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Beware of Federal Requirements when Selling or Leasing Facilities Funded by FEMA

Authors: Ernest B. Abbott, Wendy Huff Ellard
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As we are now more than ten years from the devastation of Hurricane Katrina and five from Superstorm Sandy, many applicants that received federal funding through the Federal Emergency Management Agency's (FEMA) Public Assistance Program find themselves no longer in need of facilities that FEMA may have paid to repair or replace. While sale or lease of these properties may sound like a nice way to generate much-needed capital, federal grant regulations may be interpreted to restrict the disposition of properties that previously received FEMA funding. Applicants must be aware of these little known requirements, especially as federal grant regulations are being more strictly enforced.

Section 406 of the Stafford Act authorizes FEMA to provide funding for repair or replacement of facilities damaged or destroyed by a federally declared disaster. Under some circumstances, FEMA will also fund the costs required to relocate a facility, including the cost of new land, site work and ancillaries. However, federal regulations place little-known restrictions on disposing of real property acquired in whole or in part with federal funds.

- **Disasters declared before December 26, 2014 (including Hurricanes Katrina, Rita, Wilma, etc., and Superstorm Sandy):** 44 C.F.R. § 13.31 for public entities and 2 C.F.R. § 215.32 for private non-profit entities place disposition restrictions on property "acquired in whole or in part using federal funds." These regulations require that when real property is no longer needed for the "originally authorized purpose," the applicant must request disposition instructions from FEMA. The applicant may choose to retain the title, or FEMA is authorized to approve a sale, but either option is subject to the condition that the applicant give FEMA a portion of the proceeds. FEMA's "cut" is calculated by applying FEMA's percentage of prior funding (the federal share) to either the fair market value of the property or the sales price, less reasonable selling/fixing expense incurred. FEMA has interpreted the pre-2014 regulations as applying only to real property "acquired" using FEMA funds (i.e., the restrictions are applicable to replacement projects only, not repair projects).
- **Disasters declared on or after December 26, 2014:** Regulations found in the current federal grant regulations at 2 C.F.R. § 200.311 are similar to the above, but apply to real property acquired *or improved* using federal grant funds. This slight revision could result in near limitless attachment, impacting virtually all facilities restored using FEMA funding.

The question under this regulation is: What is "the originally authorized purpose" that may trigger the federal government's claim to a portion of subsequent proceeds? FEMA has stated in one policy that "the purpose of a grant" is not just the performance of eligible work, but also compliance with all post-grant conditions. If grant funding is provided to restore eligible hospital facilities of non-profits, for example, does the "purpose of the grant" include that the facility remain an eligible non-profit or public facility? We have seen other indications that FEMA may be trying to determine the nature of the continuing interest the federal government may have after funding a replacement or improved project under the Stafford Act. Does the purpose of the grant end when the facility is restored to pre-disaster condition, in compliance with applicable codes, specifications and standards, and in compliance with floodplain management and mitigation criteria? When the grant is closed

out? If repair costs triggered replacement, does this mean the federal government now has an interest in the facility replaced?

A broad continuing interest does not appear supported. The Stafford Act was enacted to help local governments and communities rebuild after a disaster; to restore what they had prior to the disaster – with improvements to make their property more resilient. The Stafford Act was not intended to transfer from the eligible property owner to the federal government an ownership interest in that property. If FEMA, however, interprets the statute to impose a post-grant property interest in a replacement project or an improved project, project documents should specifically state that continuing interest.

It is not yet certain how FEMA might apply these regulations going forward, especially in case of disasters declared under the current grant regulations. Any entity potentially impacted should be aware of the possible restrictions – and obligation to re-pay FEMA – if disposition of a FEMA-funded property is being contemplated.

If you have questions about the specific items covered by this alert, or would like to discuss FEMA's disaster assistance programs generally, please contact Wendy Huff Ellard, Ernest B. Abbott or any of the members of our Disaster Recovery and Government Services Team.