

Department of Homeland Security **Office of Inspector General**

**Santa Clara Pueblo, New Mexico, Needs
Assistance to Ensure Compliance with FEMA
Public Assistance Grant Requirements**





OFFICE OF INSPECTOR GENERAL
Department of Homeland Security

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AUG 26 2014

MEMORANDUM FOR: George A. Robinson
Regional Administrator, Region VI
Federal Emergency Management Agency

Adrian Sevier
Acting Chief Counsel
Federal Emergency Management Agency

FROM: John V. Kelly
Assistant Inspector General
Office of Emergency Management Oversight

SUBJECT: *Santa Clara Pueblo, New Mexico, Needs Assistance to
Ensure Compliance with FEMA Public Assistance Grant
Requirements*
FEMA Disaster Numbers 4147- and 4151-DR-NM
Audit Report Number OIG-14-128-D

We audited the capability of Santa Clara Pueblo, New Mexico (Pueblo) to manage Public Assistance grant funds (Public Assistance Identification Number 000-70320-00). Our audit objective was to determine whether the Pueblo's policies, procedures, and business practices are adequate to account for and expend Federal Emergency Management Agency (FEMA) grant funds according to Federal regulations and FEMA guidelines. We conducted this audit early in the Public Assistance process to identify areas where the Pueblo may need additional technical assistance or monitoring to ensure compliance. In addition, by undergoing an audit early in the grant cycle, grant recipients have the opportunity to correct noncompliance with Federal regulations before they spend the majority of their funding. It also allows them the opportunity to supplement deficient documentation or locate missing documentation before too much time elapses.



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Our audit covered the period July 19, 2013, through January 28, 2014. At the time of our audit, FEMA estimated the Pueblo, a FEMA grantee, sustained approximately \$7.4 million in damages from two disasters. Both disasters were for severe storms and flooding that occurred in 2013 (see exhibit):

- \$5.4 million for Disaster 4147 (July 19, through July 21, 2013) and
- \$2.0 million for Disaster 4151 (September 13 through 16, 2013).

The awards provided 75 percent funding to the Pueblo for debris removal (Category A), emergency protective measures (Category B), and permanent work (Categories C–G) on both small and large projects.¹ At the time of our audit, FEMA had not obligated funds for any project, and the Pueblo had not submitted any claims for reimbursement. However, the Pueblo had begun work to repair disaster damages.

We conducted this performance audit between January and July 2014 pursuant to the *Inspector General Act of 1978*, as amended, and according to generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based upon our audit objective. We believe the evidence obtained provides a reasonable basis for our findings and conclusions based upon our audit objective. We conducted this audit by applying the statutes, regulations, and FEMA policies and guidelines in effect at the time of the disaster.

We interviewed FEMA and Pueblo officials; gained an understanding of the Pueblo's method of accounting for disaster-related costs and its procurement policies, procedures, and business practices for Disasters 4147 and 4151; reviewed the FEMA-Tribal Agreement and the Pueblo's contract documents; reviewed applicable Federal regulations and FEMA guidelines; and performed other procedures considered necessary to accomplish our objective. As part of our standard audit procedures, we also notified the Recovery Accountability and Transparency Board of all contracts the grantee plans to award under the grant to determine whether the Pueblo's contractors were debarred or whether there were any indications of other issues related to those contractors that would indicate fraud, waste, or abuse. We did not perform a detailed assessment of the Pueblo's internal controls over its grant activities because it was not necessary to accomplish our audit objective.

¹ Federal regulations in effect at the time of disasters set the large project thresholds at \$67,500 for Disaster 4147 and \$68,500 for Disaster 4151.



BACKGROUND

Since 2011, severe storms and flooding have caused repetitive damage to Santa Clara Canyon. This flooding changed the canyon's topography and damaged vegetation allowing water to rush through the canyon, resulting in increased flooding. Debris and sediment from the flooding caused major damage to the Pueblo's roads (see figure 1), irrigation systems, and water control facilities.

Figure 1. Damage to Santa Clara Canyon Road after repeated disasters.



