



## CITY OF POMPANO BEACH, FL

Kimberly Cristiano, Emergency Manager

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December 18, 2015

Ms. Gracia Szczech, Regional Administrator  
Federal Emergency Management Agency  
U.S. Department of Homeland Security  
Region IV  
3003 Chamblee-Tucker Road  
Atlanta, Georgia, 30341-4112

Through: Mr. Bryan W. Koon, Director  
Mr. David Pius, Appeals Officer  
Florida Division of Emergency Management  
2555 Shumard Oak Boulevard  
Tallahassee, Florida 32399-2100

Re: FEMA-1609-DR-FL - City of Pompano Beach, Florida - FIPS # 011-58050-00  
First Appeal of FEMA Deobligations  
Project Worksheet #7050 in the amount of \$297,739.78

Dear Ms. Szczech:

In accordance with Title 44 Code of Federal Regulations (CFR) §206.206, the City of Pompano Beach, Florida (the City) hereby submits its First Appeal of Project Worksheet (PW) 7050 from Hurricane Wilma (1609-DR-FL) for an amount totaling \$297,739.78.

This First Appeal arises from the FEMA final inspection and closeout retroactive deobligations for anticipated insurance proceeds for costs that had been previously approved and confirmed as eligible (**See Attachment #1**).

The City respectfully disagrees with FEMA's decision to deobligate these eligible costs for restoration of damaged facilities contained on this PW for reasons that will be expanded upon in this appeal.

### Background

Hurricane Wilma, which occurred in October 2005, caused a significant amount of windstorm damage throughout the City. The City had a responsibility to restore its facilities that were damaged, as a direct result of the storm, to pre-disaster conditions. The facility damages and repairs detailed on this PW were originally formulated, submitted and approved for reimbursement of expenditures incurred for permanent repairs to multiple Parks and Recreation facilities owned and operated by the City.

### ***PW 7050 – Version 0 – April 25, 2006***

The original eligible project scope and costs were approved and obligated by FEMA on April 25, 2006 (**See Attachment #2**). This Version obligated a combination of actual and estimated costs



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totaling \$306,445.36 for repairs at fourteen (14) separate Parks and Recreation facilities located throughout the City. The scope of this project included repairs to damaged elements including fencing, batting cages, volleyball court lights, score boards, trash receptacles, BBQ grills, light bollards and pavilions. The City completed and paid for the physical work and through a reimbursement request in the amount of \$297,739.78, the State of Florida Division of Emergency Management (FDEM) made payment to the City for a portion of the obligated funds totaling \$209,965.77 for this project on January 16, 2013.

### ***PW 7050 – Versions 1, 2 and 3 – January through June 2007***

Project versions 1, 2 and 3 were written and obligated to increase the Federal funding share from 75% to 90% and then from 90% to 100%. No revisions, additions or deletions to the eligible scope nor original actual and estimated costs were made.

### ***PW 7050 – Version 4 – June 19, 2008***

This project version was prepared to add Hazard Mitigation initiatives to various damaged elements at several facilities for an amount totaling \$16,518.00. All work had already been completed prior to the notification of these Hazard Mitigation opportunities being obligated. Therefore, no additional work was completed nor costs expended.

### ***PW 7050 – Version 5 – January 13, 2015***

The final inspection process for this project started in early 2012. Version 5 of this project was written for the purposes of final inspection and closeout following the completion of the work by the City. Total costs for facility restoration were presented by the City during closeout for an amount totaling \$297,739.78, representing a total project under-run of (\$25,233.58). The FEMA Region IV review process was indicated to have started on October 18, 2012 based on the General Comments contained in Version 5. During the review process, and over one year later, the FEMA insurance reviewer made the following comments on December 5, 2013 (***See Attachment 1***):

