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Federal Procurement: Emergency-Related Acquisition Flexibilities

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SUMMARY

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Federal Procurement: Emergency-Related Acquisition Flexibilities

Federal procurement is an essential component of the federal government's response to disasters, emergencies, and other types of incidents. Procurement data for federal government spending related to past hurricanes and wildfires and the COVID pandemic show that it has acquired a broad array of goods and services—from engineering and satellite services to office supplies and dump trucks—over the years to aid in response and recovery efforts.

In acquiring goods or services, contracting officers must comply with applicable procurement statutes and regulations (notably the Federal Acquisition Regulation, or FAR), which form the foundation of the federal acquisition system. However, there is no single acquisition method or process for buying goods and services. When buying goods or services to be used in recovering from or responding to an emergency or disaster, a contracting officer determines, for example, whether to use full and open competition, set aside the procurement for small businesses, or use simplified acquisition procedures. (The same is true for acquisitions not related to an emergency or a disaster.)

To aid contracting officers in identifying acquisition flexibilities that may be particularly useful for emergency-related acquisitions, acquisition officials added a new Part 18 to the FAR in 2007. Part 18 is a single reference to acquisition flexibilities that already exist in other parts of the FAR. These flexibilities may be useful in facilitating procurements during emergency situations. Subpart 18.1 lists *generally* available acquisition flexibilities. Use of these flexibilities is not contingent on an executive action. *Emergency* acquisition flexibilities are identified in subpart 18.2. These flexibilities, such as the local contracting preference established by the Robert T. Stafford Disaster Relief and Emergency Assistance Act (P.L. 100-707), may be used only when the appropriate official has made an emergency declaration or designation.

Anticipated benefits of using the flexibilities listed in Part 18 include acquiring goods and services in a more timely and efficient manner than might occur otherwise. Yet the use of such flexibilities could, for example, impair accountability. These considerations might prompt Congress to consider whether existing acquisition flexibilities are sufficient or how federal agencies could balance additional or enhanced acquisition flexibilities with the need to safeguard the government's interests.

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Introduction

When responding to a disaster or an emergency, the federal government has a broad array of capabilities at its disposal for assisting affected individuals, communities, and regions. One notable capability—government procurement of goods (equipment, supplies, and construction materials) and services—is managed through the federal acquisition system, which facilitates and governs how federal agencies carry out such purchases.

Although some federal agencies maintain stockpiles of goods for use during or after an emergency or disaster, or engage in "advance contracting," the ability of federal agencies to procure goods and services expeditiously and tailored to the needs of the affected population and area is essential to the federal government's response.[1] An illustrative list of goods and services purchased in response to disasters or emergencies includes the following:

- **Services:** satellite, translation, engineering, janitorial, telecommunication, legal, housing inspection, debris removal, imagery data, information technology support, mapping and cartography, design architect, hydrographic survey, dredging, security, and pest control.
- **Goods:** fuel, industrial hygienist kits, dump trucks, backhoes, forklifts, passenger vans, portable toilets, hot water heaters, bottled water, copiers, office supplies, canopies and tents, meals, anchors, air compressors, cameras, and portable showers.

The broad range of goods and services purchased, coupled with the amounts spent, highlights the importance of acquisition to the federal government's response. **Table 1** shows the total amount of procurement spending by federal agencies for major disasters and emergencies that occurred from 2013 through 2021.

Table 1. Procurement Spending Related to Selected Emergencies and Disasters

2013-2022

Disaster or Emergency[a]	Year the Disaster or Emergency Began or Occurred	Total Procurement[b]
Hurricane Ida	2021	$618,149,564
COVID-19 Pandemic	2020	$127,761,098,800
Hurricane Laura	2020	$251,977,561
Hurricane Dorian	2019	$9,723,496
Hurricane Michael	2018	$813,820,620
Hurricane Florence	2018	$521,187,501
Hurricane Harvey	2017	$1,585,643,361
Hurricane Irma	2017	$1,205,051,667

[1] For example, the Department of Health and Human Services (HHS) maintains the Strategic National Stockpile, (SNS) and the Federal Emergency Management Agency (FEMA) maintains distribution centers. See CRS In Focus IF11574, *National Stockpiles: Background and Issues for Congress*, by G. James Herrera and Frank Gottron. FEMA also engages in advanced contracting: "FEMA Advance Contracts for goods and services are competed and awarded in advance of major disaster declarations to provide efficient, cost-effective means for rapid delivery of supplies and services for recurring disaster response and recovery requirements." Federal Emergency Management Agency, "Advanced Contracting for Goods and Services," https://www.fema.gov/businesses-organizations/doing-business/advanced-contracts. Advance contracts are sometimes referred to as "pre-existing contracts."

