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ISSUES AND ANSWERS

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Responding to Katrina Contracting in an Emergency Situation

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In the aftermath of Hurricane Katrina, one of the worst natural disasters to befall our country in recent memory, this Advisory updates guidance to provide the latest on contracting in emergency situations.

Hurricane Katrina, one of the worst natural disasters to befall our country in recent memory, is causing a surge of emergency contracting situations. Four years ago, we faced a man-made disaster that required contracting operations to react quickly. Following the events of September 11, 2001, we prepared a guide on emergency contracting for use by contracting agencies across the government. This *Advisory* updates guidance to provide the latest on contracting in emergency situations.

Are there increased contracting thresholds following Katrina?

Yes, agency heads (see box below) have the authority to increase procurement thresholds for "acquisitions of supplies or services that, as determined by the head of the agency, are to be used to support a **contingency operation** or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack."¹

Who Is an Agency Head?

"Agency head" or "head of the agency" means the secretary, attorney general, administrator, governor, chairperson, or other chief official of an executive agency, unless otherwise indicated, including any deputy or assistant chief official of an executive agency.

FAR 2.101 Definition

Note: Our experience is that the "agency head" procurement authority normally is delegated to the assistant secretary for management, chief financial officer, chief acquisition officer, component acquisition executive, chief procurement officer, or senior procurement executive.

Why? Is the response to Katrina considered a "contingency operation"?

Yes. While a "contingency operation" has not been officially declared by the secretary of defense and likely would not be in this scenario, Hurricane Katrina would be considered a contingency operation, given the provisions of the Federal Acquisition Regulation (FAR). FAR 2.101 defines a contingency operation as:

"Contingency operation" (10 U.S.C. 101(a)(13)) means a military operation that—

(1) Is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities

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against an enemy of the United States or against an opposing military force; or

(2) *Results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of 10 U.S.C., Chapter 15 of 10 U.S.C, or any other provision of law during a war or during a national emergency declared by the President or Congress. [emphasis added]*

The current situation fits item (2). More than 12,000 active-duty forces and 22,000 National Guardsmen already have been deployed.² Subsequently, the Department of Defense issued a memorandum authorizing the use of the increased thresholds. (More details on this are found on page 5.)

What are the elevated thresholds?

If authorized by the agency heads, the thresholds shown in Table 1 are applicable to a contingency operation.

Increasing these thresholds will help agencies significantly. Orders up to \$15,000 will not require competition at all. Orders up to \$250,000 require adherence to simplified procedures outlined in FAR part 13, allowing limited competition. *And perhaps most significant, orders up to \$10 million for commercial items may use simplified procedures of FAR part 13 as well, allowing for limited competition.*

We note, with regard to the Davis-Bacon Act threshold, that President George Bush waived the Davis-Bacon Act following Hurricane Andrew in 1992. An August 31, 2005, editorial in *The Wall Street Journal* urges President George W. Bush to remove all federal impediments to a speedy reconstruction effort, and to waive the Davis-Bacon Act. We

have seen no such waiver as we go to press, but will watch this closely and immediately report in the event that there is any relief to the current Davis-Bacon Act thresholds.

Per FAR 13.501(a)(2), the following justifications and approvals are required for sole-source acquisitions only, under the commercial items test program:

Table 2. Approval Requirements for Sole Source Actions under Test Program

Value of Sole-Source Contract	Approving Official
Over \$100,000 but not exceeding \$500,000	Contracting officer unless a higher approval level is established in accordance with agency procedures. See FAR 6.304(a)(1) and 13.501(a)(2)(i), unless agency procedures specify a higher approving authority.
Over \$500,000 but not exceeding \$10 million	Competition advocate for the procuring activity designated pursuant to FAR 6.501 or an official described in FAR 6.304(a)(3) or (a)(4). This authority is nondelegable.

All procurements under the test program must be documented in the file, per FAR 13.501(b), to include—

1. A brief written description of the procedures used in awarding the contract, including the fact that the test procedures in FAR subpart 13.5 were used;
2. The number of offers received;
3. An explanation, tailored to the size and complexity of the acquisition, of the basis for the contract award decision; and
4. Any justification approved per the table above.