12/05/2013 - INSURANCE CONSIDERATIONS: PRIOR REVIEW OF DAMAGES FINDS NO PREVIOUS FEMA FUNDING AT THESE LOCATIONS EXCEEDING \$5,000 (DR-955 HELD TWO DSRS FOR LOCATIONS AS LISTED IN THIS PW). THE APPLICANT HAS INSURANCE ON THE DAMAGED FACILITIES ("ALL REAL AND PERSONAL PROPERTY" AS STATED IN THEIR INSURANCE POLICY) - INQUIRY WAS MADE AS TO THE STATUS OF THE INSURANCE CLAIM AND THE BROKER'S REPLY STATED THAT, ALTHOUGH "ALL LOCATIONS WERE COVERED" AND THE DEDUCTIBLE ASSESSED AGAINST ALL DAMAGES PAID WAS \$100,000, COVERAGE WAS NOT AFFORDED TO ANY OF THE DAMAGES IN THIS PROJECT WORKSHEET. REVIEW OF THE APPLICANT'S INSURANCE COVERAGE REVEALS THAT COVERAGE NOT INCLUDED IN COSTS ABOVE THE \$100,000 DEDUCTIBLE MIGHT HAVE BEEN AFFORDED UNDER THE APPLICANT'S MISCELLANEOUS COVERAGE OF \$1,000,000. AS OF THIS DATE, THE FILE CONTAINS NO CORRESPONDENCE FROM THE APPLICANT'S INSURANCE CARRIER (NOT THEIR BROKER OR AGENT) PROVIDING A) A LETTER OF DENIAL OF COVERAGE TO ANY SPECIFIC ITEM(S) IN THE PW; OR B) A REASON WHY THE SPECIFIC ITEM(S) ARE NOT COVERED WITH CITATION TO THE APPROPRIATE VERBIAGE FROM THE POLICY INCLUDED. AS SUCH, AN ANTICIPATED INSURANCE PROCEED REDUCTION IN THE AMOUNT OF \$297,739.78 HAS BEEN APPLIED TO THIS PW. AS PER 44 CFR 206.253, SINCE DAMAGES EXCEED \$5,000.00, THE APPLICANT IS REQUIRED TO MAINTAIN INSURANCE ON THE FACILITIES AS NOTED IN THE INSURANCE INFORMATION SECTION (PLEASE NOTE THAT THERE WAS NO BREAKDOWN OF COST FOR NEARLY \$194,000 IN COSTS PROVIDED ON THE INVOICE SUMMARY SUBMITTED WITH THE FRR, HOWEVER APPLICANT HAS MAINTAINED "ALL REAL AND PERSONAL PROPERTY" COVERAGE; THEREFORE, FUTURE DAMAGES SHOULD BE INSURED REGARDLESS OF LOCATION). G. WILSON, INSURANCE REVIEWER





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Through the State of Florida Division of Emergency Management (FDEM), FEMA engaged in discussions on multiple occasions with the City and the City's insurance broker, Arthur J. Gallagher (AJG) regarding clarifications on the City's insurance policy provisions and Wilma claim application with respect to this project as well as Wilma PW 1893, which contained similar insurance comments at the time. The City's Risk Manager, AJG and the carrier provided information to refute the FEMA comments and to clarify the appropriate coverage was determined per the policy provisions and demonstrated how to apply the policy appropriately.

On January 13, 2015, the City was informed of the final project obligation that occurred on October 18, 2014, rendering a FEMA determination to deobligate the entire amount of eligible damage costs citing that the City should have received insurance proceeds from its carrier totaling \$297,739.78, almost two years after payment to the City for eligible work was requested and partially received.

The City immediately approached FEMA Region IV with a request to once again provide additional insurance information to refute the deobligations. The City and FEMA engaged in back and forth correspondence through FDEM between January 2015 and October 2015 resulting in a final written determination from FEMA Region IV on October 19, 2015 that they would not accommodate any changes to the project deobligations (**See Attachment #3**).

FEMA determined that there should have been additional proceeds due to the City as afforded by provisions of the insurance policy that do not apply and were interpreted by the FEMA Region IV Insurance Specialist inaccurately. Additionally, the City contends that these deobligations are unjustified as the City is protected from deobligations such as these under the provisions of §705(c) of the Stafford Act. The City is therefore seeking reimbursement of the unwarranted anticipated insurance proceeds reduced from this project.

### **The Stafford Act Prohibits FEMA from Seeking Reimbursement of Approved and Properly Expended Grants**

§705(c) of the Stafford Act prohibits FEMA from deobligating any of the funds at issue.

§705(c) states:

"(c) Binding Nature of Grant Requirements- A State or local government shall not be liable for reimbursement or any other penalty of any payment made under this Act if-

- (1) the payment was authorized by an approved agreement specifying the costs;
- (2) the costs were reasonable; and
- (3) the purpose of the grant was accomplished."

