



FEDERAL CONTRACTS



REPORT

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Emergency Procurement

Even as disagreement continues over how to rebuild the Gulf Coast following the devastation of hurricanes Katrina and Rita, members of the government contracting community are considering how to avoid in future emergencies some of the contracting problems that arose in the immediate aftermath of those storms.

Familiarity with the rules and authorities discussed in this analysis can help both contractors and government officials to be better prepared for the next emergency.

Disaster Relief Contracting: Tools to Respond Do Exist

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Who can forget headlines such as the following?

- *Documents Show A Sweet Deal For Carnival Cruise Lines* (Los Angeles Times) (Oct. 5, 2005)
- *FEMA Contract Awards 'As Transparent As Mud'* (Sun Herald) (Biloxi, Miss.) (Oct. 22, 2005)
- *DHS IG Outlines 'Aggressive' Program To Oversee Hurricane Recovery Contracts* (Federal Contracts Report) (Nov. 8, 2005)

As Hurricane Katrina becomes a more distant memory, except of course for the inhabitants of the Gulf Coast and those involved in the massive cleanup and rebuilding effort, we can look with some perspective at whether traditional government contracting tools and vehicles are suitable to respond to crises like Katrina.

Immediately after Katrina, there was a sense that traditional contracting vehicles were not suitable to respond to this crisis. As a consequence, federal agencies and contractors took extraordinary contracting steps, which led to criticism of agencies and contractors alike, as well as to the promise of oversight and investigations that will keep auditors, special agents, and lawyers occupied for years to come. However, as discussed below, traditional contracting vehicles and strategies could have been utilized to procure necessary products and services, and they likely would have spared government agencies and contractors from the mis-steps and criticism that are now part of Katrina's legacy.¹

One fact cannot be changed—*time is of the essence* in responding to any emergency. Certainly, there is insufficient time to run a full-blown competition. Instead, alternative—and legitimate—strategies must be utilized.

1. Avoiding Full and Open Competition

Full and open competition in soliciting offers and awarding contracts is the preferred course in U.S. government contracting.² However, time-consuming full and open competition can legitimately be avoided in several circumstances, including when there is a “need for . . . supplies or services . . . of such an *unusual and compelling urgency* that the government would be seriously injured [financially or otherwise] unless . . . [it] is permitted to limit the sources from which it solicits bids or proposals”³ (emphasis added). Use of this authority must be supported by a contracting officer's detailed written justification and—for procurements exceeding \$500,000—higher level approval (“J&A”),⁴ although the J&A may be made after contract award if such action prior to award would “unreasonably delay the acquisition.”⁵

This authority would seem to fit perfectly with responding to disasters such as Katrina. It addresses the emergency situation, but it requires a rationale that is subject to agency review and, therefore, should be transparent and sufficiently compelling to withstand public scrutiny. However, it should not be regarded as blanket authority for sole-source procurements, which were so criticized in the aftermath of Katrina. Rather, the “unusual and compelling urgency” exception to full and open competition explicitly provides that agencies using this exception “shall request offers from as many sources as practicable under the circumstances.”⁶

¹ The purpose of these thoughts is not to add to the already plentiful criticisms of the Federal Emergency Management Agency (“FEMA”) or the broader contracting community's response to Katrina. Mistakes were made, and these will be studied by the House Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina. This article is designed only to add to the dialogue on how better to respond to inevitable future natural and man-made catastrophic events.

² FAR § 6.101(a).

³ FAR § 6.302-2.

⁴ FAR §§ 6.302-2(c)(1), 6.303—304.

⁵ FAR § 6.302-2(c)(1).

⁶ FAR § 6.302-2(c)(2).

The ‘unusual and compelling urgency’ exception should not be regarded as blanket authority for sole-source procurements.

Thus, the keys to avoiding full and open competition under the “unusual and compelling urgency” exception are the preparation and processing of a supportable J&A and the solicitation of multiple sources if practicable.

2. Bypassing Written Solicitations and Proposals

Although the Federal Acquisition Regulation (“FAR”) anticipates that solicitations and proposals generally will be in writing, “[o]ral RFPs are authorized when processing a written solicitation would delay the acquisition of supplies to the detriment of the government.”⁷

As recognized by the General Services Administration Board of Contract Appeals, “[o]ral solicitations are fraught with peril. . . . The potential for miscommunication, misunderstanding, and the inequitable treatment of vendors is great. . . .”⁸ To mitigate these risks, information provided orally to offerors should include details such as the name and contact data of the contracting officer, the type of contract contemplated, the quality, description and required delivery dates for the products or services, applicable certifications and representations, expected contract terms and conditions, instructions to offerors and evaluation criteria, and proposal due date and time.⁹

