

The following article originally appeared in the November 7, 2005 edition of the *Legal Times* and is reprinted with permission.

Learning from Katrina

Build a better emergency response with multiple-award contracts

By John J. Pavlick and Rebecca E. Pearson*

The unprecedented scope of Hurricane Katrina's devastation tested the federal government's emergency response system and its supporting procurement as never before. The contracting process did not escape the overall criticism of the federal effort. Predictably, questions were raised regarding whether the federal procurement system should be changed to more effectively respond to future disasters. While some have suggested broad organizational reforms—such as Sen. Hillary Clinton's proposed legislation to make the Federal Emergency Management Agency (FEMA) independent of the Department of Homeland Security—what is not needed are major changes to the procurement process. Used with foresight and planning, the current statutes and regulations give the federal government all the flexibility it needs to address almost any natural disaster.

The Government Reacts

Initially, the executive branch and Congress reacted to the devastation of Hurricanes Katrina and Rita by taking actions within their immediate control.

On Sept. 8, only 10 days after Katrina slammed into the Gulf Coast, President George W. Bush signed new legislation providing FEMA officials with greater flexibility in awarding contracts to assist in disaster relief and recovery. Specifically, the act raised the threshold for the use of so-called micro-purchase procedures from \$2,500 to \$250,000. Micro-purchase procedures, often associated with the use of the government credit card, allow officials (who need not be contracting officers) to obtain goods and services without regard to the usual competition and socioeconomic requirements.

By Sept. 13, recognizing the potential for abuse, the Office of Management and Budget (OMB) had issued guidance restricting this power to individuals specifically authorized by the head of the contracting activity. On Oct. 3, the OMB rescinded the raised threshold, except in "exceptional circumstances" approved by the OMB. The micro-purchase limit was effectively restored to \$2,500.

The Sept. 8 act also invoked special emergency authority to increase the simplified acquisition threshold (SAT) from \$100,000 to \$250,000 for noncommercial items and from \$5 million to \$10 million for commercial items. The SAT procedures streamline the procurement process, reduce the need for formal competition, and provide much more flexibility to the government.

Significantly, generally all procurements under the SAT are to be set aside for small businesses. However, in the initial response to Katrina, this benefit was negated by the concurrent increase in the micro-purchase threshold to \$250,000, because micro-purchases can be made without regard to business size. Since the rescission of the micro-purchase increase, the incentives to use the SAT authority should encourage the government to turn more to small businesses for response and recovery contracts.

Certain socioeconomic requirements were also suspended to make contracting easier in the disaster aftermath. On Sept. 9, the OMB suspended the requirement for contractors to develop affirmative action programs and reports, although they are still subject to various nondiscrimination requirements. In a more controversial action, the president on Sept. 8 suspended the application of the Davis-Bacon Act, which

required the payment of “prevailing wages” on construction projects in the disaster areas. Labor unions, Democrats, and even a number of Republicans in Congress strongly opposed this suspension, and the White House agreed to reinstate the Davis-Bacon provisions effective Nov. 8.

Since this initial flurry of recovery efforts, FEMA has started to take a more measured approach, attempting to use more traditional procurement practices to address some of the criticisms, including the lack of small-business contracting.

Most notably, FEMA has announced that it will seek bids on multiple five-year “indefinite delivery, indefinite quantity” contracts to provide technical assistance support on a national basis for disaster response and recovery. Prime contractors will be required to meet “significant small business subcontracting goals, including the preference for local businesses.” FEMA has also announced that it will re-compete recovery contracts totaling approximately \$1.5 billion awarded immediately after Katrina.

Fingers Pointed

Initial criticism about the post-hurricane procurement focused on FEMA’s reliance on large, nationally based contractors. Concerns were raised not only about the lack of competition, but also about the lack of opportunities for small businesses. Indeed, the lack of participation by small businesses, as well as small disadvantaged and minority-owned businesses, and the presumed failure to turn to local labor remains an ongoing source of criticism.

The public has also questioned the prices charged by contractors in this emergency and asked whether the speed with which certain procurements were made may have hampered their efficacy. Even within government, there have been voices suggesting that the process could better address major disasters.

The government’s quick actions to raise the micro-purchase and SAT thresholds, and to a lesser degree to suspend certain socioeconomic requirements, in the wake of Hurricane Katrina was a typical approach to focus on granting greater flexibility for federal officials facing a disaster. However, these actions do not address all the needs and challenges faced by officials and certainly do not assuage all the criticism leveled after Katrina.

