



FEMA



**MEMORANDUM OF UNDERSTANDING BETWEEN THE UNITED STATES
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD) AND THE
DEPARTMENT OF HOMELAND SECURITY FEDERAL EMERGENCY MANAGEMENT
AGENCY (FEMA)**

*Regarding Use of HUD Community Development Block Grant
Disaster Recovery (CDBG-DR) Funds as Non-Federal Cost Share
for FEMA's Public Assistance (PA) Program
and Hazard Mitigation Grant Program (HMGP) in response to Hurricanes Irma and Maria in
the Commonwealth of Puerto Rico*

I. PARTIES

The Parties to this Agreement are the U.S. Department of Housing and Urban Development (HUD) and the U.S. Department of Homeland Security (DHS), Federal Emergency Management Agency (FEMA).

II. AUTHORITY

- A. FEMA. The authority for FEMA to enter this MOU is under the provisions of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, P.L. 93-288, as amended (Stafford Act): 42 U.S.C. § 5121 et seq.
- B. HUD. The authority for HUD to enter this MOU is sections 2 and 3 of the Department of Housing and Urban Development Act (42 U.S.C. §§ 3531 - 3532).

III. PURPOSE AND SCOPE

This Memorandum of Understanding (MOU) establishes a framework and baseline principles upon which HUD CDBG-DR funds may be used by the Commonwealth of Puerto Rico (Commonwealth) to serve as non-Federal cost share (also known as "local match") for projects funded under the PA and HMGP programs. For purposes of this MOU, the term "CDBG-DR funds" includes funds made available for the purposes of resilience, mitigation or electrical power systems.

The Commonwealth has been appropriated or allocated more than \$20 billion in CDBG-DR funds through Pub. Laws 115-56, 115-123, and 116-20 to address the overwhelming impacts caused by Hurricanes Irma and Maria in 2017. In addition, as of June 7, 2019, the

Commonwealth currently estimates that \$59 billion will ultimately be obligated through the PA and HMGP programs combined.¹

The projected amounts necessary to meet the Commonwealth's non-Federal cost share burden was a factor considered by HUD in its estimation of the Commonwealth's unmet needs for recovery from the 2017 disasters. These unmet needs estimates were provided to Congress to help inform CDBG-DR appropriations decisions and amounts.

CDBG-DR grants are available for activities eligible under Title I of the Housing and Community Development Act of 1974, P.L. 93-393 as amended (HCDA) (42 U.S.C. § 5301 et seq.) Section 105(a)(9) of the HCDA authorizes use of CDBG-DR funds for 'payment of the non-Federal share required in connection with a Federal grant-in-aid program undertaken as part of activities assisted' under title I of the HCDA. This means that grantees are authorized to use CDBG-DR funds to satisfy the FEMA cost-share requirements, so long as the use of the funds otherwise meets all of the requirements on the use of the CDBG-DR funds.

Due to the scale of disaster impacts and the overall financial condition of the Commonwealth, it is anticipated that the Commonwealth will need to use CDBG-DR funds to support the ability to access other Federal recovery program funds requiring a non-Federal cost share, particularly FEMA PA and HMGP funds.

Given the scale of Federal investment in Puerto Rico, the Commonwealth's limited capacity to expeditiously administer funding at such a scale, and the one-time opportunity for transformation facing the island, it is in the Federal Government's best interest to provide an administratively efficient and cost-effective model when using FEMA and HUD funding. With infrastructure recovery projects anticipated to number in the thousands, providing the Commonwealth with a flexible model for applying CDBG-DR funds toward PA and HMGP cost share requirements will not only reduce administrative costs (for the Commonwealth and FEMA), it will increase the speed with which the Commonwealth is able to administer the funds and ultimately recover.

The proposed activities in this MOU are intended to streamline coordination between FEMA and HUD to enable funding to support essential infrastructure projects to be made available as quickly and cost-effectively as possible. As evidenced in the Disaster Recovery Reform Act of 2018, Congress intends for FEMA and HUD to work together to streamline and simplify circumstances where both agencies contribute to recovery and mitigation (e.g., duplication of benefits and application intake for housing assistance).

