

COALITION FOR GOVERNMENT PROCUREMENT

DISASTER RECOVERY PROCUREMENT SEMINAR Opportunities and Challenges for Government Contractors

Legal Corner

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Thomas P. Barletta
Partner, Steptoe & Johnson LLP*

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Disaster Recovery: Legal Framework

- Stafford Act: 42 U.S.C. § 5121 *et seq.*, as amended (amended in 2000 and 2006). See 44 C.F.R. Part 206 (implementing regulations).
 - Provides for Presidential Declarations of “Major Disaster” and “Emergency.”
 - “Major Disaster”: Natural catastrophes causing damage that required major federal assistance.
 - “Emergency”: Any occasion or instance where federal assistance is needed to supplement state and local capabilities to save lives and protect property and public health and safety.
 - Expedites delivery of various types of federal assistance to states, including distribution of aid, repair and reconstruction of facilities, debris removal and assistance to individuals.

Contracting Considerations

***DOC/SBA: Hurricane Contracting Information Center:
26.Q: Is there a detailed guide for firms seeking business opportunities with the federal government?***

A: Doing business with federal government agencies can be very lucrative for the people who learn how to maneuver through the maze of registrations, certifications and regulations. * * *

Hurricane Contracting Information Center

<http://www.rebuildingthegulfcoast.gov/faq/index.html#>

Contracting Considerations

- Contracting in Advance of a Disaster -- Establishing the Infrastructure.
 - *E.g.*, FEMA Housing Inspection Services Contract, Summer, 2006, to manage and provide housing inspection services to assess damage as part of assistance process.

Contracting Considerations

- Stafford Act: 42 U.S.C. § 5150: “[P]reference shall be given, ***to the extent feasible and practicable***, to . . . firms . . . residing or doing business primarily in the area affected by such major disaster or emergency.” Applies to contracts for debris clearance, distribution of supplies, reconstruction and other major disaster or emergency assistance activities. See *also* FAR 26.200-201 (implementing regulations).
 - Purpose: Put cash into local economy through use of local businesses.
 - CICA Exemption (c)(5): Statute authorizes acquisition from a specified source. Requires J&A. See FAR 6.303 (requirements for justifications).

Contracting Considerations

- Preference v. Set-Aside.
 - Agency Discretion.
 - *HAP Construction, Inc.*, B-280044, 98-2 C.P.D. ¶ 76 (Sept. 21, 1998): Rejects argument that Stafford Act requires set aside for local business.
 - Focuses on “feasible and practicable language” -- competition and price reasonableness.
 - Preference implemented through evaluation factors.

Contracting Considerations

- *AshBritt Inc.*, B-297889, 2006 C.P.D. ¶ 48 (March 20, 2006).
 - Upholds use of geographic set aside in post-Katrina procurement by Corps of Engineers in contract for debris removal in Mississippi.
 - Competition limited to firms “residing or doing business primarily in the State of Mississippi.”
 - Protester also challenged meaning of “doing business in Mississippi.”
 - Criteria in RFP included a “nonexclusive” list of factors to be considered, including: Incorporated in Mississippi; maintains permanent office in Mississippi; state licenses; record of past work in Mississippi; percentage of gross revenue in Mississippi; number of permanent employees in Mississippi; organizational memberships.
 - Rejected challenge to adequacy of justification.

Contracting Considerations

- P.L. 109-218 (2006): “In carrying out this section, a contract or agreement **may** be set aside for award based on a specific geographic area.” Enacted in response to *AshBritt* protest.

Contracting Considerations

- FAR Part 18, Interim Rule, July 2005: Collecting “acquisition flexibilities” to facilitate and expedite acquisitions of supplies and services in emergency situations. 71 Fed. Reg. 38247. See 18.203 (summarizing Stafford Act).

Contracting Considerations

- Other Emergency Contracting Authorities.
 - Increase in Simplified Acquisition and Micropurchase Thresholds.
 - 41 U.S.C.A § 428a, Special Emergency Contracting Authority for “contingency [military] operations” and for defense against or recovery from nuclear, biological *etc.*, attack. Increases these thresholds to \$250,000 and \$15,000, respectively.
 - P.L. 109-62, Katrina Supplemental Appropriations Act: Increases **both** thresholds to \$250,000.
 - Other CICA exemptions, *e.g.*, urgent and compelling circumstances.
 - Cooperative Purchasing under GSA Schedules (P.L. 109-364 § 833) in “major disasters”: DHS determines what goods and services qualify.

Contracting Considerations

- “OCIs” (see FAR 9.5).
 - Biased ground rules (preparing specifications or SOWs).
 - Impaired objectivity (evaluation services).
 - Unequal access to information (including access to proprietary information).

Lessons Learned

- GAO Reports on Performance of Government Acquisitions: See, e.g., Hurricane Katrina, Planning for and Management of Federal Disaster Recovery Contracts, GAO-06-622T (April 2006).
 - Inadequate pre-disaster planning and preparation, e.g., failure to anticipate needs for temporary housing and public facilities.
 - Haste makes waste.
 - Inadequate communications across agencies and jurisdictions -- what do we need and where do we need it?
 - Inadequate deployment of personnel to perform contractor oversight.

Lessons Learned

- Audits, Investigations and Public Scrutiny.
 - DOJ Hurricane Katrina Fraud Task Force (First Year Report, September 2006): Charged over 400 people with fraud, including procurement fraud, e.g., submission of false invoices, and public corruption.
 - Congress.
 - DHS IG Office of Disaster Assistance Oversight.
 - Purchase Card Abuse.

Lessons Learned

- Common Sense and Compliance Still Apply.
 - Pricing: Fair and Reasonable Prices.
 - Proper Invoicing.
 - Business Ethics.
 - Contract Scope.
 - Remember “Get It Right.”
 - No Good Deed Goes Unpunished.
 - “The intense public scrutiny could limit the willingness of private sector companies to offer assistance in future disasters. Several firms expressed the view that the challenges associated with emergency contracting may not be worth the trouble.” Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina, Final Report, Logistics and Contracting, at 337.