Source: DHS OIG during site visit on January 29, 2014.

RESULTS OF AUDIT

The Pueblo's accounting policies, procedures, and business practices were adequate to account for FEMA grant funds according to Federal regulations and FEMA guidelines. However, the Pueblo did not have adequate procurement policies and procedures in place to comply with all Federal procurement regulations. This occurred because FEMA regional officials incorrectly advised the Pueblo that the same Federal procurement regulations that apply to States, as grantees, also apply to the Pueblo. As a result, the Pueblo could improperly contract for disaster-related work of approximately \$7.4 million.² We discussed the Region's incorrect advice with FEMA's Chief Counsel, who agreed that the Region's advice was incorrect. Therefore, FEMA Region VI should closely monitor the Pueblo to ensure that it complies with the correct Federal procurement regulations. Further, FEMA's Chief Counsel should coordinate with all

² At the time of our audit, Pueblo officials could not estimate how much they would spend for contract costs. Therefore, we used FEMA's Preliminary Damage Assessment that estimated the Pueblo would spend approximately \$7.4 million in recovery costs for both disasters (\$5.4 million for Disaster 4147 and \$2.0 million for Disaster 4151).



FEMA Regional Administrators to ensure that Tribal governments within their areas of responsibility are aware of which Federal procurement regulations they should follow for all current and future declared disasters.

In previous disasters, the Pueblo received FEMA Public Assistance funds as a subgrantee. However, in Disasters 4147 and 4151, for the first time, the Pueblo is FEMA's direct grantee with increased responsibilities. Therefore, FEMA should provide the Pueblo continuous technical assistance in these two disasters to ensure that it understands and fulfills its grantee responsibilities.

Accounting for Project Costs

The Pueblo has adequate policies, procedures, and business practices in place to ensure that it accounts for disaster costs on a project-by-project basis as Federal regulations require. We reviewed the Pueblo's accounting manual that has a grants management section dedicated to administering FEMA grant funds. We also observed and reviewed the Pueblo's accounting procedures used in previous disasters that demonstrate the Pueblo's ability to account for grant funds for DR-4147 and DR-4151. Therefore, the Pueblo provided reasonable assurance they can track disaster costs on a project-by-project basis. As of our audit cutoff date, Pueblo officials had not submitted any claims to FEMA for reimbursement.

Pueblo's Policies and Procedures for Procurement

The Pueblo did not have adequate policies and procedures in place to comply with all Federal procurement standards because FEMA Region VI officials provided incorrect guidance. As a result, the Pueblo may improperly contract for approximately \$7.4 million in disaster costs.

Federal procurement standards applicable to Federal grants and subawards to State, local, and Indian tribal governments at 44 Code of Federal Regulations (CFR) 13.36 state the following:

§ 13.36 Procurement. (a) *States*. When procuring property and services under a grant, a State will follow the same policies and procedures it uses for procurements from its non-Federal funds. The State will ensure that every purchase order or other contract includes any clauses required by Federal statutes and executive orders and their implementing regulations. Other grantees and subgrantees will follow paragraphs (b) through (i) in this section.

Early in the disaster, FEMA Regional officials advised the Pueblo that, based on the *Sandy Recovery Act* (Act), it should follow the same policies and procedures it uses for procurements from its non-Federal funds—just as any state grantee would. We disagree



with this advice because the Pueblo, as an **other grantee**, should follow 44 CFR 13.36(b) through (i). The Act allows tribes to independently request disaster declarations just as states make requests, as grantees. However, the Act does not state that tribes should be able to use Federal procurement regulations applicable to states rather than those applicable to **other grantees**.

In April 2014, we discussed this issue with FEMA’s Chief Counsel who agreed with our position. He confirmed that, for contracting purposes, tribes were not the same as states and should follow Federal procurement regulations applicable to **other grantees**. He said that he would immediately notify FEMA Region VI officials of his determination. We recently reported that, during early disaster response, FEMA sometimes provided incomplete and inaccurate information to Public Assistance applicants regarding Federal procurement standards.³ Therefore, we were very pleased that FEMA was willing to take quick action to correct the misinformation.