FAR appears to anticipate only written proposals and contracts,¹⁰ but there is support for the enforceability of oral agreements, provided the official involved has authority to bind the government and the contractor can demonstrate that there has been a common understanding as to the terms of the agreement.¹¹

Proceeding on an oral, rather than written, basis might well be appropriate in emergency situations. Although it does run the risk of misunderstandings between the parties, that risk can be mitigated by careful communications and reducing the agreement to writing as soon as possible. If there is any question about the authority of the government official to enter into an agreement in the first place, the “ratification” procedure described in FAR § 1.602-3 provides a mechanism to formalize what may initially have been an unauthorized action.¹²

3. Delaying Full Negotiation of a Contract

FAR specifies a uniform contract format, which, as experienced contractors know, is very detailed and typi-

⁷ FAR § 15.203(f).

⁸ *ViON Corp.*, GSBGA No. 10107-P, 89-3 BCA ¶ 22,106 (July 25, 1989) at 111,176.

⁹ FAR §§ 15.203(e)-(f).

¹⁰ See, e.g., FAR § 15.204.

¹¹ See, e.g., *Hudson Contracting, Inc.*, ASBCA No. 41023, 94-1 BCA ¶ 26,466 (Oct. 27, 1993).

¹² See Madden, Elling and Reams, *Know Your Contracting Officer: Contracting with the Federal Government in Times of Natural Disaster and Other Emergencies*, 84 FCR 21 (Dec. 13, 2005), at 597-600.

cally leaves little to the imagination.¹³ Negotiating a full-blown contract in the time of an emergency may not be practical or even possible, as apparently was the case with FEMA's much criticized leasing of cruise ships for emergency housing in New Orleans. However, rather than hurriedly negotiating an *ad hoc* contract, as FEMA and the cruise ship owner apparently did,¹⁴ FEMA and the contractor would have been better served by the use of a "letter contract."¹⁵

Under FAR, a letter contract is appropriate when the government's interests demand a binding commitment so that work can begin immediately, and "negotiating a definitive contract is not possible in sufficient time to meet the [government's] requirement."¹⁶ Letter contracts must be as complete and definite as is feasible under the circumstances, and they must contain, at a minimum:

(1) dates for the submission of the contractor's price proposal,

(2) a start date for negotiations,

(3) a target date for definitization (which must be within the earlier of 180 days after the date of the letter contract or before 40 percent of the work is completed), and

(4) the maximum liability of the government (which generally is the estimated amount necessary to "cover the contractor's requirements" before definitization).¹⁷

A proper letter contract between FEMA and the cruise line would have avoided much of the criticism that arose from their *ad hoc* contract. A letter contract would have provided a fixed amount of time for the contractor to submit a proper price proposal, and for the parties then to negotiate a thoughtful contract, including a fair price, without delaying the delivery of the ships that were thought to be so necessary at the time. And, the government's financial disclosure would have been limited by the required expenditure ceiling and timely negotiation and definitization.

4. Using Existing Contracts to Avoid New Procurements

There are a number of existing contracts, which, if used by FEMA or other federal agencies, could be immediately effective for responding to emergencies such as Katrina.

a. Schedule Contracts

Federal Supply Schedule ("FSS") contracts are administered by the General Services Administration ("GSA").¹⁸ These indefinite delivery/indefinite quantity ("ID/IQ") contracts provide federal agencies a simplified process of acquiring a wide range of commercial supplies and services in varying quantities while obtaining volume discounts negotiated by GSA.¹⁹ Not only are these contracts already in place, presumably with at-

tractive discounts negotiated by GSA, but they can be utilized with a minimum of competition. Most notably, because GSA has already determined that the prices offered by FSS contractors are fair and reasonable, an agency using a Schedule contract need not synopsise its needs, seek further competition, or make a separate price reasonableness determination.²⁰ Instead, an agency need only review the price lists of at least three FSS contractors, and then place the order with the contractor that offers "the best value."²¹

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To make FSS contracts even more useful for emergencies, GSA has grouped available "Disaster Relief" services and products in one place on its Web site, at www.gsaelibrary.gsa.gov/ElibMain/ElibHome. They include building and construction services, communications solutions, emergency preparedness, energy and power services, environmental services, furniture, law enforcement and security solutions, medical and laboratory supplies and services, temporary staffing, and vehicle leasing. Although there are restrictions in FSS contracts on the size of a single order,²² these contracts still offer immediate access to supplies and services that seemed so difficult to procure after Katrina. And, if a government agency requires more supplies or services than are available under a FSS contract, it can use the prices negotiated by GSA as a starting point for negotiating a fair price for larger orders.²³

