

PUBLICATION

FEMA Updates Policy on Stafford Act § 705

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On June 2, 2021, the Federal Emergency Management Agency (FEMA) issued version 2 of its policy on Stafford Act § 705, Disaster Grant Closeout Procedures. Stafford Act § 705 (42 U.S.C. § 5205) contains two important subsections:

- subsection (a) provides for the three-year statute of limitations period that bars FEMA from initiating action to recover payments made to state or local governments; and
- subsection (c) prohibits FEMA from recovering payments made to state or local governments if certain conditions are met.

The Disaster Recovery Reform Act of 2018 (the "DRRA") amended the Stafford Act, including § 705 (we previously wrote about the DRRA [here](#)). FEMA's updated policy addresses those changes.

FEMA's revised policy on § 705 clarifies:

- FEMA confirms that § 705 prevents its deobligation of funds approved in a Project Worksheet (PW) that are in excess of actual costs, where the excess is not disputed by the applicant, recipient, or FEMA.
- Under the previous version of § 705(a), the three-year statute of limitation period began to run when the recipient transmitted to FEMA the "final expenditure report for *the disaster or emergency*". Because projects can last years, triggering the limitations period from the end of the last project for a disaster often rendered the statute of limitations toothless. The DRRA amended § 705(a) so that FEMA's limitations period now runs from the recipient's "transmission of the final expenditure report for *project completion*" and thus can be applied on a project-by-project basis. FEMA's revised policy recommends electronic transmission to avoid a discrepancy between the date sent and date received and clarifies when the three-year period is triggered for small and large projects:
 - For Small Projects, the limitations period begins on the date the recipient submits the Project Completion and Certification Report (also called a P.4 report) *or* the prior version *and* a letter certifying that the subrecipient completed the approved scopes of work for all of its Small Projects. Historically, recipients have not always submitted a P.4 for each small project, which limited applicability of § 705(a). FEMA's new policy allows recipients to submit the P.4 on a project-by-project basis *or* submit a letter for all Small Projects when they are complete. Subrecipients who want to trigger the three-year statute of limitations for Small Projects on an individual project basis, rather than upon completion of all of their Small Projects, should request the recipient timely submit a P.4 report.
 - For Large Projects, the limitations period begins when the recipient certifies the project is complete, all incurred costs are associated with the approved scope of work, the work was compliant with the FEMA-State/Territory/Tribe Agreement, and all payments were made in compliance with 2 C.F.R. § 200.305. Notably, where the recipient has requested FEMA

assistance with project validation for closeout, the recipient must still submit its certification once the process is complete.

- The new policy acknowledges that FEMA may issue a Request for Information (RFI) during its closeout review. The new version clarifies that the issuance of the RFI pauses the limitations period and the period resumes, without restarting, once FEMA notifies the recipient in writing that FEMA has received all requested information.
- Although § 705(a) does not distinguish between the agency's available debt collection methods, under the old policy FEMA said it would not directly recover funds outside the three-year period but would still pursue administrative offset unless prohibited by § 705(c). Under the new policy, FEMA states that where § 705(a) prohibits FEMA action, it will also refrain from recovering funds through administrative offset.
- With respect to § 705(c), the new version of FEMA's policy is largely unchanged. Under this section, FEMA cannot recoup payments made 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."
- FEMA's policy interprets each of these conditions. Applicants should familiarize themselves with FEMA's interpretations including:
 - FEMA considers "payments made" when the funds are drawn down by the recipient, even if they have not been disbursed to the subrecipient.
 - FEMA considers the "approved agreement specifying the costs" to be an obligated PW together with the applicable FEMA-State/Territory/Tribe Agreement.
 - FEMA will find a cost to be reasonable if "in its nature and amount, it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost."
 - FEMA does not consider the purpose of the grant accomplished if an applicant did not comply with the terms of the grant. This includes an applicant's failure to follow federal procurement standards, obtain & maintain insurance requirements, and Environmental Planning and Historic Preservation requirements, among others.

Although not new to the policy with this iteration, it is worth repeating that failure to comply with any of the three elements § 705(c) will make the statute's protection inapplicable, even if FEMA's reason for the recoupment is wholly unrelated to the noncompliance. For example, if FEMA finds that an emergency sole source procurement was not justified, FEMA may take the position that the conditions of § 705(c) have not been met and can take back any funds associated with the subgrant for any reason. Similarly, an applicant who fails to obtain and maintain insurance on a facility after drawing down funds to repair it, could later face deobligation for an applicant eligibility problem, having lost the protection of § 705(c). The protection offered by § 705(c) is deceptively fragile. FEMA's position that *any* noncompliance with *any* term of the grant eviscerates the protection provided by §705(c) has not yet been subjected to judicial review.

Contact [Michelle Zaltsberg](#), [Erin Greten](#), or any member of [Baker Donelson's Disaster Recovery and Government Services Team](#) with additional questions.