

## The Impact of Hurricane Katrina on Federal Procurement

It is now clear that Hurricanes Katrina and Rita will have a significant and enduring impact on the federal procurement process. In the days since Katrina reached landfall in the Gulf states, the President, Congress, and various agencies have responded with literally dozens of legislative, regulatory, and policy changes and proposed changes across a broad spectrum of procurement-related areas. The impacts of Katrina and Rita have merged with budgetary pressure, the fallout of recent procurement scandals, and politics-as-usual to yield the perfect storm for procurement change.

The following is intended to alert readers to the breadth, depth, and potential reach of these initiatives. We will provide more in-depth analysis of selected issues as they arise.

**Appropriations:** In two emergency supplemental appropriations bills (Pub. L. No. 109-61, Pub. L. No. 109-62), Congress provided \$62.3 billion for use in disaster relief. The President has publicly committed to provide significant additional funds to accomplish the recovery and estimates of the final costs are as high as \$200 billion. A bill introduced in the Senate (S.1765) would provide approximately \$250 billion for a broad range of recovery initiatives. The looming, politically charged question is how the federal government will pay for the disaster relief effort.

**Financial Oversight:** In two bills (S.1700, approved in committee 09/22/05; H.R.3813), Congress proposes to establish the Hurricane Katrina Recovery Chief Financial Officer, whose duties would include responsibility for the efficient and effective use of federal funds in all activities related to the recovery. Beginning on September 27, 2005, the House Appropriations Committee will hold hearings examining how agencies are spending the \$62 billion in emergency supplemental funds appropriated.

**Fraud, Compliance, Enforcement:** President Bush has promised to institute safeguards against fraud, waste, and abuse in Katrina-related procurements. In turn, Congress has initiated action on several fronts to confront the prospect of procurement fraud and other illegal conduct arising out of the Katrina recovery effort. Three House bills (H.R.3805, H.R.3810, H.R.3737) would establish some version of a special Inspector General authority for the recovery effort. A Senate bill (S.1738, approved in committee 09/22/05) expands the responsibilities of the special Iraq reconstruction inspector general to include Katrina oversight. The second emergency supplemental bill (Pub. L. No. 109-62) provided \$15 million to the DHS IG for audits and investigations related to Katrina relief work. Senate resolution

### Contact Info

If you would like more information, please contact any of the McKenna Long & Aldridge attorneys or public policy advisors with whom you regularly work. You may also contact:

**David Kasanow**  
202.496.7194

**John Clerici**  
202.496.7574

(S.RES.242) urges the President to appoint an individual to oversee all federal work in the recovery to eliminate fraud waste and abuse from the process. A Senate bill (S.1720) would provide for enhanced penalties (5 to 20 years additional imprisonment) for crimes committed using funds appropriated for remediation of any injury or damage caused by Hurricane Katrina.

Four House resolutions (H.R.RES.345, H.R.RES.432, H.R.RES.437, H.R.RES.449) were introduced to establish a select committee to monitor and investigate the award and execution of federal contracts for the recovery effort. The House passed H.R.RES.437, and hearings began on September 22, 2005, despite partisan wrangling over committee membership.

A pending House bill (H.3838) would establish an Independent Commission to Prevent Fraud and Abuse in the Response to Hurricane Katrina. The Commission, composed of members of Congress and a Presidential appointee, would be tasked with investigating, among other things, how Katrina-related contracts, grants, and cooperative agreements are awarded and whether the awards comply with competition requirements and use of appropriate contract type. The Commission also would assess, analyze, and evaluate relevant persons, policies, procedures, contracts, reports, and events.

In addition, the Department of Homeland Security Inspector General established an Office of Hurricane Katrina Oversight to ensure disaster assistance funds are spent wisely. The new function will be responsible for overseeing the management and expenditure of all contracts, grants, and governmental operations related to the recovery effort.

