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## Emergency Procurement

### **View From Brown Rudnick: Government Contracting in the Wake of Major Disasters**



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It has been weeks since Hurricane Sandy landed on the eastern coastline of the United States. The full effects are yet to be seen, but the storm has displaced thousands of people, destroyed private and public infrastructure, and interrupted economic activity. Estimates of the infrastructure damage are in the tens of billions of dollars. FEMA has said that it has \$3.2 billion ready to spend on the relief efforts. Some estimate that FEMA ultimately will spend even more than that before the work is done. Thus, by all accounts, the road to recovery will be a long and expensive one. The federal government, and by extension federal contractors, will have a major role in that recovery.

Almost before the floodwaters recede, everyone expects the government to swoop in with FEMA shovels at the ready and begin reconstruction efforts. But federal procurements are time-consuming and cumbersome. And when a major disaster is declared, procurement rules do not simply get washed away by the storm. Pro-

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urement officials have to ensure that the government pays a reasonable price, awards contracts fairly, and protects taxpayer dollars from fraud, waste, and abuse. That takes time. But there is no time when natural disasters strike. And so there remains a tension between responding to a major crisis and complying with procurement rules that create pitfalls for procurement officials and contractors.

That said, procurement rules do provide flexibility for agencies to conduct emergency procurements.<sup>1</sup> For instance, sole-source awards are permitted at or below the micro-purchase threshold, and streamlined procedures are available for purchases of commercial items at or below the simplified acquisition threshold.<sup>2</sup> In cases where disaster assistance qualifies as a contingency operation, the simplified acquisition threshold can be increased from \$150,000 to \$300,000, and the micro-purchase threshold can be increased from \$3,000 to \$15,000.<sup>3</sup> Also, agencies may limit competition “[w]hen the agency’s need for the supplies or services is of such an unusual and compelling urgency that the government would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals, full and open competition need not be provided for.”<sup>4</sup> Note this is not a justification for a sole-source procurement; it allows for limited competition, which, at times, results in a sole-source award.

Hurricane Katrina provides a cautionary tale for procurement officials and businesses eager to do the good work of reconstruction. According to one congressional report, “billions of dollars in no-bid contracts, combined with inadequate contract management and oversight, led to pervasive overcharging and wasteful spending in Katrina-related contracts.”<sup>5</sup> The congressional report also concluded that:

<sup>1</sup> See Federal Acquisition Regulation Part 18.

<sup>2</sup> See FAR Parts 12 and 13.

<sup>3</sup> See FAR 18.201; 2.101; 13.201(g).

<sup>4</sup> See 6.302-2(a)(2); see also FAR 18.104.

<sup>5</sup> United States House of Representatives Committee on Government Reform – Minority Staff, Special Investigations Division, “Waste, Fraud, and Abuse in Hurricane Katrina Contracts,” August 2006, at 1, available at <http://>

■ **Full and open competition was the exception, not the rule.** In September 2005, one month after Hurricane Katrina landed, 51 percent of the contracts dollars awarded by FEMA were awarded without full and open competition. In October 2005, that percentage went up to 93 percent, even though any “urgent and compelling” circumstances that had existed were no longer present. And by December 2006, FEMA still was awarding 57 percent of the contract dollars without full and open competition.<sup>6</sup>

■ **Poor contract planning and failure to define requirements.** Contracts were awarded by FEMA without knowledge of the government’s requirements, resulting in, among other things, a \$3 million contract for 4,000 base-camp beds that were never used and a \$10 million renovation for barracks that housed only six people. At the same time, FEMA failed to anticipate needs for temporary housing and public buildings for displaced residents.<sup>7</sup>

■ **Inadequate contract oversight.** FEMA had only 36 of the 172 acquisition officials it needed to manage the Katrina-related contracts, meaning a lack of oversight for a significant amount of contractor performance.<sup>8</sup> In some instances, the FEMA official responsible for contract oversight was unaware of their re-

sponsibilities or there was no documentation of who authorized the contractor to perform particular activities.<sup>9</sup>

And so let the bidder beware. In news coverage of Hurricane Sandy, commentators already have begun comparing perceived shortcomings in the federal government’s response to Hurricane Katrina. Government contracts awarded in Sandy’s wake likely will receive more-than-usual scrutiny, especially in relation to sole-source awards, which received the most criticism during Hurricane Katrina. If the government fails to define its requirements clearly (as it did after Katrina), cost overruns, and scope creep are inevitable and disputes over performance far more likely. Contractors should be prepared to be closely scrutinized (probably after-the-fact) and likely audited.

And what about the future? You don’t have to be Willard Scott to know that there will be other natural disasters requiring emergency responses. And since Katrina, the government has spent a considerable amount of effort to improve its procedures and practices for emergencies. But because we don’t know how nature will hit us, when it will hit us and where it will hit us, there always will be obstacles. Nonetheless, we are confident that more planning up front will smooth the response on the back end.

[democrats.oversight.house.gov/images/stories/documents/20060824110705-30132.pdf](http://democrats.oversight.house.gov/images/stories/documents/20060824110705-30132.pdf).

<sup>6</sup> *Id.* at 2.

<sup>7</sup> *Id.* at 4.

<sup>8</sup> *Id.* at 5.

<sup>9</sup> William T. Woods, GAO-06-714T, “Improving Federal Contracting Practices in Disaster Recovery Operations,” May 4, 2006 at 8-9.