¹ Letter from Omar Marrero, Governor's Authorized Representative, to FEMA dated June 7, 2019. Estimated \$56 billion in total PA obligation plus approximately \$3 billion in existing HMGP obligation equals \$59 billion.

IV. RESPONSIBILITIES

Both HUD and FEMA, as resources and information are available, and as appropriate, commit to work with each other as follows:

- A. FEMA and HUD will develop implementation guidance for the Commonwealth regarding the option of flexible use of CDBG-DR funds in meeting the non-Federal cost share requirements on FEMA-funded PA projects.**

FEMA administers cost-sharing requirements in accordance with the Robert T. Stafford Emergency Assistance and Disaster Relief Act, FEMA regulations in Title 44 of the Code of Federal Regulations (CFR) and 2 C.F.R. § 200.306, and the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards at Title 2 Part 200. Specifically, 2 C.F.R. § 200.306(b)(5) prohibits a non-Federal entity from paying its cost share under a Federal grant with funds from another Federal grant unless authorized by a Federal statute. Section 105(a)(9) of the HCDA authorizes use of the CDBG-DR to satisfy FEMA cost share requirements if the use of the funds otherwise meets the requirements on the use of CDBG-DR funds. Accordingly, CDBG-DR funds are eligible for use to meet non-Federal match.

HUD has awarded CDBG-DR funding to the Commonwealth to recover from the impacts of Hurricanes Irma and Maria in 2017. For CDBG-DR funds governed by regulations published by Notice in the Federal Register dated August 14, 2018, HUD has stated:

“For infrastructure allocations, the grantee must also describe... how the grantee will align investments with other planned state or local capital improvements and infrastructure development efforts...”²

“Grantees may use CDBG-DR funds as a matching requirement, share, or contribution for Public Assistance Projects financed pursuant to Section 428, but as in other instances in which grantee use of CDBG-DR funds to meet local matching requirements, grantees must document that CDBG-DR funds have been used for the actual costs incurred for the assisted project and for costs that are eligible, meet a national objective, and meet other applicable CDBG requirements.”³

Similar requirements apply to uses of CDBG-DR funds made available under other notices.

² 83-FR-40316, Section IV, paragraph C(13)(d)(iv)

³ 83-FR-40316, Section IV, paragraph C(15)

The joint guidance on the use of CDBG-DR funds to satisfy FEMA matching requirements for assistance to the Commonwealth in response to Hurricanes Irma and Maria will be drafted in a manner that it can be extended to other grantees and grants received in response to other disasters. It will consider matching requirements for the PA program and the use of annual CDBG funds to satisfy matching requirements.

Additionally, joint-guidance on the flexible application of CDBG-DR as cost share for FEMA-funded projects will include the option for grouping sites with a project in a manner such that one group of sites may be funded with only FEMA funds and another group of sites may be funded with only CDBG-DR funds; however, the programmatic cost share requirements may be considered collectively at the scale of both groups combined within the specific project (referred to for these purposes as “flexible” match).⁴

Among other things, Section 428 makes it possible to consolidate multiple facilities, using fixed cost estimates into a single subaward. Under the PA program, a subaward is defined by FEMA as a “project.” Since FEMA applies cost share requirements at the project level, the subrecipient is thus able to apportion the cost share to facilities within that project as it finds most appropriate.

This flexible match approach could allow a subrecipient to meet the cost share requirements at a subaward level, while all other eligibility requirements would be met at a facility level. Regulatory compliance for interrelated facilities or projects will still be addressed in accordance with applicable environmental and historic preservation regulations.⁵ FEMA’s Office of Environmental Planning and Historic Preservation and HUD’s Office of Environment and Energy will develop a supplemental agreement to this MOU that address the process for conducting Environmental and Historic Preservation compliance reviews for those projects that combine FEMA and HUD funding.