At the time of our review, the Pueblo had not awarded any contracts for the two disasters in our audit scope. However, we reviewed a contract that it awarded for disaster work in a previous disaster and the procurement procedures it used to solicit proposals for that contract. Pueblo officials said they intended to use the contract and procedures for its 2013 disaster repairs.

We determined that their previous contract and procedures did not comply with two Federal procurement standards. Specifically, 44 CFR 13.36 requires grantees (other than states) and subgrantees to –

- take all necessary affirmative steps to assure the use of small and minority firms, women’s business enterprises, and labor surplus area firms when possible (44 CFR 13.36(e)); and
- include specific provisions in all contracts, such as those for records retention, legal remedies, prohibition of “kickbacks,” and termination for cause (44 CFR 13.36(i)).

Small and Minority Firms, Women’s-Business Enterprises, and Labor Surplus Area Firms – We advised Pueblo officials that, in soliciting proposals for previous disaster work, they had not taken all necessary affirmative steps to assure the use of small and minority firms, women’s business enterprises, and labor surplus area firms when possible. These steps include using the services and assistance of the Small Business Administration and the Minority Business Development Agency of the Department of Commerce to solicit and use these firms. However, 35 percent of the Pueblo’s contractor bid responses were from small and minority firms, women’s business enterprises, and labor surplus area firms. Further, Pueblo officials have since made

³ Report Number OIG-14-46-D, *FEMA’s Dissemination of Procurement Advice Early in Disaster Response Periods*, February 28, 2014.



positive efforts to comply with this regulation and have contacted both the Small Business Administration and the Minority Business Development Agency.

Pueblo officials said this occurred because they thought they met this requirement by advertising in local newspapers, reaching out to other federally recognized tribes in the state, and notifying the Native American Economic Development Agency. Pueblo officials assured us that, for the 2013 disasters and future disasters, they will comply with this Federal procurement standard.

Contract Provisions – We advised Pueblo officials that the contract they used in previous disasters did not include all the provisions that Federal regulations require. These standard contract provisions document the rights and responsibilities of the parties and minimize the risk of contract misinterpretations and disputes. Pueblo officials said they were unaware of the requirement for these provisions and would include them in all future contracts.

In conclusion, the Pueblo plans to contract for approximately \$7.4 million in disaster work for the two 2013 disasters. Therefore, FEMA should provide Pueblo officials with technical assistance and monitor them to ensure they comply with 44 CFR 13.36(b) through (i) for all contract disaster work. FEMA should also direct all FEMA Regional Administrators to ensure that Tribal governments within their areas of responsibility are aware of which Federal procurement regulations they should follow for all current and future declared disasters.

The Pueblo's Grantee Responsibilities

In previous disasters, the Pueblo received FEMA Public Assistance funds as a subgrantee under the New Mexico Department of Homeland Security and Emergency Management. However, in Disasters 4147 and 4151, for the first time, the Pueblo is FEMA's direct grantee with increased responsibilities. There is no middleman between the Pueblo and FEMA to provide advice and oversee the Pueblo's activities. Therefore, FEMA will need to provide the Pueblo continuous technical assistance in these two disasters to ensure that it understands and fulfills its grantee responsibilities.

An Indian Tribal government that chooses to act as its own grantee must comply with the following conditions to receive FEMA funding (FEMA 322, June 2007, p. 10):

- develop and submit a Public Assistance Administrative Plan similar to the State Administrative Plan;
- meet all requirements that 44 CFR Part 13 places on a grantee; and
- execute a formal FEMA-Tribal Agreement similar to the FEMA-State Agreement.



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FEMA's *Public Assistance Policy Digest* (FEMA 321, January 2008) defines the FEMA-State Agreement as —

The FEMA-State Agreement is a document signed by the Governor of the State and the FEMA Regional Administrator that states the understandings, commitments, and conditions under which Federal assistance will be provided. The agreement identifies the incident and the incident period, specifies the type and extent of assistance that will be provided, lists the areas eligible to receive assistance, outlines the cost sharing provisions, and includes other special terms and conditions that may apply.