Finally, the Department of Justice has established the Hurricane Katrina Fraud Task Force, which includes members from the FBI, the Federal Trade Commission, the Postal Inspector's Office, and the Executive Office of the United States Attorneys. The Task Force will investigate problems associated with the recovery, including allegations of fraud, False Claims Act violations, mischarging, double billing, kickbacks, self dealing, preference violations, and insurance fraud.

**Emergency Procurement Procedures:** Of particular importance to contractors seeking to participate in the Katrina-related recovery effort are the numerous actions that dramatically alter the procurement procedural process for that efforts. As discussed in our previous Katrina Advisory (McKenna Long & Aldridge Government Contracts Advisory, Vol. III, No. 8, Sept. 21, 2005), several agencies have already waived various statutory and regulatory requirements, including competition itself. Notably, FEMA has already awarded on a sole-source basis reconstruction contracts worth hundreds of millions of dollars. In response, senior House Democrats sent an urgent request to the Government Accountability Office asking for immediate and intensive oversight of the emergency funds appropriated for Katrina efforts.

The second emergency supplemental appropriations bill for Katrina (Pub. L. No. 109-62) raised: (i) the threshold for emergency micro-purchases from \$15,000 to \$250,000; (ii) the simplified acquisition threshold from \$100,000 to \$250,000; and (iii) the limitation the Test Program for Certain Commercial Items from \$5 million to \$10 million. These actions drew immediate fire from Congressman and Senators from both sides of the aisle, who raised concerns about previous misuse and abuse of the government-wide purchase cards that now could be used for purchases up to \$250,000.

In response to this Congressional action, OMB issued guidance as to how the change

in the emergency micro-purchase threshold should be implemented. Generally, the guidance imposes enhanced oversight on the use of government-wide purchase cards to ensure against abuses. For example, the guidance requires approval by a warranted contracting officer of all purchases in excess of \$50,000. The guidance also directs that where possible, local small business be given priority for micro-purchases despite the lack of such a requirement in the law. In addition, GSA issued guidance to implement the emergency procurement authority in 41 U.S.C. § 428a. The Department of Defense issued Class Deviations regarding the use of government-wide purchase cards for micro-purchases to: (i) DFARS 213.301(2)(i)(A) and (C); and (ii) FAR 2.101, DFARS 213.270(b)(1), and DFARS 213.301(3). DOD also authorized a temporary increase in the maximum purchase dollar limit for convenience checks from \$2,500 to \$15,000.

Also in response to the changes in the second emergency supplemental, a bill was introduced in the Senate (S.1716) that would modify the \$250,000 micro-purchase threshold by setting a limit of \$50,000 on the use of government-wide purchase cards for Katrina purchases. The bill also would require OMB to issue specific guidance on the use of the cards.

The Katrina response may be a springboard for those seeking more general retrenchment of regulation in federal procurement. Consider a pending House bill (H.R.3766) that would apply simplified procurement procedures for all acquisitions related to all emergency and disaster relief efforts. The bill would take the drastic step of authorizing agency heads to eliminate competitive procedures in declared disaster situations. Further, all procurements would be treated as commercial items. The bill also authorizes FEMA to accept voluntary services to carry out its mission.

Also noteworthy is the fact that FEMA has contracted out a portion of its procurement function apparently because FEMA lacks sufficient agency acquisition professionals to handle the surge of Katrina work. The contractor is providing technical advice, helping to draft contracts, and working as support staff at FEMA.

**Socioeconomic Issues:** On September 7, 2005, a bill was introduced in the House (H.R.3684) to suspend Davis-Bacon Act requirements for federal contracts in areas declared national disasters. On September 8, 2005, the President issued Proclamation 7924, which suspended the Davis Bacon Act with respect to all construction contracts awarded in response to Katrina in the affected locations. Following a strong negative response to the Proclamation from members of Congress, unions and other groups, bills were introduced in the House (H.R.3763) and Senate (S.1749) to reinstate the Davis-Bacon Act, notwithstanding the Presidential Proclamation. On September 20, a second House bill was introduced (H.R.3834) that would not only restore Davis-Bacon applicability to Katrina-related efforts, but also would delete from the statute the provision that grants the President the authority to suspend its applicability.