Disaster or Emergency[a]	Year the Disaster or Emergency Began or Occurred	Total Procurement[b]
Hurricane Maria	2017	$5,860,337,260
Tornado—Moore, Oklahoma	2013	$256,856,552
Hurricane Sandy	2013	$2,940,350,387

Source: U.S. General Services Administration (GSA), "Data Bank, National Interest Action/Other Reports," https://sam.gov/reports/awards/static.

Notes:

a. The absence of a disaster or emergency from this table does not necessarily mean that the federal government did not provide support through procurement of goods and services. The disasters and emergencies listed here are the ones for which GSA reported procurement data. GSA has not yet reported procurement data for Hurricanes Ian and Fiona, both of which occurred in 2022.

b. Each amount is rounded to the nearest dollar. The amounts are in nominal dollars. Dollar amounts are as of December 8, 2022.

This report provides a brief overview of the federal acquisition system followed by a discussion of acquisition flexibilities federal agencies may use to facilitate the government's response to and recovery from disasters and emergencies. The final section identifies several issues related to acquisition flexibilities.

This report focuses exclusively on federal acquisition, which involves federal agencies using appropriated funds to buy goods or services for their own benefit or use.[2] Federally funded contracting[3] and any acquisition flexibilities specific to the Department of Defense are beyond the scope of this report.

Background

The federal acquisition system is the framework that governs how federal agencies buy goods and services. The vision of the system is to "deliver on a timely basis the best value product or service to the customer, while maintaining the public's trust and fulfilling public policy objectives."[4] This system is expected to "[s]atisfy the customer [federal agency] in terms of cost, quality, and timeliness of the delivered product or service."[5]

Agencies conduct acquisitions or procurements (i.e., procure goods and services) according to applicable statutes, the Federal Acquisition Regulation (FAR), agency supplements to the FAR,[6] and other agency guidance and policies. Although some steps may be common to most

[2] "Acquisition means the acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the Federal Government through purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated, and evaluated. Acquisition begins at the point when agency needs are established and includes the description of requirements to satisfy agency needs, solicitation and selection of sources, award of contracts, contract financing, contract performance, contract administration, and those technical and management functions directly related to the process of fulfilling agency needs by contract" (FAR 2.101(b)).

[3] For example, a contract awarded by a grant recipient, such as a local or state government, and funded by the federal government is a federally funded contract.

[4] FAR 1.102(a). The Federal Acquisition Regulation (FAR) is a stand-alone publication containing Parts 1-53 of Title 48 of the *Code of Federal Regulations*.

[5] FAR 1.102(a)(1).

[6] Under the FAR, an executive agency may issue a supplement to the FAR, but the supplement cannot "conflict or be inconsistent with FAR content" unless "required by law or as provided in subpart 1.4 [of the FAR]" (FAR 1.301(a)(1) and 1.304(b)(2)).

procurements involving the awarding of a new contract, there is no single, standardized procurement process for either non-emergency-related purchases or emergency-related purchases.

Based on experience and using their judgment to interpret and apply applicable statutes and regulations, contracting officers, in consultation with program managers and others, determine how to structure each procurement. In doing so, contracting officers may employ flexibilities (such as exceptions or waivers) established by statute and regulation.

Acquisition Flexibilities

The absence of a standardized process coupled with the existence of acquisition flexibilities allows contracting officers to adapt to the unique needs associated with each disaster or emergency. A contracting officer determines which, if any, acquisition flexibilities to use in acquiring goods and services necessary to fulfill an agency's requirements in a timely fashion.