Table 1. Increased Thresholds for Contingency Operations

Procurement Level	Threshold Increased from:	Threshold Increased to:	FAR Reference	Exception	Comments
Micropurchases	\$2,500	\$15,000	13.201(g)(1)(i)	Construction contracts that are subject to the Davis-Bacon Act (threshold remains at \$2,000)	No competition required under the threshold. Simply place an order with a responsible source at a reasonable price.
Simplified Acquisitions	\$100,000	\$250,000 (\$1 million for purchases made from outside the United States)	2.101	n/a	Provides relief from the applicability of several laws, provisions, and clauses, listed at FAR 13.005.
Commercial Items (test program)	\$5 million	\$10 million	13.500(e)	n/a	Same as above.

Note that commercial items are not limited to products; services can be considered commercial items as well. The definition of a commercial item at FAR 2.101 includes “Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions.” Many of the items associated with recovery, relief, and clean-up efforts are available in the commercial marketplace.

What else is different about contracting in this situation?

There are a number of important differences, related to authority, preference, and exceptions, as follows:

- **Authority to Issue Oral Requests for Proposals.** While agencies may use oral requests for proposals (RFPs) at any time for procurements under the simple acquisition threshold (per FAR 13.106-1(c)), special authority to use oral proposals also kicks in during contingency operations or other emergency situations.

For FAR part 15 acquisitions, oral RFPs may be used when “processing a written solicitation would delay the acquisition of supplies or services to the detriment of the Government” and when a synopsis is not required for the procurement action. FAR 15.203(f) cites perishable items and support of contingency operations or other emergency situations as examples of procurements that do not require a synopsis and for which an oral RFP might be used.

Of course, the use of an oral RFP does not relieve the contracting officer from complying with other applicable FAR requirements. FAR 15.203 requires that the contract files supporting oral solicitations include a description of the requirement, rationale for using an oral solicitation, the sources solicited, and the solicitation number provided to prospective offerors.

- **Preference for Contracting with Local Organizations, Firms, and Individuals.** When a “major disaster” has been declared, as it has been in this case (see box on page 4), there is a preference for contracting with local organizations, firms, and individuals. The preference for local firms is established in the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5150). Implementing regulations at FAR 26.201 require:

When contracting under this subpart for major disaster or emergency assistance activities, such as debris clearance, distribution of supplies, or reconstruction, preference shall be given, to the extent feasible and practica-

Declarations and Designations

The following official declarations have been made to date regarding Katrina:

- **“Incident of National Significance” – August 31, 2005.**⁴ Katrina is the first event given this designation, which triggers the brand-new National Response Plan, which names the Department of Homeland Security as the lead in coordinating federal response and recovery efforts.

- **“Major Disaster” – August 28 and 29, 2005.**⁵ A major disaster under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (“Stafford Act”) has been declared for the states of Louisiana, Mississippi, Alabama, and Florida.

- **“Emergency” – August 28, 2005, and September 3, 2005.**⁶ Emergency declarations were approved by the President for Mississippi and Alabama on August 28, prior to the more significant and long-term declaration of a “major disaster” in these states. Emergency declarations subsequently were issued for Arkansas and Texas on September 3, to facilitate aid to these areas in their efforts to assist victims of Katrina.⁷

- **“Public Health Emergency” – August 31, 2005.**⁸ Health and Human Services Secretary Mike Leavitt declared a public health emergency, which facilitates provision of medical services in the affected regions.

While these official declarations may further affect procurement authorities within individual departments or agencies, our research did not delve into authorities specific to individual agencies.

While not officially declared, because active-duty troops have been deployed, agency heads may consider the current situation a “contingency operation” under which increased procurement thresholds take effect, as do a select few other authorities mentioned herein.

ble, to those organizations, firms, or individuals residing or doing business primarily in the area affected by such major disaster or emergency.

The FAR provides that the authority to provide such a preference applies only to those acquisitions conducted “during the term of a major disaster or emergency declaration made by the President of the United States under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act.” In these situations, agencies may use other than full and open competition, citing FAR 6.302-5(b)(5) as the authority.

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- **Exemption from Registration in the Central Contractor Registration (CCR) database.** Contractors typically are required to be registered in the Central Contractor Registration (CCR) database. However, in situations such as this one, FAR 4.1102(a) provides the following exception to registering in the CCR:

(3) Contracts awarded by—

(i) Deployed contracting officers in the course of military operations, including, but not limited to, *contingency operations* as defined in 10 U.S.C. 101(a)(13) or humanitarian or peacekeeping operations as defined in 10 U.S.C. 2302(7); or

(ii) Contracting officers in the conduct of emergency operations, such as responses to natural or environmental disasters or national or civil emergencies, *e.g.*, Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121). [emphasis added]

The reference to the Stafford Act in item (ii) applies to a “major disaster” situation, which has been declared in this situation.