There is another potential benefit to using FSS contracts. Because they attract large and small contractors, as well as contractors from all regions of the United States, FSS contracts can provide both necessary products and services for relief efforts and support for local small business concerns, the lack of which became a political issue in the aftermath of Katrina. Indeed, GSA's e-Library, www.gsaelibrary.gsa.gov, identifies FSS contractors by locations and socioeconomic status, which makes it relatively easy to focus on small and/or local contractors as possible sources of disaster relief.

b. FEMA ID/IQ Contracts

In response to the criticism that it did not have contract vehicles in place to respond to the Katrina destruction, FEMA announced that it intended to award five-year ID/IQ contracts for Gulf Coast recovery work and five-year technical assistance contracts on a national basis for future response and recovery, and in December 2005 it published solicitations for these contracts.²⁴ FEMA intends to award 15 five-year contracts, with an estimated value of up to \$100 million each, for maintenance and eventual deactivation of temporary housing

¹³ FAR § 15.204.

¹⁴ The *Los Angeles Times* reported on Oct. 21, 2005, that FEMA's contract with Carnival Cruise Lines "was negotiated quickly, under the pressure of emergency," and contained a provision requiring Carnival "to return any excess profit based on its own 'good faith' estimate."

¹⁵ FAR § 16.603.

¹⁶ FAR § 16.603-2(a).

¹⁷ FAR § 16.603-2(c).

¹⁸ FAR Part 38.

¹⁹ FAR § 38.101.

²⁰ FAR §§ 8.404(a) and 8.404(d).

²¹ FAR § 8.405-1(c).

²² FAR § 8.405-1(d).

²³ *Id.*

²⁴ FEMA press releases dated Oct. 11, 2005, and Dec. 2, 2005, <http://www.fema.gov/news/newsrelease>.

in Alabama, Louisiana, Mississippi, and Texas, all restricted to small and small disadvantaged businesses, with evaluation preferences for local businesses.²⁵ The national contracts will be available to both large and small businesses, but prime contractors will be required to meet small business subcontracting goals, which include giving preferences to local businesses.²⁶

These contracts will presumably give FEMA the resources both to respond to the immediate Gulf Coast housing needs and to have contractors in place potentially to provide goods and services needed for future response and recovery work. Combined with the FSS contracts discussed above, FEMA should have the ability to address future contracting needs far more quickly and conventionally than it did in September 2005 in response to Katrina.

c. Economy Act

The Economy Act, 31 U.S.C. 1535, permits interagency acquisitions, as well as the placement of orders between units of the same agency. Like FSS contracts, acquisitions pursuant to the Economy Act are attractive in emergency circumstances because they are exempt from further competition requirements—the agency holding the contract (“servicing agency”) is deemed to have already fulfilled these requirements.²⁷

Before placing an interagency order under the Economy Act, the agency seeking to use the servicing agency’s contract (“requesting agency”) must support the acquisition by a Determination and Finding (“D&F”) stating, among other things, that the acquisition is in the “best interest” of the government, that the servicing agency’s contract is for the “same or similar”

supplies and services, and that the supplies and services cannot be obtained “as conveniently or economically by contracting directly with a private source. . . .”²⁸ As is true for the J&A required to avoid full and open competition, the requirement for a D&F might seem burdensome in an emergency response situation. However, it assures that the interagency acquisition is sensible, and that, if made publicly available, the requesting agency’s decision is transparent and presumably defensible.

Conclusion

As noted by the Government Accountability Office in testimony before the House Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina, “[t]he fact that natural disasters are not precisely predictable must not be an excuse for careless contracting practices.”²⁹ Hopefully, the legacy of Hurricane Katrina contracting will be more than scores of audits and investigations,³⁰ and will include meaningful advance planning by FEMA and other federal agencies for inevitable future emergencies. If so, the focus of the planning should be on not only the development of new tools, such as FEMA’s recently announced ID/IQ contracts, but also on best practices for the use of tools that are already available. If existing procurement tools are fully utilized, there should be no need to develop a drastically different regime of contract vehicles to respond to future extraordinary circumstances.

²⁸ FAR § 17.503.

²⁹ *Hurricanes Katrina and Rita, Contracting for Response and Recovery Efforts*, GAO-06-235T (Nov. 2, 2005).

³⁰ On Jan. 13, 2006, the *Washington Post* reported that more than 600 auditors and investigators had been sent to the Gulf Coast to “monitor” \$8.3 billion in contracts awarded in response to Hurricane Katrina. *Washington Post* (Jan. 13, 2006) at D02.

²⁵ *Id.*

²⁶ FEMA press release dated Oct. 11, 1995.

²⁷ FAR § 17.504(d)(3)(ii); *Protest of Liebert Corp.*, B-232234.5, 91 CPO ¶ 413 (Apr. 21, 1991).