All requirements for eligibility and regulations for FEMA PA must be met for all sites/facilities (those funded by PA and those funded by CDBG-DR but being used as match for PA). For sites/facilities using HUD CDBG-DR funds, all HUD CDBG-DR eligibility and regulatory requirements will be met in accordance with HUD requirements. Where shared cross-cutting Federal requirements apply and are perceived by the Commonwealth as conflicting, FEMA and HUD will issue joint-guidance to reconcile.

⁴ Letter from FEMA to Omar Marrero, Governor’s Authorized Representative, dated July 5, 2019.

⁵ 40 CFR Part 1500, 36 CFR Part 800, 44 CFR Part 9, and 24 CFR Part 58, and DHS Directive 023-01 and FEMA Directive 108-1

When work is complete, PA program reimbursement requests may be submitted by the Subrecipient through the standard reimbursement process established by the Commonwealth for disbursement of program funding. PA reimbursement requests will note the applied CDBG-DR cost share match for the subaward. There should be no need to draw CDBG-DR funds in advance of their use for the CDBG-DR funded activity or to create a “revolving fund.” It is important to note that the federal share and non-federal share for FEMA-funded projects do not have to be drawn down at the same time.

The flexible match concept can perhaps best be demonstrated by the following simplified scenario of ten FEMA PA-eligible sites/facilities with equal total eligible project costs consolidated into one subaward:

Standard Approach (each site/facility is a separate subaward)					Flexible Approach (all sites/facilities combined into a single subaward)				
Site/ Facility	Total Project Cost	PA Funds	CDBG-DR Funds	Subaward Cost Share	Site/ Facility	Total Project Cost	PA Funds	CDBG-DR Funds	Subaward Cost Share
1	\$10	\$9	\$1	90/10	1	\$10	\$10		
2	\$10	\$9	\$1	90/10	2	\$10	\$10		
3	\$10	\$9	\$1	90/10	3	\$10	\$10		
4	\$10	\$9	\$1	90/10	4	\$10	\$10		
5	\$10	\$9	\$1	90/10	5	\$10	\$10		
6	\$10	\$9	\$1	90/10	6	\$10	\$10		
7	\$10	\$9	\$1	90/10	7	\$10	\$10		
8	\$10	\$9	\$1	90/10	8	\$10	\$10		
9	\$10	\$9	\$1	90/10	9	\$10	\$10		
10	\$10	\$9	\$1	90/10	10	\$10		\$10	
Total 1-10	\$100	\$90	\$10	90/10	Total 1-10	\$100	\$90	\$10	90/10

Eligibility and Compliance Under Standard Match:

- Sites 1-10: All facilities and costs must meet eligibility and regulatory requirements of both FEMA PA and HUD CDBG-DR.
- Both FEMA and HUD must provide oversight and monitoring on all projects.

Eligibility and Compliance Under Flexible Match:

- Sites 1-10: All facilities and costs are PA-eligible and will meet all FEMA PA regulatory requirements. FEMA provides oversight and monitoring on sites 1-10 as all ten constitute the eligible project/subaward. The subrecipient must identify their intention to include all 10 sites together as a single subaward to meet environmental and historic preservation regulatory requirements.
- Site 10: In addition to being PA-eligible, the facility and all costs must be CDBG-DR-eligible and must meet all HUD CDBG-DR requirements. In

addition to FEMA, HUD also provides oversight and monitoring on Site 10 (but not sites 1-9, as no HUD funds are used for those sites). FEMA will not conduct environmental and historic compliance review for Site 10; the HUD Responsible Entity will be solely responsible for conducting environmental and historic compliance review in accordance with HUD's regulations.