In addition, the Department of Labor has granted a limited exemption and waiver from certain of the laws administered by the Office of Federal Contract Compliance Programs ("OFCCP"). The action relieves contractors providing Hurricane Katrina relief from the obligation to develop written affirmative action programs under Executive Order 11246, Section 503 of the Rehabilitation Act, and Section 4212 of the Vietnam Era Veterans' Readjustment Assistance Act. The Department of Defense issued a class deviation to the three pertinent contract clauses (FAR 52.222-26, 52.222-35, 52.222-36) to effectuate the OFCCP action.

A pending Senate bill (S.1763) would promote employment on federal clean-up and

reconstruction projects for workers displaced by Katrina by giving priority to companies that hire such workers. The bill also would ensure the workers would be paid prevailing wages.

**Small Business Considerations:** In an amendment to the Commerce, State, and Justice 2006 appropriations act (Sec. 529 of H.R.2862), the Senate approved the designation of the Katrina-impacted area as an Historically Underutilized Business Zone (HUBZone). Under the HUBZone program, eligible small business concerns would get a 10 percent price evaluation preference in procurement competitions. The provision also directs the Small Business Administration to establish a contracting outreach and technical assistance program for small businesses in the Katrina disaster area.

Pending in the Senate is a bill (S.1724) that provides broad assistance to small businesses damaged by Katrina. Provisions include additional loans and deferment of loan payments; additional grant authority; HUBZone designation for the Katrina disaster area; and increasing the small business participation goals for federal procurement related to Katrina to 30 percent for prime contracts and 40 percent for subcontracts.

**Liability Limitation:** A bill introduced in the Senate (S.1761) would limit contractor liability on recovery projects related to Katrina recovery. The bill would create a federal cause of action, prohibit the award of punitive or exemplary damages, and proscribe private lawsuits

**Lessons Learned:** In response to the well-publicized shortcomings in the Katrina response by government, a bill introduced in the Senate (S.1725) would create an Office of Emergency Communications, Interoperability, and Compatibility and establish other programs generally to improve responses to disasters. The bill is intended to strengthen federal leadership, provide grants, enhance outreach and guidance, and provide other support to state and local officials. Also pending in the senate is a bill (S.1748) that would establish a congressional commission to examine the federal, state, and local response to Katrina and establish corrective measures to improve such responses in the future.

\* \* \*

The message to be taken from this extensive series of actions is clear: any company participating in the Katrina recovery effort must be well-informed, cautious, and diligent. Contractors will face increased scrutiny in every aspect of their performance and the consequences of missteps may be severe.

#### ■ About Us

McKenna Long & Aldridge LLP is a full-service law firm of approximately 400 lawyers and public policy advisors. The firm provides business solutions in the areas of corporate law, government contracts, intellectual property and technology, complex litigation, public policy and regulatory affairs, international law, real estate, environmental, energy and finance.

#### ■ Subscription Info

If you would like others to receive future mailings of the *Government Contracts Advisory*, please email their contact information to us at [information@mckennalong.com](mailto:information@mckennalong.com)

If you would like to be removed from the *Government Contracts Advisory* mailing list, please email [information@mckennalong.com](mailto:information@mckennalong.com)

---

\*This **Government Contracts Advisory** is for informational purposes only and does not constitute specific legal advice or opinions. Such advice and opinions are provided by the firm only upon engagement with respect to specific factual situations. This message is intended as a transactional message for clients of the Firm. If you are not a client of the Firm, you have received it for informational purposes only and should not consider it an advertisement or solicitation.

• Atlanta • Brussels • Denver • Los Angeles • Philadelphia • San Diego • San Francisco • Washington D.C.

© Copyright 2005, McKenna Long & Aldridge LLP, 1900 K Street, NW, Washington DC, 20006

---