

Update: The Impact of Hurricane Katrina on Federal Procurement

Since our last advisory, the flurry of legislative, regulatory, and policy activity addressing the impact of Hurricanes Katrina and Rita on the federal procurement process has continued unabated. Despite the volume of activity and the sometimes heated rhetoric, however, these initiatives have not yet translated into legislation that has actually been enacted.

The following are the key activities in the past several weeks. We will continue to keep you updated on these issues.

Appropriations: Despite earlier estimates that the cost of disaster relief would reach \$250 billion, on October 6, 2005, Congressional Budget Office Director Douglas Holtz-Eakin said the final tab is likely to be less than \$150 billion. "There's nothing that we've seen so far that adds up to even approach \$200 billion. Everything we've seen is in the vicinity of \$150 billion or below," Holtz-Eakin told the Associated Press, amplifying on testimony to the House Budget Committee.

Fraud, Compliance, Enforcement: Reaction to the award of large sole-source contracts and other questionable contracts for Katrina recovery efforts has been vocal and widespread. In response to questions at a House Energy and Commerce subcommittee hearing, the Inspector General of the Department of Homeland Security ("DHS") promised to take a hard look at the no-bid contract issue. The Inspector General ("IG") testified that he had assigned 60 auditors and investigators to review Katrina contracts. The focus will be to prevent misspending on questionable contracts and grants, with the office's goals being to: determine the extent of compliance with the FAR; assess whether effective contracting practices are being used; and determine whether the expenditures are necessary and reasonable. The IG will review all major contracts, including those awarded in the first days after Hurricane Katrina struck.

At the House Energy and Commerce subcommittee hearing, the acting DOD IG testified that his office, as well as the Army Audit Agency, the Naval Audit Agency, the Air Force Audit Agency, DCAA, and the Defense criminal investigation organizations "will employ a cadre of auditors, investigators, and inspectors who will provide immediate and professional oversight of DOD contracts, grants, and operations related to Hurricane Katrina relief and recovery efforts." In all, the federal offices of inspectors general in agencies that are involved in hurricane reconstructions have committed over 300 auditors, investigators, and inspectors to the effort. The cost of this oversight effort will be about \$45 million, according to the President's Council on Integrity and Efficiency and Executive Council on Integrity and

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Efficiency.

On October 6, 2005, the acting Director of FEMA announced that it would rebid all no-bid federal relief contracts awarded after Hurricane Katrina struck, including the four \$100 million contracts that had been awarded without competition to The Shaw Group, Fluor, Bechtel and CH2M Hill. According to the Associated Press, more than 80 percent of the \$1.5 billion in Katrina-related FEMA contracts were awarded with little or no competition.

On October 6, 2005, a bill was introduced in the Senate (S.1844) that would require the use of full and open competition for procurement of goods or services in connection with Hurricane Katrina or Hurricane Rita reconstruction efforts. Exceptions would require written approval of the President or the President's designee, and notice to Congress and publication in the Federal Register or Federal Business Opportunities 7 days prior to award of any contract procured using other than full and open competition procedures. H.Con.Res.251 would state the sense of Congress that open and fair competition must be used for the award of contracts for Hurricane Katrina or Hurricane Rita reconstruction efforts.

On October 11, 2005, FEMA announced a new dual-track competitive bidding strategy for procuring disaster-related goods and services. The strategy calls for giving local and small disadvantaged businesses in the Gulf Coast region priority in awarding multiple, five-year, IDIQ contracts for technical assistance in the recovery effort. In addition, the strategy will seek award of such contracts on a national basis without regard to the size of the bidders, but will require awardees to meet certain small business subcontracting goals and provide preferences to local firms. Sen. Olympia Snowe (R-Maine), Chair of the Senate Committee on Small Business and Entrepreneurship, responded by requesting that FEMA revise its new policy to provide the work to small businesses.

On October 7, 2005, members of the House Homeland Security Committee voted to create a sixth subcommittee that would conduct in-depth investigations of DHS issues, including FEMA issues. Committee Chairman Peter T. King (R-N.Y.) named Michael McCaul to chair the new panel. Before McCaul was elected in November 2004, he was chief of the Terrorism and National Security section of the Justice Department's Criminal Division, in the Western District of Texas. McCaul was deputy attorney general under then state attorney general — now senator — John Cornyn (R-Tex.) and was a prosecutor with the Justice Department's Public Integrity Unit.

For its part, DHS has asked the DCMA to provide assistance to assure that the Department's procurement integrity is maintained in the review, negotiation, and award of contracts and task orders for the recovery effort. DCMA will provide on-site audit support to help negotiate contracts and assess potential contractors' ability to comply with technical performance requirements.

A bill was introduced in the Senate (S.1843) that would establish a strong federal officer appointed by the President focused exclusively on the official and effective use of federal resources for Hurricane Katrina recovery.

Emergency Procurement Procedures: Responses to the increase in the purchase limit to \$250,000 for government-wide purchase cards remain a hot topic. Bill sponsor Sen. Byron Dorgan (D-N.D.) noted that the decision to increase the limit was defended by David Safavian, recently resigned and indicted Administrator of OFPP. On September 30, 2005, a bill was introduced in the Senate (S.1805) that would repeal the provision of the second emergency supplemental appropriations bill

for Katrina (Pub. L. No. 109-62) that raised the limit.

On October 3, 2005, OMB issued guidance to federal agencies that effectively rescinded the \$250,000 limit. OMB restored the purchase limit to \$2,500 for normal purchases and \$15,000 for contingency operations, except in extraordinary circumstances approved by OMB. Note that on October 1, 2005, new OMB government-wide policies intended to reduce the risk of fraud, misuse, and late payments associated with government purchase cards became effective. The policies are Appendix B to OMB Circular A-123, available at www.whitehouse.gov/omb/financial/fia_travel.html.

Socioeconomic Issues: The President's suspension of the Davis-Bacon Act continues to illicit strong responses. On the Congressional front, a House Resolution was introduced (H.Res.467) that would request that the President provide Congress with information in his possession relating to contracts for services and construction related to Hurricane Katrina recovery that relate to wages and benefits to be paid to workers. A bill was introduced in the Senate (S.1817) that would suspend for one year the prevailing wages rules under the Davis-Bacon Act in national disaster areas. In contrast, 37 House Republicans who want the President to reinstate the Davis-Bacon Act intend to take floor action if the President does not act. As previously reported, H.R. 3763, currently pending, would reinstate the Act. At the same time, leaders of state labor federations in Alabama, Louisiana, Mississippi, and Texas have urged the President to rescind the suspension.

Small Business Considerations: Sen. Olympia Snowe (R-Maine) and Rep. Donald Manzullo (R-Ill.), heads of the congressional committees that address small business issues, are leading the way in the battle to ensure that small and minority-owned businesses get their fair share of the hurricane recovery appropriated funds. They have asked the GAO to investigate the question, including the degree to which contractors other than small businesses are complying with their small business subcontracting plans. Sen. Snowe, in a letter to the acting Director of FEMA, expressed her concern that despite FEMA's assurances regarding the rebidding of some \$1.5 billion in previously awarded contracts to the contrary, the agency announced a new competitive bidding strategy that allows the current large incumbents to finish their contracts rather than allowing these contracts to be recompleted.

In Congress, Sen. Snowe, with bipartisan support, introduced a bill (S.1807) that would require that awards to small business be taken into account by any federal agency making hurricane-related procurements, and to set goals of awarding to small businesses of 30 percent for prime contracts and 40 percent for subcontracts for such procurements. Similar legislation (H.R.3988) was introduced in the House.

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