

Government Contract

COMMENTARY

REPRINTED FROM VOLUME 19, ISSUE 17 / DECEMBER 19, 2005

Responding to Domestic Disasters: Federal Relief And Assistance Under the Stafford Act

By Raymond F. Monroe, Esq., and Peter J. Eyre, Esq.*

When a domestic disaster is declared, the federal government can provide a broad range of relief and assistance to state and local governments, private organizations, and individuals under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121 *et seq.* The types of federal relief and assistance vary by the category of declared disaster: “emergency” or “major disaster.”

An “emergency” is any instance in which federal assistance is needed to supplement state and local efforts and capabilities to “save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe.”¹ A “major disaster” is “any natural catastrophe ... or, regardless of cause, any fire, flood, or explosion, ... which in the determination of the president causes damage of sufficient severity and magnitude to warrant major disaster assistance [under the Stafford Act].”²

Federal “emergency” assistance focuses on immediate needs, whereas federal “major disaster” assistance includes both immediate essential assistance and longer-term repair, restoration and replacement. Federal assistance can be provided:

- Directly from the federal government;
- Through state and local governments and through private organizations using federal funds furnished through cost-sharing arrangements, grants and loans; and
- Through federal contracts.³

In most instances, however, the federal government cannot act unilaterally, and the level of relief and assistance is determined by a mixture of federal, state and local decision-makers.

Starting the Stafford Act: The Prerequisite Of a State Request

The Stafford Act was enacted in 1974, in the wake of 111 natural disasters across 41 states during a three-year period, to strengthen the ability of the U.S. government to mobilize federal dollars and assets to respond effectively to domestic disasters.⁴ The Stafford Act is the latest in a long string of federal efforts to provide or coordinate disaster relief, and it coexists with a patchwork of numerous other federal, state, local and private relief and assistance programs.⁵ In most cases, the act’s “emergency” or “major disaster” relief and assistance provisions are not engaged until a state asks for help.⁶

Specifically, the governor of an affected state, as a prerequisite to federal assistance, must request that the president declare an “emergency” or a “major disaster.” With respect to both declarations, the request must be based on a finding that the disaster “is of such severity and magnitude that effective response is beyond the capabilities of the state and the affected local governments.”⁷

With respect to an “emergency,” the governor must also demonstrate that federal assistance is necessary to “save lives and protect property, public health and safety”⁸ and must “define the type and extent of federal aid required.”⁹ With respect to a “major disaster,” the governor does not have to request specific relief or assistance.¹⁰ The president, in all cases, retains discretion to grant or deny a declaration request.¹¹

The Scope of Federal Relief and Assistance and The Mechanisms for Its Provision

Once the president declares an “emergency” or “major disaster,” the Department of Homeland Security, acting through the Federal Emergency Management Agency:

- Coordinates with state and local governments and private organizations to determine the types of assistance needed;
- Enters into a legally binding FEMA-state agreement setting forth the conditions and understandings under which federal assistance is to be provided; and
- Coordinates the administration of relief by federal, state, local and private entities, including directing other federal agencies to utilize their authorities, resources and personnel to support state and local assistance efforts.¹²

In an “emergency,” federal assistance may include:

- Supporting state and local efforts “to save lives, protect property and public health and safety, and lessen or avert the threat of a catastrophe”;
- Coordinating state, local and private disaster relief efforts;
- Providing technical and advisory assistance to state and local governments for essential community services; issuance of warnings; provision of health and safety measures; and management, control and reduction of immediate threats to public health and safety;
- Removing debris;
- Providing assistance to individuals and households, including housing, transportation, medical aid, legal services and crisis counseling; and
- Assisting “in the distribution of medicine, food and other consumable supplies, and emergency assistance.”¹³

Such assistance is to be provided for a limited time period, the federal share of the costs shall not be less than 75 percent, and absent the grant of additional assistance, federal expenditures per emergency are capped at \$5 million.¹⁴

