

Disaster Response Has Unique Hazards For Contractors

By **Daniel Wilson**

Law360, Nashville (September 1, 2017, 9:01 PM EDT) -- As part of the multibillion-dollar recovery effort expected following Hurricane Harvey, there will be significant and potentially lucrative opportunities for contractors to participate in the cleanup, but there are unique circumstances they should be aware of before committing to any emergency work, attorneys said.

The devastation caused by Harvey, which has dumped immense amounts of rain on Texas and Louisiana, resulting in significant flooding — “probably the worst disaster” Texas has seen, in the words of Federal Emergency Management Agency Director Brock Long — will need both short- and long-term cleanup and rebuilding responses from federal, state and local authorities.

If past natural disasters are any guide, much of that work will be contracted out, with contractors often keenly interested in participating both for business and humanitarian reasons, attorneys said.

“Contractors and the federal government have a tremendous track record of working together in the wake of disasters to get relief, get supplies, get recovery and response efforts underway in a timely fashion,” Crowell & Moring LLP partner Stephen McBrady said. “Many times, private-sector companies can move to deploy resources more quickly and efficiently than the federal government, and it’s that spirit of partnership that I think draws companies to get involved.”

In the long term, there will be opportunities for a broad range of government-funded work related to permanent rebuilding, such as construction and building-repair work, environmental restoration, and road building, which usually follows the typical, well-understood government contracting process.

But during the initial response to the hurricane, involving short-term emergency work such as the removal of debris and hazardous chemicals, there are a unique set of circumstances and risks that contractors should be aware of before taking on any job, or they may see work they do go unpaid, attorneys said.

For example, there is much increased risk, compared to a standard contract, that the scope of work will grow or otherwise deviate from what was initially expected. This is often reimbursable, but contractors should keep an “airtight” paper trail regarding what they did and why, or risk that extra work going unrewarded upfront or having those extra funds clawed back later, according to McBrady.

“One of the risks from a contractor standpoint is to make sure that they keep appropriate

documentation of contract changes and contract scope, what the government has asked them to do, in part because it's also commonplace, years later, for auditors ... to come through and audit work that was performed, oftentimes under really remarkable conditions, under really remarkable time pressure, and under a ceaseless series of changing demands," he said.

Even well-meaning contractors sometimes come unstuck because, under time and deadline pressure, they make paperwork mistakes, which means they don't have adequate records available later on to justify their initial cost claims, as legitimate as those claims might be, McBrady said.

With the potential for the conditions of post-disaster work to change rapidly and frequently, it is also important to know exactly who the relevant government decision maker is, especially because there are sometimes several, often competing demands being made at the same time, McBrady noted — and responding to the demands of someone who isn't legally authorized to make those demands can be costly.

And the potential clash between state and federal laws and requirements is perhaps the biggest issue that contractors need to be wary of when it comes to emergency work, attorneys said.

State, local and tribal governments, as well as certain qualified nonprofits, award many deals for emergency work in the short-term aftermath of a disaster. But the required work is usually outside of their regular budget and available funding, and awarded with the expectation that most, if not all, of the costs will be reimbursed through federal disaster assistance programs, attorneys said.

"If it's a federal disaster, they're expecting the federal government to pick up at least 75 percent of the tab ... [and] assuming you're contracting directly with the entity that needs the work done, they may not have the money to pay the contractor," Jones Walker LLP partner Davis Allgood said. "And so you're hoping [that entity] will get the money from the federal government to pay your bill."

If the ultimate funding source is the federal government, it expects its procurement laws and regulations to be followed on top of state and local procurement law, such as requirements that contracts are awarded competitively; that certain types of contracts are not used; or that only debris that is clearly on public property, or is a clear public hazard, is taken away, attorneys noted.

Where there is a clash, federal requirements are expected to take precedence, said Baker Donelson Bearman Caldwell & Berkowitz PC of counsel Ernest Abbott, a former FEMA general counsel.

"[For example], if the governor issues an order waiving normal requirements for competitive bidding due to the emergency, then under state law a local government doesn't have to procure things competitively," he said. "That is a valid state order and noncompetitive procurement would be lawful. But if you want the federal government to pay for the contract work, you should comply with the federal rules [or] you will risk being denied federal reimbursement."

Although contractors may in some states be able to win judgments against a state or local government that hasn't paid them, there is often no legal or practical way to actually enforce those judgments, Allgood noted.

And if a state or local contracting entity expected but, for whatever reason, didn't receive federal grant money, there is no legal mechanism available for the now-skint contractor to pursue FEMA or other federal agencies directly, he said. As such, even amid the time pressures that accompany emergency

contracting, seeking out experienced professional advice should be a given before agreeing to a deal, Allgood said.

“Don't rely upon the local government that you're dealing with to get it right,” he said. “It's worth getting a lawyer involved on your side to make sure that the rules are going to be followed, particularly if there's a lot of money involved.”

--Editing by Katherine Rautenberg and Mark Lebetkin.

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