In one of its reports documenting the federal response to the COVID-19 pandemic, the Government Accountability Office (GAO) noted the importance of procurement to the government's response while acknowledging the challenges:

> Our prior work has found that contracts play a key role in federal emergency response efforts, and that contracting during an emergency can present a unique set of challenges as officials can face a significant amount of pressure to provide critical goods and services as expeditiously and efficiently as possible.[7]

While acquisition flexibilities may enable agencies to provide goods and services in a timely, more efficient fashion than might occur otherwise, the use of such flexibilities is not without risks. Possible consequences include reduced transparency, less accountability, limited or no competition, and higher costs. For example, undefinitized contract actions,[8] such as letter contracts, can be useful when an agency must move quickly to award a contract. Generally, it may take less time to draft a letter contract (or other types of undefinitized contracts) because these types of contractual agreements do not include all of the terms and conditions usually found in a procurement contract. As GAO has noted, the downside to using undefinitized contract actions is that they "can pose risks to the government, such as when contractors lack incentives to control costs before all contract terms and conditions are defined."[9] Writing about the Defense Department's use of undefinitized contracts,[10] GAO reported the following:

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[7] U.S. Government Accountability Office, *COVID-19: Urgent Actions Needed to Better Ensure and Effective Federal Response*, GAO-20-191, November 2020, p. 338, https://www.gao.gov/assets/gao-21-191.pdf.

[8] Given that the FAR does not contain a definition of *undefinitized contract*, the definition of *undefinitized contract action* found in the Defense Federal Acquisition Regulation Supplement (DFARS) may be instructive:

"'Undefinitized contract action' means any contract action for which the contract terms, specifications, or price are not agreed upon before performance is begun under the action. Examples are letter contracts, orders under basic ordering agreements, and provisioned item orders, for which the price has not been agreed upon before performance has begun" (DFARS 217.7401(d)). *Definitization* means "the agreement on, or determination of, contract terms, specifications, and price, which converts the undefinitized contract action to a definitive contract" (DFARS 217.7401(b)).

[9] U.S. Government Accountability Office, *COVID-19: Federal Efforts Could Be Strengthened by Timely and Concerted Actions*, GAO-20-701, September 2020, p. 128, https://www.gao.gov/assets/gao-20-701.pdf.

[10] "Each letter contract shall, as required by the [contract] clause at 52.216-25, Contract Definitization, contain a negotiated definitization schedule including (1) dates for submission of the contractor's price proposal, required certified cost or pricing data and data other than certified cost or pricing data; and, if required, make-or-buy and subcontracting plans, (2) a date for the start of negotiations, and (3) a target date for definitization, which shall be the earliest practicable date for definitization" (FAR 16.603-2(c)).

- "[U]ndefinitized contracts transfer additional cost and performance risks from contractors to the government because contracting officers normally reimburse contractors for all allowable costs they incur. With all allowable costs covered, contractors bear less risk and have little incentive to control costs."
- "The government also risks incurring unnecessary costs as requirements may change before the contract is definitized."[11]

The extent of the risk to the federal government may depend, at least in part, on the specific circumstances surrounding the use of any acquisition flexibilities.

To aid contracting officers in identifying acquisition flexibilities that may be particularly useful for emergency-related acquisitions, acquisition officials added a new Part 18 to the FAR in 2007. Part 18 is a single reference to acquisition flexibilities that already exist in other parts of the FAR.[12] This report examines two categories of acquisition flexibilities found in Part 18 of the FAR: generally available acquisition flexibilities and emergency acquisition flexibilities.[13]

Generally Available Acquisition Flexibilities

This section discusses several of the 26 *generally* available acquisition flexibilities that are listed in subpart 18.1 of the FAR. The use of these mechanisms is not contingent upon any type of executive action, meaning that neither an emergency declaration nor a designation of contingency operation[14] is required to use any of these procedures or exceptions.[15] Note that, because some flexibilities are interrelated, a report subsection may contain information drawn from or related to several sections found in subpart 18.1 of the FAR.