In a “major disaster,” FEMA performs an equivalent function with respect to essential assistance. FEMA can directly or indirectly provide services to save lives and protect property, including, for example, debris removal, search and rescue, clearance of roads, emergency medical care, shelter, and demolition of unsafe facilities.¹⁵ In addition, FEMA can assist in the repair, restoration and replacement of damaged facilities.¹⁶ Again, under the Stafford Act, the federal share shall not be less than 75 percent, but the

regulations contain complex provisions for determining or re-determining the federal share, providing loans to cover the non-federal share, and setting or extending the period of assistance.¹⁷

Relief and Assistance Through Contracts: Unique Provisions in the Stafford Act

Although much of the assistance under the Stafford Act is provided by state, local and private entities, FEMA does provide some assistance directly or through other federal agencies via mission assignments.¹⁸ According to the Government Accountability Office, FEMA and these other federal agencies “are relying increasingly on contractors” to carry out these tasks.¹⁹

These federal contracts are governed by traditional federal government contracts law, including the Competition in Contracting Act²⁰ and the Federal Acquisition Regulations.²¹ But the Stafford Act and its implementing regulations have some unique provisions. For example, contractors must comply with the Buy American Act and must not discriminate “on the grounds of race, color, religion, nationality, sex, age or economic status.”²² The act also contains a “local preference” provision that has attracted attention in the wake of Hurricane Katrina.²³

Local Preference

Under the Stafford Act, in awarding contracts for “debris clearance, distribution of supplies, reconstruction, and other major disaster or emergency assistance activities,” preference must be given “to the extent feasible and practicable” to firms and individuals “residing or doing business primarily in the area affected by” the “major disaster” or “emergency.”²⁴ The regulations implementing the act require a clause in each solicitation creating a price preference for local offerors.²⁵

However, this price preference may be omitted if the contracting officer determines that it is in the best interest of the government.²⁶ Such a determination must be documented, signed by the contracting officer and approved by the head of the contracting activity.²⁷

Accordingly, in *HAP Construction Inc.* the GAO held that under the Stafford Act an agency “may, but does not have to, conduct a set-aside for local firms when procuring disaster relief services.”²⁸ And the Stafford Act would not prevent an agency from excluding local businesses if an exception to the CICA requirement for full and open competition existed, such as “urgent and compelling circumstances.”²⁹ Thus, the “local preference” is far from a guarantee that local firms and individuals will receive contracts under the Stafford Act.

Heightened Scrutiny for Fraud, Waste and Abuse

The Stafford Act provides that the U.S. comptroller general, states and local governments may audit or investigate "any person relating to any activity undertaken or funded" under the statute.³⁰ The act provides for criminal and civil penalties for anyone who "knowingly" mishandles or misapplies relief money.³¹ Following Hurricanes Katrina and Rita, scrutiny by Congress, inspectors general and prosecutors for fraud, waste and abuse intensified. For example, the Hurricane Katrina Fraud Task Force was created with more than 350 auditors, many contract reviews were initiated and numerous indictments related to Katrina relief activities were issued.³²

The Future

The Stafford Act strikes a balance among federal, state and local interests and operates in conjunction with many other federal, state, local and private assistance programs. But, under the act, a disaster is treated as an inherently local phenomenon. After Hurricane Katrina, the perceived challenge is how to respond to events that may not be "inherently local" and may require virtually immediate coordination and unity of effort from multiple federal, state, local and private participants.³³

The open question is: Do such challenges require rewriting the Stafford Act, streamlining its implementation or a combination of both?³⁴ There is likely not a "one size fits all" answer for either disasters or states.³⁵ But some fear that reactionary decisions, rather than implementation of lessons learned, could lead to the excessive federalization of emergency response, a result characterized by Florida Gov. Jeb Bush as "a disaster as bad as Hurricane Katrina."³⁶

Several outcomes appear plausible. It is probable that this debate will produce changes in both the Stafford Act and FEMA. The dialogue may also change the current delicate balance of federal, state and local interests in responding to disasters.³⁷ The change could be a single shift, but potentially there could be a rebalancing of the allocation of power and responsibility, by the creation of additional "categories" of "disasters" to encompass, for example, regional, national and/or major terrorism incidents.