- **Exemption from Electronic Funds Transfer (EFT) Requirements.** The government generally is required to provide all contract payments through electronic funds transfer (EFT). However, during contingency operations or when responding to emergency situations such as this one, FAR 32.1103(e) provides the following exception to making payment via EFT:

(e) A contract is awarded by a deployed contracting officer in the course of military operations, including, but not limited to, *contingency operations* as defined in 2.101, or a contract is awarded by any contracting officer in the conduct of *emergency operations, such as responses to natural disasters* or national or civil emergencies, if—

- (1) EFT is not known to be possible; or
- (2) EFT payment would not support the objectives of the operation

What permanent authorities can we apply in the current situation?

While the above-mentioned authorities apply only to emergency-type situations, there are several procurement options that are always in the contracting officer’s toolkit. We cite a few below:

- **Limit competition based on an “Urgent and Compelling Need.”** FAR 6.302-2 allows agencies to contract “without providing for full and open competition” when 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. Use of this authority requires a written justification and approval in accordance with FAR 6.303 and 6.304. Approvals are detailed in Table 3 below. To use this authority for other than full and open competition, a written justification of the urgency is required, although the FAR allows the justification to be prepared after contract award if approval prior to award would unreasonably delay the acquisition.

Table 3. Approval Requirements for Actions Subject to Other than Full and Open Competition

Value of Sole-Source Contract	Approving Official
Not exceeding \$500,000	Contracting officer unless a higher approval level is established in accordance with agency procedures.
Over \$500,000 but not exceeding \$10 million	Competition advocate for the procuring activity designated pursuant to FAR 6.501 or an official described in FAR 6.304(a)(3) or (a)(4). This authority is nondelegable.
Over \$10 million but not exceeding \$50 million (or for DoD, NASA, and Coast Guard, not exceeding \$75 million)	Head of the procuring activity, or a designee who—(i) if a member of the armed forces, is a general or flag officer; or (ii) if a civilian, is serving in a position in a grade above GS-15 under the General Schedule (or a comparable or higher position under another schedule).
Over \$50 million (or for DoD, NASA, and the Coast Guard, over \$75 million)	Senior procurement executive (SPE) of the agency. Not delegable except in the case of the under secretary of defense for acquisition, technology, and logistics, acting as the SPE for DoD.

Source: Federal Acquisition Regulation 6.304

- **Leverage existing contract vehicles.** Place task orders or delivery orders against existing contracts. It is possible to adopt expedited competitive procedures using such tools as purchase cards in tandem with federal supply schedule contracts, Federal Supply Service multiple award schedule (MAS) blanket purchase agreements, government-wide acquisition contracts (GWACs), and multiagency contracts (MACs). Rarely would you use a FAR part 14 or 15 procedure when responding to an emergency situation.

- **Leverage the use of purchase cards.** The purchase card is a convenient and widely accepted simplified acquisition method described in FAR part 13. Purchases on the cards are not limited to those under the micropurchase

Stafford Act

§ 5149. PERFORMANCE OF SERVICES (Sec. 306)¹⁰

- a. Utilization of services or facilities of State and local governments

In carrying out the purposes of this Act, any Federal agency is authorized to accept and utilize the services or facilities of any State or local government, or of any agency, office, or employee thereof, with the consent of such government.

- b. Appointment of temporary personnel, experts, and consultants; acquisition, rental, or hire of equipment, services, materials and supplies

In performing any services under this Act, any Federal agency is authorized—

1. to appoint and fix the compensation of such temporary personnel as may be necessary, without regard to the provisions of title 5, United States Code, governing appointments in competitive service;
2. to employ experts and consultants in accordance with the provisions of section 3109 of such title [5 U.S.C. § 3109], without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title [5 U.S.C. §§ 5101 et seq. and 5331 et seq.] relating to classification and General Schedule pay rates; and
3. to incur obligations on behalf of the United States by contract or otherwise for the acquisition, rental, or hire of equipment, services, materials, and supplies for shipping, drayage, travel, and communications, and for the supervision and administration of such activities. Such obligations, including obligations arising out of the temporary employment of additional personnel, may be incurred by an agency in such amount as may be made available to it by the President.

threshold. While purchase card spending limits typically are set to accommodate day-to-day operations, such limits can be increased on demand to accommodate emergency situations, in accordance with agency purchase card procedures. This likely would require coordination through the cardholder's supervisor and the agency purchase card coordinator.⁹ In response to Katrina, the Department of Defense is now allowing purchases up to \$250,000 to be placed on purchase cards.