Noncompetitive Procedures—Unusual and Compelling Urgency

Generally, it is the policy of the federal government to engage in full and open competition,[16] but agencies may use other than full and open competition (also known as "noncompetitive

[11] U.S. Government Accountability Office, Defense Contracting: DOD Has Enhanced Insight into Undefinitized Contract Action Use but Management at Local Commands Needs Improvement, GAO-10-299, January 2010, p. 5, https://www.gao.gov/assets/gao-10-299.pdf.

[12] In 2007, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council created a new FAR Part 18 "to provide a single reference to acquisition flexibilities [already available in the FAR] that may be used to facilitate and expedite acquisitions of supplies and services during emergency situations" (Department of Defense, General Services Administration, and National Aeronautics and Space Administration, "Federal Acquisition Regulation; FAR Case 2005-038, Emergency Acquisitions," 72 *Federal Register* 46342, August 17, 2007).

[13] "The acquisition flexibilities in this part [Part 18] are not exempt from the requirements and limitations set forth in FAR part 3, Improper Business Practices and Personal Conflicts of Interest" (FAR 18.000(b)). Agency-specific flexibilities authorized in individual agencies' supplements to the FAR are beyond the scope of this report.

[14] "*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 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 sections 688, 12301(a), 12302, 12304, 12304(a), 12305, or 12406 of title 10 of the United States Code, Chapter 15 of title 10 of the United States Code, or any other provision of law during a war or during a national emergency declared by the President or Congress" (FAR 2.101(b)).

[15] FAR 18.101. As indicated in footnote 13, the flexibilities listed in subpart 18.1 already existed in the FAR when Part 18 was created and thus may be, and are, used for non-emergency-related contracting.

[16] 10 U.S.C. §2304 and 41 U.S.C. §3301 require, "with certain limited exceptions (see subpart 6.2 and 6.3 [of the FAR]), that contracting officers shall promote and provide for full and open competition in soliciting offers and awarding Government contracts" (FAR 6.101(a)).

procedures") under seven circumstances, one of which is unusual and compelling urgency.[17] FAR 6.302-2 identifies a circumstance of "unusual and compelling urgency" as a procurement flexibility for emergency situations. Using other than full and open competition means that a source or sources (i.e., would-be contractors) are excluded from a procurement that would otherwise be open to them.[18]

Although a contracting officer may determine that one of the *other* six circumstances under which noncompetitive procedures may be used is appropriate, invoking the urgent and compelling circumstance allows a contracting officer to use three additional flexibilities. Generally, an agency is required to post a synopsis of a proposed contract action (i.e., a solicitation) whose value is expected to exceed $25,000 on the federal government's government-wide point of entry (GPE) for federal procurement opportunities, which is the System for Award Management (SAM) website.[19] FAR 5.202(a)(2) provides that, when an agency cites unusual and compelling urgency as its reason for using noncompetitive procedures[20] and "the Government would be seriously injured if the agency complies with the time periods specified in [FAR] 5.203," a synopsis is not required.[21]

The second related flexibility involves the bid protest process. When GAO notifies an agency that a protest has been filed prior to the award of a contract, or "within 10 days after contract award or within 5 days after a debriefing date offered to the protester," the contracting officer may not award the contract, or "the contracting officer shall immediately suspend performance or terminate the awarded contract," respectively.[22] However, the head of the contracting activity may issue a written finding authorizing the award or performance of the contract if "urgent and compelling circumstances which significantly affect the interest of the United States will not permit awaiting the decision of the GAO."[23]

The third and final flexibility related to noncompetitive procedures when the rationale is unusual and compelling urgency has to do with contractor registration in SAM. Generally, contractors and would-be contractors are required to be registered in SAM at the time they submit an offer or a quotation to a federal agency.[24] The list of circumstances that allow a contractor to forego SAM registration includes agency procurements that use noncompetitive procedures due to unusual and compelling urgency and contracts awarded by contracting officers in "the conduct of emergency

[17] As appropriate, agencies may also use any of the other six circumstances for procurements during emergency situations: (1) only one responsible source and no other supplies or services will satisfy agency requirements; (2) industrial mobilization; engineering, developmental, or research capability; or expert services; (3) international agreement; (4) authorized or required by statute; (5) national security; and (6) public interest (FAR 6.302-1, 6.302-3, 6.302-4, 6.302-5, 6.302-6, and 6.302-7).