This is precisely the case at hand. Specifically, the City is a local government entity. The PW at issue was formulated, reviewed and obligated over 10 years ago and scope of the project was





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completed. The PW at issue was reviewed by multiple personnel, including FEMA insurance specialists. Thus, the PW was reviewed and approved by FEMA, which establishes that FEMA approved and determined the costs at issue to be reasonable. Finally, the purpose of the grant was accomplished by completion of the work identified in the PW.

Succinctly, FEMA is now statutorily prohibited from seeking reimbursement through deobligation of funding in and project versions subsequent to accomplishment of the purpose of the grant. As FEMA is aware, the U.S. District Court for the Southern District of Florida recently determined that §705(c) of the Stafford Act " ... prohibits FEMA from deobligating funds issued by FEMA in certain instances ... even if FEMA's initial decision did not comply with FEMA policy." (*South Florida Water Management District v. FEMA*, Case No. 13-80533- CIV)

Additionally, the issue at hand does not constitute a duplication of benefits since there were no additional second or third party funds received or any reasonable anticipation of funds that could have been received that would have been applicable to the facilities and buildings for the disasters at issue. The City's Risk Manager, insurance broker and insurance carrier prepared and provided multiple correspondence documents pertaining to this matter that were repeatedly disregarded by the FEMA Region IV insurance specialist.

§705(c) was clearly created with the intent to insulate state and local governments from distractions to their business of governing after FEMA had unmistakably reviewed and approved reasonable cost grant assistance and the purpose of the grant assistance was accomplished.

Thus, it is distressing to the City that many years after the purpose of the grant was accomplished and funds paid, the City is forced to engage in lengthy discussions with FEMA and engage in the appeals process over a matter which FEMA was statutorily required to raise before funds were paid and the purpose of the grant accomplished. Effectively, FEMA's current refusal to acknowledge its statutory obligation under §705(c) is now causing the City to divert substantial time and expense to a matter which the statute was specifically intended to circumvent. More importantly, it is a violation of Federal law.

Accordingly, FEMA's deobligation of the funds in the case at hand must be reversed to comply with the clear statutory requirements of the Stafford Act.

### **FEMA Should Reimburse Erroneously Applied Anticipated Insurance Proceeds**

Regardless of the prohibitions of §705(c) of the Stafford Act, the facts of the case do not warrant the deobligations taken by FEMA in the final inspection and closeout version of this project.

During the final inspection and closeout of this project, FEMA determined that the items at this location were covered as they are 'ALL real and personal property' and/or should have been afforded coverage under various miscellaneous provisions of the City's insurance policy including Miscellaneous Unnamed Location or Errors and Omissions coverage.

The City adamantly disagrees with the FEMA determinations and deobligations because the insurance specialist recommended deobligation of eligible funds for items not afforded coverage and or not qualifying for reimbursement from the City's insurance carrier per specific policy provisions and deductibles.





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Further, the City, the broker and the insurer were in agreement as to the existing coverages and the amounts paid. Accordingly, it is not up to FEMA, a non-party to the insurance contract, to second-guess the intent of parties to the contract at issue - particularly when there is not clarity in the contract relative to FEMA's assertions. Additionally, it should be pointed out that if FEMA had serious concerns about the extent of coverage, it should have been raised long ago (perhaps when the PW was obligated) rather than waiting until the statute of limitation for bringing claims under the contract or being able to procure additional written verbiage and explanation from the carrier expired on October 2010, five (5) years after the occurrence of the named windstorm. Of note, even though the statute of limitations had expired, the carrier graciously agreed to evaluate the City's claim AGAIN, resulting the same determination for the THIRD time, that the items questioned by FEMA were NOT afforded coverage under the City's policy in place at the time (**See Attachment #4**).

## **Discussion**

In the following discussion, the City will present clarifications to its insurance policy provisions and details to demonstrate a clear understanding of the correct application of insurance to the FEMA PW at issue.

### ***Insurance Policy Coverage and Provisions***

The City's insurance broker and claims consultant, Arthur J. Gallagher (AJG), has explained the provisions of the City's insurance policy in written responses to FEMA, through the City, on multiple occasions. AJG has provided a final detailed breakdown and response (**See Attachment #5**) to the most recent statements from FEMA Region IV contained in the October 19, 2015 written response to the City via FDEM closing the issue (**See Attachment #3**).

