

PUBLICATION

FEMA Seeks Comment on Revised Policy Implementing Stafford Act Section 705

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On October 10, 2020, FEMA published a proposed revision to its existing policy for implementation of Stafford Act § 705, *Disaster Grant Closeout Procedures*. FEMA seeks comment on the proposed policy by December 10, 2020. Stafford Act § 705 has two subsections that give important rights to applicants and thereby limit FEMA's broad discretionary authority in the administration of disaster assistance funding. These provisions have created opportunities for applicants facing deobligation to successfully retain previously awarded funds and thus FEMA's policy to implement them should be of significant interest to disaster-prone state, tribal, and local governments.

Subsection (a) contains a statute of limitations on efforts by the Federal Government to recover disaster assistance paid to a state, tribal, or local government. As originally drafted, the three-year limitations clock started with the state recipient's transmission to FEMA of the final expenditure report for *all* projects of an applicant under a declared disaster or emergency, which did little to protect applicants from late deobligations, as this report is often submitted many years after a disaster event. The Disaster Recovery and Reform Act of 2018 changed § 705(a) to apply on a project-by-project basis, so that FEMA is now prohibited from initiating any action to recover assistance after "the date that is 3 years after the date of transmission of the final expenditure report for project completion as certified by the grantee." Since this change, determining what signifies the final expenditure report for project completion as certified by the grantee has been challenging, e.g., such reports are not consistently produced for small projects on a project-by-project basis. Key provisions of FEMA's proposed policy with respect to § 705(a) includes:

- Underscoring that the administrative action subject to § 705(a) need not be completed within the three-year limitation period, only initiated (e.g., by providing notice), to avoid application of § 705(a).
- Directing recipients to submit certifications of the final expenditure report for project completion electronically to FEMA to avoid ambiguity on the date the three-year limitation period begins. The proposed policy defines what constitutes a "final expenditure report for project completion" for both small and large projects and requires the recipient to submit a certification letter containing certain specified information.
- Clarifying that issuance of an RFI after submission of the required certification that triggers the three-year clock "constitutes the beginning of an administrative action to potentially recover funds" and thus tolls the clock until "the recipient and/or subrecipient provide the requested information and FEMA makes a determination on the substantive issue," effectively granting FEMA the ability to stop every three-year limitation period by issuing an RFI.
- Providing that a deobligation of funds prohibited by § 705(a) cannot be made instead as an administrative offset against future federal payments due to the applicant. It also clarifies that § 705(a) can prohibit deobligation even to adjust funding where a duplication of benefits has occurred due to the receipt of insurance proceeds.

Stafford Act § 705(c), *Binding Nature of Grants Requirements*, provides that a state, tribal, or local government applicant *shall not* be liable for reimbursement or any other penalty for any Stafford Act payment made to it if three criteria are met: (1)–the payment was authorized by an approved agreement specifying the costs (i.e., a project worksheet); (2)–the costs were reasonable; and (3)–the purpose of the grant was accomplished. FEMA has used its § 705 policy to curtail the "binding nature" of its grant payments by taking the position that "the purpose of the grant was not accomplished" if an applicant failed to comply perfectly with federal procurement standards. FEMA's proposed revised policy maintains this position, severely limiting the practical application of § 705(c). While this position may not be consistent with the language or intent of § 705(c), to date it has not been subjected to judicial review.

For more information, please contact [Michelle F. Zaltsberg](#) or any member of Baker Donelson's [Disaster Recovery and Government Services Team](#).