Funding Summary Under Flexible Match:

- Use \$90 PA for Sites 1-9
- Use \$10 CDBG-DR for Site 10
- \$90 FEMA PA + \$10 HUD CDBG-DR = \$100 Subaward Total
- Subaward cost share = 90% Federal, 10% non-Federal (via CDBG-DR)

The resulting disaster-specific guidance will identify how other shared cross-cutting Federal requirements applicable to both programs will be addressed (e.g., procurement, fair labor standards, etc.). Existing disaster-specific guidance will be leveraged such as the Unified Federal Review (UFR) which addresses shared cross-cutting Federal requirements for environmental and historic preservation regulation compliance.

The guidance will also include information sharing roles and responsibilities among program staff at the field, regional, and headquarters levels. This is to include specifics on project tracking and reporting as well as access to program grant management systems (or system outputs) to identify sites and facilities where the two agencies have joint investment or other programmatic/agency equities.

- B. FEMA and HUD will work collaboratively to implement the FEMA HMA Cost-Share Guide (publication date May 2016) in meeting the non-Federal cost share requirements on FEMA-funded HMGP projects.**

The use of CDBG-DR to meet non-Federal cost share requirements of other Federal programs has been a long-standing practice. As a result, numerous grantees have employed flexible mechanisms for applying CDBG-DR to meet the non-Federal cost share requirements of the HMGP. FEMA has documented this process in the HMA Cost-Share Guide and promotes the use of any/all available funds for recipients to meet the required non-federal cost share. For FEMA HMGP, the current process requires the recipient to explain how they will effectively manage the process in the HMGP Administrative Plan.

- C. FEMA and HUD will work together to prevent duplication of benefits and fraud, waste, and abuse.**

FEMA and HUD will work together to develop strategies for improving data sharing between FEMA and CDBG-DR grantees, so that FEMA and CDBG-DR grantees have appropriate information and documentation relating to the relevant work done with FEMA funds and the relevant work done with CDBG-DR funds in sufficient detail to prevent the duplication of benefits, or fraud, waste, and abuse.

D. FEMA and HUD will work together to identify and document opportunities for improved alignment and leveraging of PA, HMGP, and CDBG-DR funds.

Due to differences in the timing and delivery of these major recovery and mitigation funding sources, opportunities to combine the two sources of funding for maximized impact and cost-effectiveness may be missed. While grantees are indeed responsible for the ultimate administration of these programs, much is beyond their control. FEMA and HUD will work to align planning requirements, deadlines, and extensions for these three sources of funds to the extent practicable and permissible. The agencies will also work to explore how to better align the overall grant funding and administration, to include key decision points encountered by local and state officials in moving the long-term recovery, rebuilding, and mitigation process forward. Particular consideration will be given to improving the coordination and alignment of grantee planning efforts regarding the use of HUD and FEMA funds for mitigation purposes.

The Recovery Support Function Leadership Group (RSFLG) can serve as a locus for regular briefings and resolution of questions national significance related to the implementation of this MOU. In addition to serving as the coordinating agency for the Housing Recovery Support Function (RSF), HUD is also a supporting agency for the Infrastructure Systems RSF which is coordinated by the U.S. Army Corps of Engineers (USACE).

V. REPORTING AND DOCUMENTATION

If the implementation of this flexible model is used prior to the issuance of formal guidance, then documentation at the project level may include reference to this MOU.

VI. POINTS OF CONTACT

HUD and DHS/FEMA designate the following key offices and personnel within their respective organizations to lead MOU implementation; ensure effective coordination across components of each agency which have equities in the MOU; and support partnership activities in a manner serving mutual interests and benefits. These offices and personnel will

also ensure that information sharing occurs among the field offices, regional offices, and headquarters as necessary.

A. Department of Housing and Urban Development (HUD)

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B. Federal Emergency Management Agency (FEMA)

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VII. OTHER PROVISIONS

A Nothing in this Agreement is intended to conflict with current law or regulation or the directives of FEMA or HUD. If a term of this agreement is inconsistent with such authority, then that term shall be invalid, but the remaining terms and conditions of this agreement shall remain in full force and effect.