Finally, to the extent emergency response contractors are engaged, which is highly likely, they will be scrutinized for full compliance with all applicable laws in an ever-brightening spotlight of audits; investigations; and allegations of fraud, waste and abuse.

Notes

¹ 42 U.S.C. § 5122(1) (2005); 44 C.F.R. § 206.2(9) (2005).

² 42 U.S.C. § 5122(2); 44 C.F.R. § 206.2(17).

³ See 42 U.S.C. § 5149.

⁴ 42 U.S.C. § 5121; S. Rep. No. 93-778 (1974).

⁵ See FEMA History available at <http://www.fema.gov/about/history.shtm> (last visited Nov. 18, 2005); 1950 Disaster Relief Act, Pub. L. No. 81-875, 64 Stat. 1109 (1950); Disaster Relief Act of 1966, Pub. L. No. 89-769, 80 Stat. 1316-1321 (1966); Disaster Relief Act of 1969, Pub. L. No. 91-79, 83 Stat. 125 (1969); Disaster Relief Act of 1970, Pub. L. No. 91-606, 84 Stat. 1744 (1970); see, e.g., Catalog of Federal Domestic Assistance, available at <http://www.cfda.gov> (last visited Nov. 18, 2005); 44 C.F.R. § 206.35(e). See also Critical Infrastructures Protection Act of 2001, 42 U.S.C. § 5195c.

⁶ The exception to the prerequisite for a state request is any emergency in which the federal government "exercises exclusive or preeminent responsibility and authority." 42 U.S.C. § 5191(b). In making such a determination to act without a request from the state, the president "shall consult the governor of any affected state, if practicable." *Id.*

⁷ 42 U.S.C. § 5170 (major disaster); 42 U.S.C. § 5191 (emergency).

⁸ 44 C.F.R. § 206.35(b)(2).

⁹ 42 U.S.C. § 5191(a).

¹⁰ 42 U.S.C. § 5170.

¹¹ Based on the information provided, with respect to a request for a declaration of a "major disaster," the president may declare a "major disaster," declare an "emergency" or deny the request. 42 U.S.C. § 5170; 44 C.F.R. § 206.38. See 44 C.F.R. § 206.48 (factors to consider in evaluating request for declaration of "major disaster"). With respect to a request for an "emergency," the president may declare an "emergency" or deny the request. 42 U.S.C. § 5191. Between Jan. 1 and Nov. 1, the president declared 38 "major disasters" and 68 "emergencies." Some events, such as Hurricanes Katrina and Rita, received both "emergency" and "major disaster" declarations. See 2005 Federal Disaster Declarations, available at <http://www.fema.gov/news/disasters.fema?year=2005> (last visited Nov. 18, 2005).

¹² 44 C.F.R. §§ 206.5, 206.42, 206.44.

¹³ 42 U.S.C. § 5192; 44 C.F.R. § 206.62. See also 42 U.S.C. §§ 5173-74 (Sections 407-08 of the Stafford Act, governing debris removal and assistance to individuals/households); 44 C.F.R. §§ 206.110, 206.224.

¹⁴ See 44 C.F.R. §§ 206.63, 206.65, 206.66, 206.117, 206.119.

¹⁵ 42 U.S.C. § 5170b (essential assistance). See 42 U.S.C. § 5173; 44 C.F.R. § 206.224 (debris removal from public and private lands and waters).

¹⁶ 42 U.S.C. § 5172.

¹⁷ See, e.g., 42 U.S.C. §§ 5172, 5174; 44 C.F.R. §§ 206.45, 206.47, 206.114.

¹⁸ 44 C.F.R. § 206.7.

¹⁹ *Hurricanes Katrina and Rita: Contracting for Response and Recovery Efforts: Hearing Before the House Select Bipartisan Comm. to Investigate the Preparation for and Response to Hurricane Katrina*, 109th Cong. at 3 (Nov. 2, 2005) (statement of David E. Cooper, Director, Acquisition and Sourcing Management at the GAO). According to the President's Council on Integrity and Efficiency Biweekly Interagency Homeland Security Roundtable Report on Hurricane Katrina Oversight as of Nov. 14, 2005, federal agencies have awarded 3,667 contracts worth \$5.3 billion relating to Hurricane Katrina. See http://www.dhs.gov/interweb/assetlibrary/OIG_PCIE_111405.pdf.