First, AJG addressed the fact that the City met its requirements to present its insurance claim settlement and continuous policy updates to FEMA throughout the project completion process. The City submitted an insurance claim to its carriers for citywide damages as a result of Hurricane Wilma and did not receive any proceeds for facilities included in the scope of this project due to a combination of no individual location deductibles being pierced for covered items and other items not afforded coverage under the provisions of the policy. Only two facilities owned by the City received proceeds, neither of which are contained on the project at issue.

Second, AJG addressed the purported coverage under miscellaneous unnamed locations, 'ALL real and personal property' and errors and omissions coverage. They quote policy provisions in the Manuscript All Risk Form Item 7 which concludes "If the property is not scheduled it is not covered" period. The City's 2005-2006 insurance policy in place at the time of the occurrence of Hurricane Wilma contained windstorm coverage that was based on:

#### **Schedule of Deductibles**

3% of total insured values per building at locations involved in a loss; or

\$100,000 **minimum** per occurrence, whichever is greater





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To be afforded coverage under the provisions FEMA highlights and to be considered an insured building, contents or personal property, the element has to have been listed on the Schedule of Values (SOV) in place at the time which was dated October 1, 2005 (**See Attachment #6**).

Third, AJG addresses the misinterpretation of the miscellaneous unnamed location coverage provision and misapplication of the \$100,000 deductible.

The City did and still does have a provision in their insurance policy for coverage of Miscellaneous Unnamed Locations in the amount of \$1,000,000. Based on the understanding by all parties to this agreement, upon common industry standards and upon clarification in more recent policy provisions of the City's insurance policy, Miscellaneous Unnamed Locations include "a building, yard, wharf, pier or bulkhead (or any group of the foregoing) bounded on all sides by public streets, clear land space or open waterways, each not less than fifty feet wide". The damaged elements were not afforded coverage under this provision of the insurance policy because 1) the locations where the elements were located were named locations at the inception of the policy and 2) the locations where the elements were located are contained on the SOV. However, they are not covered under the insured locations as the damaged elements were not listed specifically at the named locations at the time. Coverages have since been added to address the costs paid by FEMA to the City and to meet the obtain and maintain obligations as set forth in policy.

AJG goes on to clarify that the 'City's deductible is not a flat \$100,000. The deductible is calculated at 3% of the total insured value at the damaged location subject to a minimum of \$100,000 per occurrence and no maximum." The total damage repair costs for elements at the locations contained on this project that were covered under the policy did not pierce any single location deductible as reviewed and denied by the carrier in their September 29, 2015 letter (**See Attachment #4**). As such, there were no proceeds to be paid by the carrier for any of the damages included in this project scope.

Fourth, AJG addresses FEMA's question as to what items were covered and when they were afforded coverage. The answer is simple and lies in the past and current SOV documents detailing out each location insured and what elements are insured at each location. AJG certified that independent property appraisals have been conducted to include all elements listed on the current SOV at the appropriate values. These appraisals have been reviewed by the City, the broker and the carrier and accepted as accurate and sufficient coverage for the items insured.

Lastly, AJG concludes its letter by reiterating the main points for consideration specifically with respect to coverage provisions of the City's policy. FEMA is not a party to this agreement and is therefore not in a position to apply inaccurate, unwarranted interpretations or insert language or intent to the City's policy language and coverage as they see fit.

#### ***Accurate Application of Insurance Proceeds***

The City, its broker, its carrier and consultant have performed several detailed evaluations and analyses of the documents that exist in all of the project files including the FEMA projects for which the deobligations occurred and the insurance claim and supporting documentation that was processed. Based on this additional review, the City provided the detailed cost breakdown of damaged per each location for this project to FEMA per their request (**See Attachment #4**).





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The breakdown was also provided to the insurance carrier during their final review and evaluation of the City's damage claim in September 2015. The carrier actually sent a representative out to physically inspect the sites to compare the damages versus covered elements resulting in the issuance of the denial letter (**See Attachment #4**).

