

# PUBLICATION

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## Draft Rules Issued for New Arbitration Option for FEMA's Public Assistance Program

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**The Civilian Board of Contract Appeals (CBCA) has published draft rules for the new arbitration option for the Federal Emergency Management Agency's (FEMA) Public Assistance Program. In this analysis, we examine the proposed rules in the context of the ongoing effort to address the right of arbitration under the program.**

On October 5, 2018, the Disaster Recovery Reform Act (DRRA) amended the Stafford Act to provide a permanent right of arbitration for qualifying disputes under FEMA's Public Assistance Program. The arbitrations will be conducted by the U.S. Civilian Board of Contract Appeals (CBCA). The dispute must be related to assistance provided (or denied) for a disaster declared on or after January 1, 2016, and the amount in dispute must be more than \$500,000, or \$100,000 for applicants for assistance in a rural area, as defined.

In December 2018, FEMA issued a limited fact sheet on the new process and advised it would be issuing regulations specific to the new right of arbitration. However, the CBCA issued proposed rules of procedure in the Federal Register on March 5, 2019. Comments in response to the CBCA's proposed rules must be submitted by **May 6, 2019**. Even while FEMA and the CBCA are working out details of the program, applicants with eligible projects may request arbitration immediately, provided they meet the requirements as provided by the DRRA.

This is the third arbitration process established by Congress for FEMA's Public Assistance Program, reflecting its continuing concern with the speed and independence of the traditional administrative appeal system handled by FEMA internally. Much was learned from the first two forays into arbitration. First, in response to the catastrophic storms of 2005, Congress required FEMA to establish an arbitration process so that applicants could look to an independent forum for expedited relief. Arbitration was available only for disputes originating from claims associated with Hurricanes Katrina or Rita and involving projects with costs exceeding \$500,000. Under this program (which is still being utilized), the CBCA conducts arbitrations *de novo*, meaning that the CBCA was not required to defer to FEMA's decision or to accept FEMA's fact-finding, but could accept additional information and argument and make its own decision on the merits of each case. Congress created a second, nationwide arbitration process after Hurricane Sandy in 2013, but was persuaded by FEMA to limit the authority of arbitrators under this program: arbitrators were required to give deference to FEMA's fact-finding and to FEMA's decision. This program was allowed to expire in December 2015 without a single request for arbitration filed – likely reflecting applicants' views of the clearly biased ground rules.

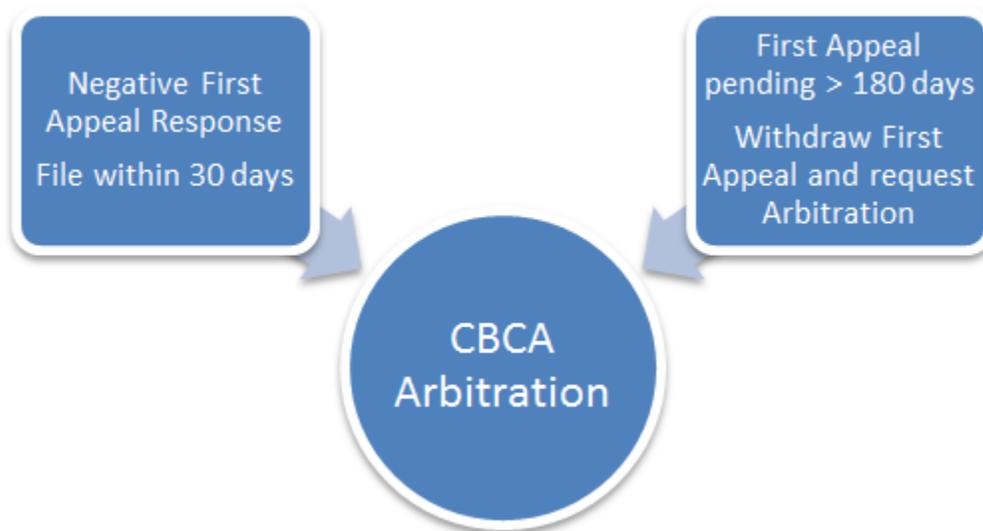
The DRRA arbitration process follows the general model of the Katrina arbitration process – but with some important differences intended to expedite and lower the cost of the arbitration process.

### Applicability

Under the DRRA, the right of arbitration is available to any applicant disputing a FEMA decision regarding the eligibility for, or repayment of, assistance where the **amount in dispute** (not the amount of the project) is more than \$500,000, **or** more than \$100,000 for applicants in **rural areas**. Additionally, the dispute must arise from a **disaster declared after January 1, 2016**.

## Time Considerations

In order for an applicant to exercise its arbitration right, it must either receive an adverse first appeal decision and file its request for arbitration **within 30 days from receipt of FEMA's determination**, or have a first level appeal **pending with FEMA for more than 180 days**.



## Deciding Between the Administrative Appeal and Arbitration Processes

Before arbitration became available, the Stafford Act's administrative appeal process was the only way most applicants could challenge a FEMA field or Regional determination. Judicial review is normally unavailable because FEMA's decisions on what disaster assistance to provide are largely discretionary, and the federal government cannot be liable for its discretionary acts or omissions under the Stafford Act. The principal exception is where FEMA has awarded assistance and then later takes the money back (see *Snohomish Public Utility District No. 10 v. FEMA* and *South Florida Water Management District v. FEMA*) or where the FEMA decision violates a mandatory duty under the Stafford Act and is contrary to law.

