



Federal Procurement Law & Natural Disasters

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In the wake of the recent hurricanes that have severely damaged parts of the United States, questions have been raised about the impact of federal procurement law on the federal government’s disaster response. There are a limited number of special provisions in federal procurement law that apply to procurement contracts entered into by federal agencies to respond to federally declared emergencies or major disasters. As discussed in detail below, these special provisions generally authorize and encourage, but do not require, federal agencies to contract with local contractors for disaster assistance after a federally declared emergency or major disaster. Some [Members of Congress](#) have raised concerns that these provisions do not adequately incentivize agencies to choose local contractors when entering into contracts for disaster assistance.

By way of background, there are two forms of contracting to assist with disaster relief that often are confused: (1) those entered into by the federal government and (2) those entered into by state and local governments. A significant portion of federal disaster assistance comes in the form of grants to state and local governments, which often use those federal funds to contract with private entities to assist with disaster recovery. State and local contracts with private parties—including those, like the [widely criticized Whitefish contract](#) with the Puerto Rico Electric Power Authority (PREPA), that are intended to be funded by [federal grants](#)—are not governed by federal procurement law and, thus, are not discussed in this post.

Emergency & Disaster Provisions of Federal Procurement Law. Under two provisions of [the Robert T. Stafford Disaster Relief and Emergency Assistance Act](#) (Stafford Act), federal agencies entering into contracts for disaster assistance (e.g., debris removal, distribution of supplies, and reconstruction) after a federally declared [emergency or major disaster](#) are encouraged to: (1) [use local contractors](#) (“locality-based preference provision”); and (2) [transition existing contracts to local contractors](#) (“transition provision”). These provisions are intended to help a community affected by a federally declared disaster or emergency recover through [“infusions of cash through the use of local people and business firms.”](#)

A contractor is considered to be [“local”](#) for purposes of these Stafford Act provisions if the contractor is [“residing or doing business primarily”](#) in the affected area. The Federal Acquisition Regulation (FAR) – the [government-wide regulation that generally applies to acquisitions by executive branch agencies](#) -- [clarifies](#) that a contractor is [“residing or doing business primarily”](#) in the affected area if, during the previous 12 months, the contractor’s main operating office was located in the area and that office generated 50% or more of the contractor’s gross revenue and employed 50% or more of its permanent employees. The FAR also provides that firms that do not meet these criteria may still be considered local

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based on other factors, such as the extent of the firm’s previous work, prior contracts with suppliers and subcontractors, and physical presence in the affected area.

The FAR provides that, under the Stafford Act’s locality-based preference provision, federal agencies are authorized to: (a) “set aside” contracts so that only firms local to a [specific geographic region](#) of the declared disaster or emergency area may compete for them; and (b) favor (i.e., apply an “[evaluation preference](#)” for) local firms when awarding contracts, if authorized by the agency. Rather than imposing an absolute mandate, the Stafford Act and the FAR state that these locality-based preferences should be used “to the extent feasible and practicable.” However, an agency that chooses against using these preferences [must justify its decision in writing](#), taking into consideration the scope of the emergency or disaster and the speed at which goods and services must be procured to care for victims and protect lives and property.

The transition provision of [the Stafford Act provides](#) that, following the federal declaration of an emergency or major disaster, agencies performing response, relief, and reconstruction activities must transition work conducted under preexisting contracts to local contractors, unless “the head of the [] agency determines that it is not feasible or practicable to do so.” [The FAR states](#) that agencies should transition work to local contractors “at the earliest practical opportunity,” based on: the severity and expected length of the disaster or emergency; the existing contract’s terms; the likely effect that the transition will have on the response to the emergency or disaster; and the expected pool of local firms that can fulfill contractual obligations at a reasonable rate.

