its policy language governing eligibility of COVID-19 costs. Applicants should be prepared to address these five trending eligibility traps.

COVID-19 emergency work claims have finally begun making frequent appearances in the flow of FEMA Second Appeal and CBCA Arbitration decisions. The decisions highlight many common pitfalls applicants face in other types of disasters, but with a COVID-specific nuance.

1. **Eligible Applicant**. Applicants must have legal responsibility for the work. To demonstrate this, private non-profits (PNP) must own or operate an eligible facility. An eligible facility is one that provides an eligible service, which includes education, utilities, emergency, medical, custodial care, and other essential social services as set out in the Public Assistance Program and Policy Guide v. 3.1 (PAPPG). The applicant also needs to demonstrate that they were legally responsible for the work. PNP applicants should be prepared to provide their proof of private non-profit status, their bylaws, proof that they own or operate an eligible facility, and must be able to demonstrate they had the legal responsibility to perform the work. For COVID-19, if the work performed is not of a type explicitly stated in FEMA's COVID-19 Safe Opening and Operating Policy or its COVID-19 Medical Care Policy, proving PNP legal responsibility can be a challenge.
2. **Eligible Work**. This is one of the fundamental pillars in FEMA's Public Assistance eligibility pyramid and is one of the most common bases for FEMA's recent denials of COVID funding. To be eligible, costs must be directly tied to the performance of eligible work and must be adequately documented. It is the applicant's responsibility to substantiate their claim as eligible and in doing so, an applicant should be careful to align their claim with the language of FEMA's policies, including the PAPPG, the Safe Opening and Operating Policy, and the Medical Care Policy.
3. **Documentation**. During the pandemic, applicants were doing their best to safely operate and to save lives under novel circumstances, with limited staffing, and for what was the longest incident period in Public Assistance history. That said, FEMA still expects documentation supporting the claim. For example, FEMA recently denied hazard pay costs when an applicant's hazard pay policy was undated, did not contain sufficiently non-discretionary triggers for premium/hazard pay, and the applicant could not provide documentation showing that the employees were performing eligible work. FEMA explained that "While the Applicant has provided documentation, such as timesheets which show the hours claimed during the incident period, the documentation does not specify what the employees were doing during those hours. The Applicant did not provide documentation such as daily logs or activity reports that would permit FEMA to verify the claimed hours were directly tied to the performance of eligible emergency work." *Child and Family Services of Erie County*, Second Appeal Decision issued April 5, 2023.

4. **Timing.** Normally, emergency work that addresses an immediate threat and is performed within the period of performance of the grant can be eligible. Due to the unique duration of the COVID-19 disaster, FEMA established May 11, 2023, as both the close of the incident period and the close of the period of performance. As a result, applicants across the country are in the process of compiling documentation to meet the upcoming November 7, 2023, deadline to submit reimbursement requests for COVID-19 emergency work costs incurred from July 2, 2022, through May 11, 2023. However, applicants seeking reimbursement for emergency work activities that did not begin before 2023 may want to explain the reason for that delay in their project materials, as recent second appeal decisions denied assistance for planned COVID equipment purchases that had not been made by 2022. See, for example, *Lake Ozark Fire Protection District*, Second Appeal Decision issued April 5, 2023, wherein FEMA stated that "FEMA finds that the future acquisition of EMS equipment for work that has not yet started, nearly three years into the pandemic, is not eligible."

5. **Straight Time Force Account Labor.** There have been several recent second appeal and arbitration decisions denying requests for regular time salaries and benefits of an applicant's budgeted personnel performing emergency work. Applicants should carefully review the guidance regarding emergency work labor eligibility on pages 23 – 26 of the PAPPG, their own written policies, and their supporting documentation if considering projects that include these costs.

Although time will tell, the trend of future Public Assistance appeal and arbitration decisions will likely evolve to include 2 C.F.R. Part 200 compliance, environmental and historic preservation compliance, reductions for supply and equipment disposition, and duplication of benefits disputes.

Applicants responding to Requests for Information from FEMA should keep these issues in mind, as should applicants who have an approved Request for Public Assistance and costs for COVID-19 emergency work performed from July 2, 2022, through May 11, 2023 (i.e., projects with a 90 percent federal cost share). Applicants still have until November 7, 2023, to identify and report 90 percent cost share projects.

If you have questions or concerns related to Public Assistance procedures or eligibility or would like to learn more about FEMA assistance, please contact [Erin Greten](#) or any member of [Baker Donelson's Disaster Recovery and Government Services Team](#).