[18] Ralph C. Nash Jr. et al., *Government Contracts Reference Book: A Comprehensive Guide to the Language of Procurement*, 3rd ed. (Riverwoods, IL: CCH, 2007), p. 413.

[19] FAR 5.101(a)(1). The System for Award Management is available at https://sam.gov/content/home.

[20] This acquisition flexibility also applies to "purchases conducted using simplified acquisition procedures, if unusual and compelling urgency precludes competition to the maximum extent practicable" (FAR 5.202(a)(2)).

[21] An agency must publish a synopsis at least 15 days before it issues the solicitation. (FAR 5.203(a)).

[22] FAR 33.104(b)(1) and (c)(1). See CRS Report R45080, *Government Contract Bid Protests: Analysis of Legal Processes and Recent Developments*, by David H. Carpenter.

[23] FAR 33.104(b)(1)(i). FAR 33.104(c)(2)(ii), which applies to post-contract award bid protests, contains slightly different language: "Urgent and compelling circumstances that significantly affect the interests of the United States will not permit waiting for the GAO's decision." The relevant regulations, FAR 33.104(b) and (c), are listed in FAR 18.125.

[24] FAR 4.1102(a). The existence and maintenance of SAM increases "visibility of vendor sources (including their geographical locations) for specific supplies and services; and … [e]stablish[es] a common source of vendor data for the Government" (FAR 4.1100).

operations such as responses to natural or environmental disasters or national or civil emergencies."[25]

A potential drawback for an entity not registered in SAM that seeks disaster- or emergency-related federal government contracts is that it does not appear in SAM's Disaster Response Registry.[26] Contracting officers are to consult the registry "when contracting for debris removal, distribution of supplies, reconstruction, and other disaster or emergency relief activities inside the United States and outlying areas."[27]

Soliciting from a Single Source for Procurements Less Than the Simplified Acquisition Threshold

Under certain circumstances, a contracting officer may forgo competition when the anticipated value of a procurement is less than the simplified acquisition threshold (SAT).[28] If a contracting officer determines that the "circumstances of the contract action deem only one source reasonably available (e.g., urgency, exclusive licensing agreements, brand-name or industrial mobilization)," the contracting officer may solicit an offer from that source (contractor) for a procurement whose value is less than the SAT.[29] Furthermore, an agency may use simplified acquisition procedures—such as a government credit card, purchase order, or blanket purchase agreement—when the value of a contract is less than the SAT.[30]

Oral Requests for Proposals

Under FAR 5.201, agencies are required to post solicitations on SAM.gov when the value of the contract action is expected to exceed $25,000. One of the permitted exceptions authorizes an oral request for proposals (RFP) when "processing a written solicitation would delay the acquisition of supplies or services to the detriment of the Government and a notice is not required under [FAR] 5.202 (e.g., perishable items and support of contingency or other emergency situations)."[31]

Advance Payments

Part 32 of the FAR provides, among other procedures and policies, different methods for making payments to contractors. Common methods include performance-based payments and progress

[25] FAR 4.1102(a)(3)(iii) and (5).

[26] FAR 18.102(b). Prospective contractors or vendors that provide these types of services may voluntarily participate in the registry. Each business that has opted to participate in the registry is responsible for maintaining current information about itself. Although the registry is available to the public, a user must register with the SAM.gov website to view the registry.

[27] FAR 4.1104.

[28] The SAT is generally $250,000. When an agency head determines that the procurement of supplies or services is "to support response to an emergency or major disaster," the SAT is $800,000 "for any contract to be awarded and performed, or purchase to be made, inside the United States" and $1.5 million for "any contract to be awarded and performed, or purchase to be made, outside the United States" (FAR 2.101(b)).

[29] FAR 13.106-1(b)(1)(i).

[30] "Purchase order, when issued by the Government, means an offer by the Government to buy supplies or services, including construction and research and development, upon specified terms and conditions, using simplified acquisition procedures" (FAR 2.101(b)). "A blanket purchase agreement (BPA) is a simplified method of filling anticipated repetitive needs for supplies or services by establishing 'charge accounts' with qualified sources of supply" (FAR 13.303-1(a)).

