Overview

For additional guidance, please refer to Steptoe’s COVID-19 Resource Center.

As part of the federal government’s response to the COVID-19 pandemic, President Trump declared two different types of emergencies. The first, under the National Emergencies Act, allows the president to waive various federal regulatory requirements and activate a variety of emergency authorities already embedded in federal statutes. The second, under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), allows the federal government, through the Federal Emergency Management Agency (FEMA), to take specific actions in support of the US Department of Health and Human Services (HHS), as the lead federal agency for the COVID-19 response, and to provide certain specific types of assistance to states and local governments as well as other specific types of private non-profit organizations. Among other things, the Stafford Act declaration allows FEMA to provide federal financial assistance from the President’s Disaster Relief Fund.

Due to the nationwide scope of the president’s emergency declaration under the Stafford Act, all government agencies, governmental-type special districts, and all private non-profit organizations performing either critical services (i.e. education, utilities, emergency services, or medical services) or non-critical but essential social services to the public (including the operation of nursing homes, shelters, food assistance programs, and similar services) should anticipate the availability of this assistance by: (1) documenting costs associated with emergency measures they are taking to save lives, protect public health and safety, protect improved property, and eliminate or lessen the immediate threat of additional damage; and (2) communicating with their local or state emergency management agency concerning eligibility for federal reimbursement and the process for documenting and submitting claims.

There are two types of declarations under the Stafford Act: (1) major disasters and (2) emergencies. Major disaster declarations unlock a range of federal disaster response, recovery, and hazard mitigation authorities and associated funds. Emergencies are more narrowed, providing funding and direct federal assistance for only certain types of emergency activity, usually with a capped amount of assistance available. There are also two types of emergency declarations: (1) emergency declarations requested by the governor of an affected state or the tribal chief executive of an affected Indian tribal government (under Section 501(a) of the Stafford Act), and (2) emergencies declared by the president where primary responsibility rests with the federal government (under Section 501(b) of the Stafford Act). Emergency declarations typically make available reimbursement for eligible “emergency protective measures” undertaken by states or territories, Indian tribes, local governments, and private non-profit organizations providing defined types of critical services or essential social services (e.g. education, healthcare, and similar functions) (referred to here as “Eligible Entities”).
In this case, President Trump issued a letter to the Secretaries of the Departments of Homeland Security, Health and Human Services, and the Treasury, as well as the FEMA Administrator, declaring that an emergency exists under Section 501(b) of the Stafford Act due to the ongoing COVID-19 pandemic for which primary responsibility rests with the federal government. The intended effect of this declaration is primarily to have FEMA coordinate federal government activities. The format is somewhat unusual, as was the national (rather than state-by-state) scope of the declaration. However, FEMA has indicated that eligible emergency protective measures taken by Eligible Entities, which are at the direction or guidance of public health officials in response to the COVID-19 pandemic, and not supported by the authorities of another federal agency, will be reimbursed under FEMA's Public Assistance rules. Costs are to be shared 75% by the federal government and 25% by the recipient (or by a state, local, or tribal government, at its option, if the state, local, or tribal government is not the recipient).

So, in addition to increased activity and coordination by the federal government, what does this mean?

- **Eligible Entities.** Eligible Entities should collect documentation reflecting direction or guidance from state and local officials to undertake emergency protective measures and record all potentially reimbursable costs associated with such measures to protect public health and safety.

- **Private Non-Profit Organizations.** As part of the process of documenting and recording potentially reimbursable costs associated with measures to protect public health and safety, potentially eligible non-profit organizations should determine which of their activities fall within FEMA’s guidelines for reimbursement and whether FEMA or other local emergency agencies impose any additional requirements for reimbursement of those activities. Under FEMA guidance, eligible entities are non-profit organizations that either:
  - Provide a critical service (defined as education, utilities, emergency services, or medical services); or
  - Provide a non-critical but essential social service to the general public (which includes the operation of nursing homes, shelters, food assistance programs, and similar services).

- **FEMA Reimbursement.** Since requests for FEMA reimbursement must run through states, territories, and tribes, private non-profit organizations providing governmental-type services should immediately contact the state, territorial, or tribal emergency management agency to understand how costs should be collected, recorded, and reimbursed.

- **Emergency Protective Measures.** As discussed above, reimbursement is available for "emergency protective measures." Those measures include activities that must be done immediately to save lives, protect public health and safety, protect improved property, and eliminate or lessen the immediate threat of additional damage, and can include costs associated with overtime and sick leave for permanent employees and straight time and overtime associated with temporary employees, transporting and pre-positioning equipment, purchasing equipment and supplies providing essential commodities, evacuating and sheltering individuals, and providing medical care and transport. Emergency protective measures eligibility can be more restrictive for private non-profit organizations than for local governmental entities. However, the Stafford Act has rarely been used for pandemics and there may be repeated changes to eligibility criteria as different types of emergency measures are undertaken by governments and private non-profit organizations to save lives, protect public health and safety, and eliminates or lessen the immediate threat of additional damage (such as temperature screening, building access control, decontamination, and other virus-specific actions).

- **Follow Existing Procurement Policies and Procedures.** Although there is no question that COVID-19 is presenting unique and urgent challenges for every entity involved in providing critical or essential social services, private non-profit organizations and other non-state entities must continue to follow their existing procurement policies and procedures as well as procurement requirements imposed on recipients of Federal funding under OMB's Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (2 CFR Part 200). Those procurement rules include certain exceptions to the typical requirement for competitive procurements, but those exceptions are limited.

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  - The procurement decisions made today (and over the next weeks) will be subject to scrutiny months from now – well after the COVID-19 crisis is over. Despite the seriousness of the current situation, federal reviewers and auditors will expect to receive contemporaneous documentation: (1) demonstrating that any sole-source or non-competitive procurements to address COVID-19 were made in accordance with existing procurement procedures; and (2) justifying the use of any non-competitive exceptions based on exigent or emergency exception. Among other things, this documentation should explain how the procurement addresses an exigent or emergency situation; why a competitive procurement was not available or would have caused an unacceptable delay in addressing the exigency or emergency; the steps taken to confirm that competition could not be used; and, where required, a cost or price analysis determining that the costs incurred are reasonable.
Although relief is probably available under the Stafford Act, there are numerous issues, such as insurance coverage and eligibility for assistance from other federal agencies that can complicate reimbursement, which are in addition to substantial administrative challenges associated with demonstrating the reasonableness of incurred costs, such as adequate documentation, compliance with existing procurement rules, preparation of an appropriate cost submission, and other issues. Steptoe can assist with these and other challenges associated with cost reimbursement for the COVID-19 pandemic under the Stafford Act.


[2] FEMA has now issued emergency declarations specific to each state, which is consistent with FEMA’s past practice. These declarations are available here. It is likely that governors and tribal chief executives will request modifications over time to the declarations specific to their states or tribes, unlocking more categories of reimbursements and/or increasing the federal share of reimbursement.

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