²⁰ 41 U.S.C. § 253 (2005).

²¹ 48 C.F.R. § 1.000 et seq. (2005).

²² 42 U.S.C. §§ 5151, 5206; 44 C.F.R. § 206.11.

²³ See 42 U.S.C. § 5150; *Hurricane Katrina Response and Contractor Roles: Hearing Before the House Select Bipartisan Comm. to Investigate the Preparation for and Response to Hurricane Katrina*, 109th Cong. (Nov. 3, 2005); *FEMA Gulf States Recovery Efforts: Hearing Before the Senate Homeland Security and Governmental Affairs Comm.*, 109th Cong. (Oct. 6, 2005).

²⁴ 42 U.S.C. § 5150.

²⁵ 48 C.F.R. §§ 4417.7001, 4452.217-70.

²⁶ 48 C.F.R. §§ 4417.7001.

²⁷ *Id.*

²⁸ *HAP Construction Inc.*, B-280044.2, Sept. 21, 1998, 98-2 CPD ¶ 76 at 6.

²⁹ See 10 U.S.C. § 2304(c)(2) (2005); 41 U.S.C. § 253(c)(2); 48 C.F.R. § 6.302-2 (FAR 6.302-2).

³⁰ 42 U.S.C. § 5161. In addition, government contractors are subject to standard audit and investigation mechanisms.

³¹ 42 U.S.C. § 5157; 44 C.F.R. § 206.14.

³² See http://www.usdoj.gov/katrina/Katrina_Fraud/index.html (last visited Nov. 18, 2005); Hurricane Katrina Fraud Task Force Progress Report (October 2005), <http://www.usdoj.gov/katrina/>

[Katrina_Fraud/HKFTF_Docs/KatrinaProgressReport10-18-05.pdf](http://www.usdoj.gov/katrina/Katrina_Fraud/HKFTF_Docs/KatrinaProgressReport10-18-05.pdf); President's Council on Integrity and Efficiency Biweekly Interagency Homeland Security Roundtable Report on Hurricane Katrina Oversight (Nov. 14, 2005), http://www.dhs.gov/interweb/assetlibrary/OIG_PCIE_111405.pdf.

³³ See *Role of the Military and National Guard in Disaster Responses: Hearing Before the House Armed Services Comm.*, 109th Cong. (Nov. 9, 2005) (Testimony of Paul McHale, Assistant Secretary, Department of Homeland Security).

³⁴ For example, local disasters could remain a "bottom-up" process with a streamlined FEMA, whereas a regional or national disaster could prompt a more direct and immediate federal response consistent with the Constitution. See *Legislative Proposals in Response to Hurricane Katrina: Hearing Before the House Transportation and Infrastructure Comm.*, 109th Cong. (Nov. 4, 2005) (Statement of Albert Ashwood, Vice President, National Emergency Management Association).

³⁵ See *Federalism and Disaster Response: Examining the Roles and Responsibilities of Local, State and Federal Agencies: Hearing Before the House Comm. on Homeland Security*, 109th Cong. at 11 (Oct. 19, 2005) ("holding localities to higher expectations and improving FEMA" may be optimal) (Statement of Florida Gov. Jeb Bush).

³⁶ *Id.* at 2. See Ashwood, note 34, *supra*.

³⁷ See, e.g., *Federalism and Disaster Response: Examining the Roles and Responsibilities of Local, State and Federal Agencies: Hearing Before the House Comm. on Homeland Security*, 109th Cong. (Oct. 19, 2005).

* Raymond F. Monroe is a partner at Crowell & Moring LLP in Washington, D.C., specializing in government contracts, homeland security and False Claims Act issues. He can be reached at rmonroe@crowell.com. Peter J. Eyre is an associate in the government contracts and litigation practices at Crowell & Moring LLP. He can be reached at peyre@crowell.com. The firm's Web site is www.crowell.com.