• **Award letter contracts.** The award of letter contracts expedites the start of work and is authorized by FAR 16.603. A letter contract is a preliminary contract issued when time is of the essence and the government's interests demand that the contractor be given a binding

commitment so work can start immediately. Negotiation of specific terms and conditions (such as final price) must be definitized in a contract within a specified period of time thereafter. A letter contract, of course, should be as complete and definite as feasible under the circumstances.

In addition, for any procurements that are protested, FAR 33.104(b)(1)(i) allows the head of a contracting activity to make a written determination that "urgent and compelling circumstances which significantly affect the interest of the United States will not permit awaiting the decision of the [Government Accountability Office]," and subsequently award a contract as long as this action is taken within 30 days of the written determination.

Of course, discretion is required in determining appropriate procedures and the extent to which certain actions should be waived. Where there is potential for imminent loss of life or when necessary to prevent additional damage, the most expedited procedures are warranted (that is, use of a letter contract or purchase card order).

Can agencies seek outside help?

Yes. Section 5149 of the Stafford Act allows "any federal agency" to appoint temporary personnel, experts, and consultants to assist in responding to the situation. Agencies may incur obligations "by contract or otherwise" for the acquisition, rental, or hire of equipment, services, materials, and supplies for shipping, drayage, travel, and communications, and for the supervision and administration of such activities, "in such amount as may be made available to it by the President." The President already has signed, on September 2, 2005, a \$10.5 billion emergency supplemental act, appropriating \$10 billion to the Department of Homeland Security (DHS) and \$500 million to the Department of Defense.¹¹

In addition, the Stafford Act authorizes "any Federal agency" to accept and utilize the services or facilities of any state or local government.

Have agencies already begun issuing their policies?

Yes. The Department of Defense issued two documents (accessible via the Library feature at www.acqsolinc.com/emergencycontracting) on September 2, 2005, as follows:

- **Authorization to use increased procurement thresholds.** The under secretary of defense issued a policy that specifically authorizes the use of the special emergency procurement thresholds previously mentioned.
- **Authority to use purchase cards up to \$250,000.** The acting director of defense, procurement and acqui-

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sition policy, issued a memorandum authorizing a class deviation that allows contracting officers, when using their government-wide purchase cards in support of Hurricane Katrina relief efforts, to deviate from the requirements of Defense Federal Acquisition Regulation Supplement (DFARS) 213.301(2)(i)(A) and (C). The effect of the memo is that cardholders may use their purchase cards to make purchases up to \$250,000 each. The memorandum includes an attachment that clearly identifies the applicable laws that must be adhered to. The deviation does not apply to construction contracts.

The Department of Homeland Security has instructed its procurement offices that it is waiving all headquarters reviews required by the FAR, the Homeland Security Acquisition Regulation (HSAR), and the Homeland Security Acquisition Manual (HSAM). Heads of contracting activities (HCAs) have been delegated such approval authorities until further notice.

Other agencies are formulating their policies as we go to press on this *Advisory*.

Where can we find available policies and additional guidance?

To aid the acquisition community in its emergency and relief efforts, we have developed a special publicly available website at www.acqsolinc.com/emergencycontracting. Through this website, we will provide information relevant to emergency contracting in response to Hurricane Katrina. This website includes or soon will include:

- This *Advisory* and our prior *Advisory* on emergency contracting
- Temporary public access to our proprietary database of Streamlined Acquisition Vehicles, including GWACs, MACs, and other sources of help
- Daily News: Legislation and other emergency contracting material

- Library on Emergency and Contingency Contracting Guidance
- Inquiry Responses: Answers to clients' questions (will be posted as available), such as
 - ▶ What special acquisition authorities are in effect for DHS and where are they implemented?
- Research Responses: White papers (posted as available) on related topics such as:
 - ▶ Acceptance of Donations
 - ▶ Strategic Sourcing and Supply Chain Techniques as Emergency Solutions
 - ▶ Alpha Contracting
 - ▶ Lessons Learned
- Other information to be determined

Conclusion

Contracting in emergency situations can be challenging, but there are authorities that allow agencies to contract quickly and effectively with limited or no competition to meet critical needs expeditiously. Situations such as these represent the true meaning of "urgent and compelling." It is our hope that this *Advisory* and our new emergency contracting website will assist the men and women in the federal acquisition workforce, who are working diligently to provide the goods and services needed to help the Gulf Coast recover from the devastation of Hurricane Katrina.