However, FEMA's administrative appeal process has been fundamentally broken for much of the last 15 years (although there are signs of improvement). The administrative appeal process requires an applicant to navigate two levels of appeal (first to the applicable Regional Administrator, and if unsuccessful, to the Assistant Administrator), yet delay is endemic. A [2017 report](#) published by the U.S. Government Accountability Office (GAO) stated, "from 2014 to July 2017, FEMA processed only 9% of first-level and 11% of second-level appeals within its 90-day limit." These delays have significantly slowed recovery and frustrated applicants across the country.

| Appeal Process                        | Arbitration   |
|---------------------------------------|---|
| No transparency at First Appeal level | All decisions published on CBCA website   |
| No time limits enforced against FEMA  | FEMA held to strict response time limits by the court   |
| FEMA is the fact finder and arbiter   | Conducted outside of the agency and decided through a quasi-judicial process before a neutral |

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|--|--|
|  | panel  |
| Costs may be reimbursable as a direct administrative cost (or now under the DRAA as management costs) (See previous alerts <a href="#">here</a> and <a href="#">here</a> ) | Costs are borne entirely by the applicant and not reimbursable at any point – and likely much higher than appeal costs |
| Second appeals do <b>not</b> allow additional information not included in the first appeal   | Arbitrations allow additional information not included in the first appeal   |

### CBCA's Proposed Procedural Rules

One of the major changes the CBCA proposes is the option for a single panel member to conduct a hearing outside of Washington, D.C. It also proposes the following basic timelines and roles and responsibilities of the parties involved:

- **Request for Arbitration:** Applicant must e-file request with CBCA either (1) within 30 days from receipt of FEMA determination of First Appeal; or (2) after 180 days of FEMA Region's receipt of an applicant's First Appeal (but before an applicants' receipt of a decision).
- **Initial Conference:** CBCA will conduct a telephonic scheduling conference as soon as practical, ordinarily within 14 calendar days after the clerk docketed an arbitration request. Presumably, the nature of the hearing required will be set at this conference (e.g., live witnesses vs. oral argument only vs. "paper" submissions only; location in Washington or at applicant's location; rules for expert testimony and expert reports).
- **Response to Request for Arbitration:** CBCA will schedule any filings necessary after receiving the arbitration request, presumably during the initial conference (a FEMA response is not required unless requested by the CBCA).
- **Pre-hearing Motions:** Recognizing that many Katrina arbitrations were delayed significantly by FEMA's practice of filing multiple pre-hearing motions to dismiss, the CBCA states that such motions will rarely be permitted, and will not be decided until after the close of the hearing.
- **Arbitration Hearing:** CBCA will begin the live, or written record (paper hearing), hearing within 60 calendar days after the initial conference.
- **Arbitration Decision:** CBCA will resolve the dispute within 60 calendar days after the close of the hearing.

### Tips for Successful Dispute Resolution

- **Don't miss filing deadlines – for appeals or arbitrations.** All time requirements for appeals and arbitrations are strictly enforced. If a deadline is missed, it is likely the appeal or arbitration right is forfeited, along with all the funding at stake.
- **For Appeals: Seek to obtain a meeting with FEMA decision makers on the dispute.** FEMA has expressly authorized applicants to seek "Facilitated Discussions," and face-to-face meetings are frequently very helpful with or without a "facilitated" format.

- **The First Appeal "Administrative Record" is critically important.** FEMA currently prohibits applicants from submitting additional information on Second Appeal. If an applicant pursues arbitration, the Administrative Record will be a part of the arbitration record before the CBCA. That said, the DRRRA specifically states that a request for arbitration may contain additional documentation supporting the applicant's position, and the CBCA's proposed procedural rules state that "an applicant or grantee may, but need not, supplement materials it previously provided to FEMA regarding the dispute" and "the panel will not exclude as untimely evidence proffered before close of arbitration." Nonetheless, applicants must treat First Appeals as a serious legal filing that seeks both to persuade FEMA's Regional Administrator to rule in its favor, and provides the documentation the Regional Administrator would need to justify that decision before an Office of Inspector General Auditor. And if an issue is significant enough that an applicant will pursue arbitration, the First Appeal should still be thorough and complete. The cost and complexity of arbitrations will increase dramatically where the applicant seeks to provide new information or arguments that it had not deemed important enough to include in the First Appeal.

### **Bottom Line**

The DRRRA arbitration option will encourage timely reviews on behalf of FEMA at the first appeal level, encourage conflict resolution in project decisions, and allow a fair and equitable approach to determinations when a resolution of a disagreement between an applicant and FEMA cannot be reached. Comments in response to the CBCA's proposed rules must be submitted by **May 6, 2019**.

For more information on this or other matters, please contact [Ernie Abbott](#), [Wendy Ellard](#), [Danielle Aymond](#), [Michelle Zaltsberg](#), or any of the members of Baker Donelson's [Disaster Recovery and Government Services Team](#). These team members have years of experience representing eligible applicants on FEMA Public Assistance Program issues and disputes, including participation for applicants or for state grantees in more than 50 arbitrations before the CBCA.