There were still delays in obtaining emergency authority and procuring needed services. While streamlined, this approach still required that multiple new contracts be awarded. They did not guarantee reasonable prices to the government or ensure a reliable source of supplies and services when and where needed. Finally, they failed to increase the use of smaller, locally based contractors, which would have put more money back into the struggling local economy.

All these needs present conflicting pressures. For example, to obtain a quick response in the face of massive devastation, the government naturally turns to larger companies that have performed major contracts in the past and that are set up to meet the numerous requirements placed on government contractors and to monitor and document their costs, making it easier for the government to audit and manage their work. These same requirements would eliminate many smaller local businesses from performing larger projects, unless they were already experienced contractors.

Pre-Disaster Response

But the debate over how to divide up the federal response pie is no substitute for a practical analysis of whether the federal procurement system has the flexibility and capability to get major infrastructure up and running as soon as possible. The procurement system can do this well if, and only if, the appropriate agencies take steps to put in place the full range of contract vehicles before a disaster strikes.

Besides giving greater flexibility to officials in reaction to a crisis, the federal procurement system offers a number of very useful procedures for setting up the necessary contracts in advance.

In particular, the use of task orders or multiple award contracts—such as the indefinite delivery, indefinite quantity contracts now proposed by FEMA—prepares qualified contractors to provide a wide variety of supplies and services on a regional or national basis as needs demand. A number of companies can be

awarded these contracts with prenegotiated pricing and standard terms. Federal agencies can then access these supplies and services through the issuance of a purchase or task order tailored to a particular project. The precise volume and timing of specific orders remain contingent on the government's changing needs.

The Federal Supply Schedule (FSS) of the General Services Administration (GSA) has already established a government-wide contract platform to provide everything from engineering services to essential supplies at prenegotiated prices. Moreover, a new option has recently been added to FSS contracts that allows agencies not to buy, but to rent, construction equipment, generators, and similar equipment. Agencies can rent what they need for as long as they need it without having to worry about long-term maintenance of the equipment or other capital costs.

The ability to rent and the development of "virtual" inventories held by suppliers should help to address past concerns over the cost of the government's acquiring and maintaining stockpiles of emergency supplies and equipment, as well as the quandary of where to locate these stockpiles.

FSS contracts and the like also offer a long-term solution to the dearth of small businesses engaged in federal disaster relief. As a practical matter, many small businesses do not know how to work with the government's requirements, and immediately after a disaster is no time to learn. But many small companies do hold FSS contracts, and the GSA procedures make it relatively easy for a small business to obtain a contract.

The awarding of contracts for performing work in a specific region could also make it easier and more attractive for small businesses to participate. If a substantial number of small companies held FSS contracts, particular task orders or competitions for orders could more effectively be set aside for them. And under the GSA rules, small businesses can go after opportunities by teaming with large contractors or other small businesses.

Buying Together

One final change that could significantly enhance the effectiveness of the FSS contracts in times of disaster would be to make them available to state and local officials in areas where the president has declared a state of emergency. Currently, this concept, called cooperative purchasing, is available on a regular basis for information technology equipment. Extending the customer base would not only provide small businesses with more opportunities to obtain a contract, but would also allow state and local governments to draw upon a quick, efficient process safeguarded by the enormous negotiating power of the federal government.

A similar concept was proposed this year for goods and services used in defense against or recovery from terrorism or nuclear, biological, chemical, or radiological attack. While other portions of the proposed Acquisition System Improvement Act were incorporated into the Defense Department's 2006 authorization bill, the section on cooperative purchasing was not.

Emergency steps taken after Hurricanes Katrina and Rita reflected, in part, a view that full and open competition and socioeconomic goals are inconsistent with the government's procurement needs following a disaster. That is simply not true. Contracting procedures already available can provide the supplies and services needed for disaster recovery without giving up on the ideals of good procurement.

* Mr. Pavlick and Ms. Pearson gratefully acknowledge the research and editorial assistance that Mr. Dismas Locaria provided to the preparation of this article.

For further information please contact:

John J. Pavlick at (202) 344-4894 – jjpavlick@venable.com, Rebecca E. Pearson at (202) 344-8183 – repearson@venable.com, Dismas N. Locaria at (202) 344-8013 – dzlocaria@venable.com or any of the other attorneys in Venable's Government Contracts Practice Group www.venable.com ~ 1-888-VENABLE

The Government Contracts Update is published by the Government Contracts Practice Group of Venable LLP. Venable publications are not intended to provide legal advice or opinion. Such advice may only be given when related to specific fact situations. © Copyright 2005 by ALM Properties Inc. All rights reserved. This article is reprinted with permission from Legal Times.