As reported on *60 Minutes* on Sunday, September 04, 2005, this is the worst U.S. natural disaster in the past hundred years. We all give in the way we can. For acquisition professionals, in government or outside it, this is an opportunity to use the science and art of procurement to meet objectives: in this case, relief to American citizens. Keep the objective in mind, make good business judgments, use these flexibilities and the FAR Guiding Principles, provide for competition where you can, and take care of documentation, if need be, later. Lives hang in the balance. ♦

Special thanks to Steve Cohen and Steve Slavsky, who contributed to this Advisory.

Endnotes

1 The Federal Acquisition Regulation (FAR) uses this term within the definitions of micropurchase threshold and simplified acquisition threshold to describe the times during which these thresholds may be increased. http://205.130.237.11/far/current/html/Subpart%202_1.html#wp1145507. These authorities originally were granted by the Services Acquisition Reform Act (SARA), section 1443; http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_public_laws&docid=f:publ136.108.pdf.

2 Donna Miles, "More Active, Guard Troops Join Katrina Response," Department of Defense American Forces Information Service, September 3, 2005, http://www.defenselink.mil/news/Sep2005/20050903_2605.html

3 "Katrina's Awful Wake," *Wall Street Journal*, August 31, 2005, <http://www.opinionjournal.com/editorial/feature.html?id=110007190>.

- 4 "Press Conference with Officials from Homeland Security, the Environmental Protection Agency, and the Departments of Health and Human Services, Energy, Transportation, and Defense," press release, Department of Homeland Security, August 31, 2005; http://www.dhs.gov/dhspublic/interapp/press_release/press_release_0724.xml.
- 5 FEMA defines "major disaster" as "any natural catastrophe (including any hurricane, tornado, storm, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought) or, regardless of cause, any fire, flood, or explosion in any part of the United States that, in the determination of the President, causes damage of sufficient severity and magnitude to warrant major disaster assistance under the Stafford Act to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby;" <http://training.fema.gov/EMIWeb/IS/is14/glossary.htm>. A "major disaster" provides more long-term relief than a "declaration of emergency." Major disaster declarations: (1) Florida, August 28, 2005: <http://www.fema.gov/news/newsrelease.fema?id=18459>; (2) Alabama, August 29, 2005: <http://www.fema.gov/news/newsrelease.fema?id=18479>; (3) Louisiana, August 29, 2005: <http://www.fema.gov/news/newsrelease.fema?id=18478>; (4) Mississippi, August 29, 2005: <http://www.fema.gov/news/newsrelease.fema?id=18474>.
- 6 "Emergency Declaration Ordered for Mississippi," press release, FEMA, August 28, 2005, <http://www.fema.gov/news/newsrelease.fema?id=18460>; "Emergency Declaration Ordered for Alabama," press release, FEMA, August 28, 2005, <http://www.fema.gov/news/newsrelease.fema?id=18462>.
- 7 "President Approves Emergency Declaration for Arkansas," press release, FEMA, September 3, 2005, <http://www.fema.gov/news/newsrelease.fema?id=18580>; "President Approves Emergency Declaration for Texas," press release, FEMA, September 3, 2005; <http://www.fema.gov/news/newsrelease.fema?id=18579>
- 8 Secretary of Health and Human Services, Declaration of Public Health Emergency, August 31, 2005, <http://www.hhs.gov/emergency/determination.pdf>
- 9 GSA's emergency purchase card guidance at http://www.gsa.gov/gsa/cm_attachments/GSA_DOCUMENT/Emergency%20Procurement%20Authority_R2E-c-o9_0Z5RDZ-i34K-pR.doc is an example.
- 10 Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended by Public Law 106-390, October 30, 2000, <http://www.fema.gov/library/stafact.shtml>
- 11 Statement on H.R. 3645, the "Emergency Supplemental Appropriations Act to Meet Immediate Needs Arising From the Consequences of Hurricane Katrina, 2005," September 2, 2005, <http://www.whitehouse.gov/news/releases/2005/09/20050902-9.html>; H.R. 3645; <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR03645:@@D&summ2=1&>.

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