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The California Society of Municipal Finance Officers is the statewide organization serving all California municipal finance professionals.

We promote excellence in financial management through innovatin, continuing education and the professional development of our members. CSMFO members are deeply involved in the key issues facing citis, counties, and special districts in the State of California.

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The Disaster After the Disaster: The Quicksand of Post-Disaster Funding



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In January of this year

the Department of Homeland Security issued an audit of a Southern California special district¹ with a finding of \$31,700,000, largely for its alleged multiple failures to follow the district's own procurement regulations AND those of the Federal government after receiving a FEMA Public Assistance grant award of \$41,300,000. This is a nearly 77% take-back.

This audit had nothing to do with the emergency response and everything to do with the "business side" of how a local government agency exposed itself to a financially staggering risk because of its alleged failure to follow a confusing labyrinth of Federal regulation. A confusing labyrinth of regulation for which they likely had little, if any, prior knowledge or understanding.

The audit is not yet final, and both the district and at least one of its contractors have retained separate legal counsel to help them battle their way out of this undesirable predicament. However, even if the district and its contractor "win" this battle with the auditors and FEMA, it will most likely cost them hundreds of thousands of dollars in legal and expert fees and staff time.

How did a basic public works pipeline project get run aground on these fiscal shoals?

Without getting too deep into the gritty details, the auditors allege that the district failed to follow both the district's own procurement policies AND those of the Federal government, as embodied in Title 2 of the Code of Federal Regulations, Part 200.

The audit report states that the district failed to:

- "perform cost/price analyses of bid proposals to ensure fair and reasonable costs;"
- "follow its own procurement policy AND (emphasis added) Federal regulations when evaluating and selecting its contractors;"
- "include all mandatory Federal provisions in contracts to document rights and responsibilities of the parties;"
- "maintain records sufficient to detail the significant history of its procurements;"
- "maintain an adequate contract administration system that included careful review of invoices; or"
- "include a ceiling price in time-and-material contracts that contractors exceed at their own risk."

To be fair, this pipeline project had its share of complications. First of all, the pipeline had to be relocated because of environmental issues. Once the decision to relocate the pipeline was made, the method of construction changed from trenching to tunneling at a substantially higher cost. In the tunneling process, the contractor discovered two separate plumes of contaminated soil which further increased the costs. These problems notwithstanding, however, the auditors allege that the district failed to properly procure the three contracts for this project.

The auditors further allege improper accounting in so far that invoices from one project in question were paid for with funds for a distinctly separate other project.

These compound issues can and do often arise in construction projects of all types and Federal regulations must be followed or the project funding may be jeopardized.

I liken the complexity of the laws (the Stafford Act) and regulations (Title 44 CFR, Part 206 and Title 2 CFR, Part 200) to the complexity of the U.S. Tax Code, with the added feature that FEMA has the authority to interpret the regulations.

The very scary part is that this particular audit is nowhere close to the record. The initial audit findings for a rural county in Texas² were \$44,500,000; a transit district in New Orleans³ had an initial audit finding of \$62,000,000; a high school⁴ in New Orleans had an initial audit finding of \$82,000,000; and a university⁵ in the mid-West an initial audit finding of

\$83,000,000. These are all staggering numbers, guaranteed to make the news both in print and in broadcast. Even if such audits are ultimately defeated, much of the reputational damage is done upon publication.

Here is an even more insidious aspect, if the preceding citations weren't enough to produce fatal onset insomnia. On July 24th, nearly 12 years after Hurricane Katrina ravaged the Mississippi-Louisiana Gulf Coast region, DHS auditors published this audit:

"FEMA Should Disallow \$2.04 Billion Approved for New Orleans Infrastructure Repairs"⁶



FEMA has said "NO," we're not taking that money back.

But the case illustrates the "almost-forever-at-risk" aspect to these Public Assistance grants. To be fair, FEMA itself, in 2014, initiated a "claw back" of \$275 million dollars from cities and counties in Florida from a series of hurricanes that struck Florida in 2004-05.

What can be done to defend local government agencies against such losses and such mega-migraine headaches?

Awareness of the potential for problems related to disaster cost recovery is the first important step. Finance professionals, procurement officials and emergency managers across the state are developing an awareness of the Public Assistance program and its unique challenges.

Note: Anytime local government agencies spend any Federal grant funds, from any Federal agency, for any project, the rules in 2 CFR, Part 200 apply. And many local government procurement officials are unaware that these rules exist and apply in spite of whatever proclamation of local disaster might exist.

Progressive agencies across the state are reviewing their procurement policies to bring them into compliance; Santa Clara County is just finishing its first Disaster Cost Recovery plan, a Northern California city is developing a long term Strategic Disaster Cost Recovery Plan; while in the City of San Francisco, the Controller's Office has 2½ F.T.E. staff devoted to various aspects of planning and preparedness for disaster cost recovery; and a major Southern California city has adopted a disaster purchasing plan to give it leeway for procurement during a disaster. Dozens of cities, counties, special districts and educational institutions are providing training programs for their staff to raise levels of awareness and move action within their agency.

So far, however, these best efforts have been piecemeal, agency by agency. But virtually every public agency in the state is exposed to one sort of disaster or another; some have multiple exposures; and still others have a much more severe and focused risk than others, particularly from earthquakes. It may well be time for a unified effort through the leadership of a statewide organization or at least a regional group to organize and drive the necessary work for the benefit of every agency in California.

But whether or not such an organizational effort takes root, every public agency needs to analyze its own threats and take the appropriate course of action to reduce these financial risks before a disaster happens.

No one of sound financial mind would be without some level of fire, auto and medical insurance, yet every day local government agencies are effectively naked with no protection whatsoever for even the most basic needs for the disaster cost recovery process.



¹ Google: DHS-OIG Audit 17-25-D for the complete audit report of January 24, 2017

² Google: DHS-OIG Audit DD-11-05 for the complete audit report of December 2, 2010

³ Google: DHS-OIG Audit DD-13-01 for the complete audit report of November 14, 2012

⁴ Google: DHS-OIG Audit 15-65-D for the complete audit report of April 4, 2015

⁵ Google: DHS-OIG Audit DD-12-17 for the complete audit report of June 9, 2012

⁶ Google: DHS-OIG Audit OIG-17-97-D for the complete report of July 24, 2017

For nearly two decades, Mike Martinet has trained local government officials on how to maximize their disaster cost recovery under FEMA's Public Assistance program.