The only facilities afforded coverage and that received proceeds under the policy in place at the time of Wilma were the Municipal Golf Course and the Water Department Administration Building (**See Attachment #7**). The minimum \$100,000 deductible was applied to this claim and deducted from the proceeds due to the City as it was greater than the 3% deductibles of the sites combined.

Municipal Golf Course – 3% Deductible:	\$82,812
<u>Water Dist Admin Building – 3% Deductible:</u>	<u>\$ 9,789</u>
Total Deductible	\$92,601 < \$100,000

The Municipal Golf Course damage is contained in 1609 PW 1893 and the Water Department Administration Building was not incorporated into an eligible FEMA project for Wilma reimbursement.

### Conclusion

The City of Pompano Beach, Florida incurred appropriate and reasonable costs for facility repair and restoration due to Hurricane Wilma which occurred in October 2005. The City contends that the deobligations detailed in the above sections were unwarranted based upon the fact that 1) all of the criteria for compliance with §705(c) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act were met, making the deobligations at issue prohibited by law; and 2) the City has presented ample information to support reinstatement of the funds resulting from FEMA's inaccurate interpretation and application of the City's insurance policy proceeds and policy coverage provisions.

The City recognizes the importance of its fiduciary role in the proper use and accounting of public funds received from the Federal government through FEMA, which is why we have expended a considerable amount of staff time for more than a decade to comply with FEMA requirements and interpretations. Although the City had established internal procedures for disaster planning and recovery and compliance with FEMA disaster funding guidelines prior to Hurricane Wilma, the City's enhanced commitment to this effort over the past decade has been evident in its hiring of a full time Emergency Manager and contracting with Witt O'Brien's for standby emergency and disaster recovery services. These two forces have been instrumental in the development of additional trainings and standard operating procedures for City staff with the focus of ensuring continued compliance with FEMA guidelines. The City has therefore always taken a proactive stance in this respect, rather than a reactive one. We have further developed good working relationships with FEMA Regional staff and have always afforded the highest level of cooperation when information has been requested of us, even given the extensive period of time which has lapsed post disaster. Further, the City's insurance carriers have also been heavily involved in assisting the City in complying with FEMA's regulations and with all requested communications. In addition, the City's Public Assistance grant requests *have resulted in*





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successful close-outs and audits by the State of Florida, FEMA and the Office of the Inspector General further evidencing the City's strong disaster planning and recovery infrastructure.

The City appreciates FEMA's role in supporting local governments in its emergency preparedness and post disaster recovery efforts as we fully understand the magnitude of this task. That being said the City would also appreciate FEMA's serious consideration of the City's position regarding this issue. Our insurance carrier has in essence denied any coverage of the damages in question, citing applicable sections of the City's insurance policy. FEMA's insurance reviewer has basically disagreed with our insurance carrier's position, which the City takes issue with and simply does not support FEMA's position. FEMA has therefore placed the City in a precarious position, for which we have no recourse to recover these costs other than from a successful appeal with FEMA or a successful challenge within the Stafford Act guidelines (as discussed above). It should also not be ignored that so much time has lapsed since the City incurred the damages on the applicable properties, so that statutory limitations may have precluded the City from seeking any restitution from our insurance carrier, even though the City would not pursue that route even if statutory limitations were not to pose an immense obstacle, as the City agrees with our insurance carrier's position. While the City greatly respects FEMA, its mission and its outstanding efforts to help communities recover quickly after a disaster, we certainly would like to see reasonable time limits placed on FEMA's ability to de-obligate funds once a close out and audit has successfully concluded in addition to this appeal being granted.

In consideration of the facts outlined above and existing law discussed herein and submitted herewith, the City requests reconsideration of this issue in the City's favor, resulting in the full reimbursement of its actual and eligible expenses for non-insured damages that were deobligated in error in the amount of \$297,739.78.

Thank you for your immediate attention to this matter and in advance for your cooperation in avoiding an undue and unreasonable financial burden on the residents and taxpayers of the City of Pompano Beach and the continued exhausting of resources on this issue by both the City and FEMA. If you require any additional information, please do not hesitate contact Kimberly Cristiano at (954) 545-7799 or kimberly.spill-cristiano@copbfl.com.

Sincerely,

Kimberly Cristiano, CEM  
Emergency Manager

Cc: Eddie Beecher, Risk Manager  
Suzette Sibble, Finance Director