We reviewed and discussed the Pueblo's FEMA-Tribal Agreement with Pueblo officials to ensure that they were aware of their grantee responsibilities. The tasks we discussed included the following:

- preparing quarterly financial and progress reports for FEMA,
- submitting an accounting to FEMA for every large project within 90 days of work completion,
- requesting time extensions to complete work (beyond the grantee's extension authority), and
- ensuring that subgrantees are aware of and follow Federal regulations (the Pueblo currently has no plans to have subgrantees for the 2013 disasters, but that option is available).

Pueblo officials said FEMA Region VI had frequently provided advice to them, but were unsure whether FEMA officials had advised them of all tasks grantees should perform. Because the scope of a grantee's responsibilities is much larger than that of a subgrantee, FEMA should continue to provide assistance to the Pueblo throughout the life cycle of these two disasters.

Pueblo officials agreed with this finding. However, they pointed out that another Federal agency considers tribal governments as equal to state governments. Pueblo officials believe that FEMA should amend its regulations to allow tribal governments to follow the same regulations that states follow. However, based on current regulations, the Pueblo agrees that it should follow the procurement guidelines of **other grantees**. Pueblo officials said that, moving forward, the *Stafford Act* needs to be amended to give tribal governments the same rights as States in every respect.



RECOMMENDATIONS

We recommend that the Regional Administrator, FEMA Region VI:

Recommendation #1: Provide additional technical assistance to the Santa Clara Pueblo to ensure it complies with Federal procurement regulations for awarding disaster contracts and to prevent the improper payment of approximately \$7.4 million in procurements.

Recommendation #2: Continue technical assistance to the Pueblo to ensure it is aware of and performs all responsibilities that Federal regulations impose on grantees.

We recommend that FEMA's Chief Counsel:

Recommendation #3: Coordinate with all FEMA Regional Administrators to advise Tribal governments within their areas of responsibility to follow 44 CFR 13.36(b) through (i), rather than 44 CFR 13.36(a) for current and future declared disasters.

DISCUSSION WITH MANAGEMENT AND AUDIT FOLLOWUP

We discussed the results of our audit with Pueblo officials during our audit and included their comments in this report, as appropriate. We also provided a draft report in advance to FEMA and Pueblo officials and discussed it at exit conferences with them on July 16, 2014. FEMA and Pueblo officials generally agreed with our findings and recommendations.

Within 90 days from the date of this memorandum, please provide our office with a written response that includes your (1) agreement or disagreement, (2) corrective action plan, and (3) target completion date for each recommendation. Also, please include the contact information for responsible parties and any other supporting documentation necessary to inform us about the current status of the recommendation. Until we receive and evaluate your response, we will consider the recommendations open and unresolved.

Consistent with our responsibility under the *Inspector General Act*, we will provide copies of our report to appropriate congressional committees with oversight and appropriation responsibility over the Department of Homeland Security. We will post the report on our website for public dissemination.



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Major contributors to this report are Christopher Dodd, Acting Director, Central Regional Office; Paige Hamrick, Audit Manager; Lori L. Smith, Auditor-in-Charge; Chiquita Washington, Senior Auditor; and Christina Spong, Auditor.

Please call me with any questions at (202) 254-4100, or your staff may contact Christopher Dodd at (214) 436-5200.



Schedule of Estimated Costs by Category

*Project Category	**FEMA Estimate DR-4147	**FEMA Estimate DR-4151	Total Both Disasters
A	\$4,648,100	\$ 192,750	\$4,840,850
B	0	102,300	102,300
C	537,635	1,444,070	1,981,705
D	96,704	165,840	262,544
E	0	5,000	5,000
F	111,414	0	111,414
G	<u>0</u>	<u>75,000</u>	<u>75,000</u>
Totals	<u>\$5,393,853</u>	<u>\$1,984,960</u>	<u>\$7,378,813</u>

*Source: FEMA Region VI preliminary damage estimates as of January 15, 2014.

**FEMA classifies disaster-related work by type: debris removal (Category A), emergency protective measures (Category B), and permanent work (Categories C through G).



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