B. Nothing in this Agreement is intended to restrict the authority of either party to act as provided by statute or regulation.

C. This Agreement, upon execution, contains the entire agreement of the Parties and no prior written or oral agreement, express or implied, shall be admissible to contradict the provisions of this Agreement.

D. Any information shared under this Agreement will comply with the Privacy Act, and to the extent required and allowable, the Freedom of Information Act (FOIA), and any other applicable statute, Executive Order, or regulation.

E. The use of Federal facilities, supplies and services undertaken under this Agreement will be in compliance with regulations promulgated by FEMA under the Stafford Act guaranteeing non-discrimination and prohibiting duplication of benefits. (See Stafford Act Section 312 and 44 CFR § 206.11.)

F. This Agreement is between FEMA and HUD and does not confer or create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity, by any third person or party (public or private) against the United States, its agencies its officers, or any person; or against HUD, their officers or employees or any other person.

G. This Agreement creates neither a partnership nor a joint venture, and neither party has the authority to bind the other. This agreement is not intended to be enforceable in any court of law or dispute resolution forum.

H. The Parties will use or display each other's name, emblem, or trademarks only in the case of projects and only with the prior written consent of the other party. The Department of Homeland Security (OHS) seal is protected by 18 U.S.C. §§ 506, 701, and 1017, among other laws, and use of the seal is controlled by the OHS Office of Public Affairs through OHS Management Directive No. 0030 (MD 0030). Written permission is required to use the OHS Seal. Any party to this agreement that is not a Federal entity may only use an official OHS seal or logo upon written permission from OHS.

I. The Parties agree to be responsible for the negligent or wrongful acts or omissions of their respective employees arising under this agreement. The Parties agree --subject to any limitations imposed by law, rule, or regulation -- to cooperate in good faith to resolve any claims promptly and, whenever appropriate, without litigation. For all claims or suits arising under this agreement, each party's designated legal representatives will, within (7) calendar days of receipt, provide each other's designated legal representatives copies of any documents memorializing such claims. Nothing in this Agreement shall be construed as a waiver of any sovereign immunity of the United States. The Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346 (b), 2671-2680 provides the exclusive monetary damages remedy for

allegedly wrongful or negligent acts or omissions by federal employees within the scope of their employment.

J. This Agreement is not a fiscal or funds obligation document. Any services, equipment or personnel provided to FEMA to accomplish the goals anticipated under this agreement are done so without expectation of reimbursement or the payment of fees related to the provision of such services, equipment or personnel unless otherwise agreed. Any specific work or activity that involves the transfer of funds, services, or property among the Parties will require execution of a separate agreement and will be contingent upon the availability of appropriated funds. Such activities must be independently authorized by appropriate statutory or other authority: This agreement does not provide such authority.

K. Any ancillary reimbursement agreements must be in writing and signed by both Parties.

L. This MOU is a voluntary agreement that expresses the good-faith intentions of the Parties, is not intended to be legally binding, does not create any contractual obligations, and is not enforceable by any party.

M. This MOU does not create any right or benefit, substantive or procedural, enforceable by law or equity, by persons who are not party to this agreement, against FEMA or HUD, their officers or employees, or any other person. This MOU does not apply to any person outside of FEMA and HUD.

N. All commitments made by HUD and FEMA in this MOU are subject to the availability of appropriated funds and budget priorities. Nothing in this MOU, in and of itself, obligates HUD and FEMA to expend appropriations or to enter into any contract, assistance agreement, interagency agreement, or incur other financial obligations. Any transaction involving transfers of funds between the Parties to this MOU will be handled in accordance with applicable laws, regulations, and procedures under separate written agreements.

This MOU is to take effect upon signature of both Parties, and will expire, unless otherwise extended, 5 years from the date of signature. This MOU may be extended or modified at any time though the mutual written consent of the Parties. Notwithstanding, the expiration or otherwise termination of this MOU will not invalidate any approvals provided pursuant to the terms of the MOU while effective.

