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Don't Take FEMA Closeout Deobligations Lying Down

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As the 2023 Hurricane season continues, the depleting Disaster Relief Fund isn't the only thing that participants in FEMA's programs should be concerned about. The increased focus on the rising costs of disasters and the falling balance of FEMA's coffers has also brought intense pressure to close "legacy" disasters. FEMA is working to expedite final reviews and many states and applicants are noticing silent deobligations, retroactively taking back millions for unsuspecting subrecipients.

FEMA has the authority to retroactively take back (or deobligate) federal funding for a variety of reasons including:

- Improper procurement;
- Unreasonable costs;
- Work performed outside of the scope of the contract or project;
- Failure to comply with environmental and/or historical preservation laws and regulations;
- Lack of Documentation; or
- FEMA's own mistakes!

The most common reason we see cited during the closeout of these legacy disasters is a lack of documentation. Although this documentation likely did exist or could have easily been obtained when the work was being performed and the costs claimed, it can now be extremely hard to provide for a variety of reasons: database changes, staff turnover, age, other disasters, cyberattacks, dissolution of contractors, etc.

Considering that many of these legacy disasters occurred more than ten years ago, the ability of recipients and subrecipients to provide additional documentation at this late stage is often near impossible. Many subrecipients simply throw their hands up and accept the deobligation by either cutting a check back to the state or accepting an offset to funding owed to them by the state under a different, and more recent, event. But this borrowing from Peter to pay Paul can have serious financial impacts as the events continue to cascade and the debts mount.

FEMA's retroactive deobligations should not always be accepted. Subrecipients have numerous options to help support and retain those dollars. Here are a few tips:

Monitor All Project Amendments

During the closeout process for these legacy events, FEMA often will issue its determination within an amendment to the Project Worksheet (PW). Subrecipients aren't receiving a Determination Memorandum, but rather a newly versioned PW. If the subrecipient doesn't read the fine print within the amendment, they may fail to notice that FEMA has taken funding and alerted them of their appeal rights. Most concerning about these closeout denials is that many subrecipients are simply unaware that their appeal deadlines have begun to toll! You have the Right to Appeal – use it!

In the meantime, subrecipients should monitor carefully all documents they receive from FEMA and review in detail amendments to projects – especially those issued as the result of a closeout. Be sure to look for any

negative findings and any indication of appeal rights. And when in doubt – file an appeal within 60 days of FEMA issuing the amendment.

Create New Documentation!

Just because the documentation that used to exist may no longer be available … that doesn't mean all is lost. FEMA policy and precedent support the use of a variety of resources and creative ideas to generate sufficient documentation. This can include affidavits, public documents, other historical documents, documents that may be available from other federal or state agencies, and more.

The point is, just because FEMA (and maybe the state) initially determines there is not enough documentation presented to support the full costs for your project, all hope is NOT lost. Many policies are flexible and FEMA has a great deal of discretion regarding what documentation it can accept, as long as it is reasonable and helps to support the claimed cost. So get creative!

Use 705(c) to Hold Onto that Funding!

Stafford Act Section 705(c) is a powerful, but often overlooked, tool that states and local governments may use to retain funding FEMA attempts to deobligate when certain conditions are met. Congress added "Disaster Grant Closeout Procedures" to the Stafford Act in 2000 in response to concern with FEMA's decisions which frequently clawed back disaster assistance provided to state and local governments years after the funds had been spent. Section 705(c) provides that states and local governments "shall not be liable" for reimbursement or any other penalty (including deobligation) if certain conditions are met.

However, this protection is not unlimited:

1. Section 705(c) does not apply at all if no actual payment is drawn down. Protection exists only if FEMA has obligated funding for a specific project, and the state recipient has drawn the obligated funds for that project down from its FEMA Smartlink account!

2. FEMA has sought to narrow the situations in which Section 705(c) provides protection, particularly where the subrecipient has not complied with federal grant procurement, duplication of benefits, and environmental requirements.

3. It remains the burden of the subrecipient to show that the costs incurred for a project, and sometimes for different portions of a project, are reasonable. The finding of reasonableness is usually satisfied where FEMA itself has determined that specific costs are reasonable.

Although arguing with FEMA about decade-old costs may feel daunting and overwhelming – subrecipients can triumph!

Should you have any questions about this topic, please contact Danielle Aymond, Wendy Huff Ellard, Jaron Herd, or another member of Baker Donelson's Disaster Recovery Team.