Legal Analysis of Stafford Act Provisions. Both of the Stafford Act’s locality-based contracting provisions use the terms “practicable” and “feasible.” However, as the Government Accountability Office (GAO), which reviews many procurement contract [bid protests](#), has [noted](#), neither the Stafford Act nor the FAR define these inherently ambiguous terms. In light of these ambiguities, agencies appear to have a fair amount of discretion to determine when to use these preferences. However, it appears that GAO and the courts have had relatively few opportunities to review the use of the locality-based contract provisions. Consequently, the scope of agency discretion under these provisions is unclear.

In general, GAO [defers](#) to an agency’s implementation of statutory procurement obligations “[unless the record shows that the implementation is unreasonable or inconsistent with congressional intent](#).” Thus, GAO [denied](#) a protest asserting that a request for proposals from the Army Corps of Engineers to respond to a natural disaster in Puerto Rico and the U.S. Virgin Islands did not sufficiently apply the Stafford Act locality-based preference provision. GAO concluded that the Army Corps of Engineers’ decision that it was not “feasible or practicable” to apply the local preference based on the agency’s previous procurement activities on the islands was neither “unreasonable [n]or inconsistent with congressional intent.” However, there appear to be few other legal challenges to the discretionary application of either locality-based contract provision. The dearth of challenges could be due to legal impediments (e.g., a firm might determine that it is not an “[interested party](#)” in the award of the contract and therefore unable to file a bid protest) or practical impediments (e.g., a firm might believe a challenge would not be economically feasible in light of the agency’s discretion under the provisions), among other factors.

Other Relevant Procurement Laws. In addition to the locality-based contracting provisions set forth in the Stafford Act and FAR, certain other federal procurement laws might be relevant in the context of major disasters and emergencies. For example, [in certain circumstances](#) an agency can use “[simplified acquisition procedures](#)” when it makes small-dollar purchases, and [the thresholds](#) under which agencies can use these simplified acquisition procedures are increased for procurements in support of a federally declared major disaster or emergency. As another example, the Competition in Contracting Act of 1984 (CICA) [permits agencies to make sole-source \(i.e., noncompetitive\) awards when justified](#) under certain circumstances, including when the need for the service or good is of such an “[unusual and compelling urgency](#)” that the government potentially could suffer serious harm if the typical procurement competition procedures were followed. Arguably, this circumstance might commonly arise in the context of a major

disaster or emergency. Finally, the FAR [provides numerous exceptions or “flexibilities”](#) to the typical procurement competition process that, while not specific to disaster relief, can still be used by agencies when contracting for supplies and services to respond to disasters and emergencies.

Considerations for Congress. A post-Hurricane Katrina [conference committee report from 2006](#) expressed concern that the federal government was not using the locality-based preferences to hire local firms, but instead “tended to hire large contractors to perform broad responsibilities over the entire disaster area, which made it difficult for smaller, local firms to compete.” In response, [Congress amended the Stafford Act](#) to direct agencies, when “feasible and practicable,” to “[formulate appropriate requirements to facilitate compliance with](#)” the act’s locality-based preferences. Similarly, [some Members expressed concern](#) that the purpose of the Stafford Act’s locality-based preferences was undermined by the use of non-local subcontractors. Around that time, the FAR was [amended to limit](#) the circumstances under which local contractors can subcontract with non-local firms.

In light of recent disasters, Congress might consider whether these post-Katrina changes to the locality-based contract provisions in the Stafford Act and FAR sufficiently addressed congressional concerns that the provisions are not effectively incentivizing the federal government to contract with local firms or whether additional changes might be needed. For example, [at least one commentator](#) has argued that the current FAR definition of “local firm” may “create[] a situation in which most of the tax revenue and employment money is sent outside of the affected area” because the definition does not, for example, require that the company employ a specified number of local employees or maintain its main operations in the affected area throughout contract performance. Additionally, Congress also might consider whether the flexibility and discretion provided to agencies under these provisions, and the seemingly limited amount of meaningful review of agencies’ use of these preferences, is appropriate or has limited their use.

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