[31] FAR 15.203(f).

payments, while "advance payment is the least preferred method of contract financing," and agencies are to authorize the use of this method "sparingly."[32]

Under FAR 32.405, designated agencies that take actions "to facilitate the national defense" may make advance payments under contracts awarded using sealed bidding procedures or negotiated contracting procedures.[33] The President may authorize any federal department or agency to make advance payments.[34] While offerors may request, and an agency may make, "advance payments before or after [contract] award," an agency may accept or decline such a request, and a contracting officer "shall reject any bid requiring that advance payments be provided as a basis for acceptance."[35]

Letter Contracts

When preparing contracts, ordinarily contracting officers are to use the uniform contract format, which is outlined in Table 15-1 of the FAR.[36] The uniform contract format includes nine sections:

1. Section A, Solicitation/contract form
2. Section B, Supplies or services and prices/costs
3. Section C, Description/specifications/statement of work
4. Section D, Packaging and marking
5. Section E, Inspection and acceptance
6. Section F, Deliveries or performance
7. Section G, Contract administration data
8. Section H, Special contract requirements
9. Section I, Contract clauses[37]

[32] FAR 32.402(b). Performance-based payments are "contract financing payments on fixed-price-type contracts that are not payments for accepted items but are based on objective performance measures, the accomplishment of specified activities (milestones), or other quantifiable measures of results." A progress payment is a "payment made on a fixed-price type contract during the performance of the work but before completion of the contract. Progress payments are made on the basis of either a percentage of completion of the work, FAR 32.101(e), or the incurrence of costs." An advance payment is an "advance of money made by the government to a contractor before costs have been incurred on a contract" (Nash et al., *Government Contracts Reference Book*, pp. 18, 429, 458).

[33] Sealed bidding involves, among several other steps, the public opening of bids and awarding a contract "to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, considering only price and the price-related factors included in the invitation" for the bid (FAR 14.101(c) and (e)). "A contract awarded using other than sealed bidding procedures is a negotiated contract" (FAR 15.000). See FAR 15.101-1, 15.101-2, and 15.101-3 for negotiated contracting source selection methods. Whereas sealed bidding has one evaluation factor (cost or price), negotiated contracting procedures involve both cost or price and non-cost or non-price evaluation factors. The federal acquisition system (including the FAR) neither includes nor prescribes a list of non-cost or non-price evaluation factors. Examples include key personnel, technical expertise, and subcontracting plans.

[34] 50 U.S.C. §1431. For example, several weeks after declaring a national emergency regarding the COVID-19 pandemic and pursuant to the National Emergencies Act, President Donald J. Trump authorized the Secretary of Veterans Affairs to exercise authority under P.L. 85-804, as amended (President Donald J. Trump, "Authorizing the Exercise of Authority Under Public Law 85-804," memorandum to the Secretary of Veterans Affairs, April 10, 2020, 85 *Federal Register* 21735). FAR 32.405 applies P.L. 85-804.

[35] FAR 32.405(a) and (b). An offeror is an entity that has submitted a bid in response to an invitation for bid, or a proposal in response to a request for proposals.

[36] FAR 15.204-1(a).

[37] FAR "Table 15-1—Uniform Contract Format." Regarding Section I, contract clauses may be found in Part 52 of the FAR.

Under certain circumstances, including a disaster or an emergency, a contracting officer may opt to use a letter contract,[38] which is a "written preliminary contractual instrument that authorizes the contractor to begin immediately manufacturing supplies or performing services."[39] A letter contract is a type of undefinitized contract or contract action, and, as such, it may not contain all of the terms and conditions usually included in a definitized contract.[40] A letter contract may be used "when (1) the Government's interests demand that the contractor be given a binding commitment so that work can start immediately and (2) negotiating a definitive contract is not possible in sufficient time to meet the requirement. However, a letter contract should be as complete and definite as feasible under the circumstances."[41]

Interagency Acquisitions

Using interagency acquisitions may provide a surge capacity for an agency's acquisition workforce or expedite the procurement of goods or services. The term *interagency acquisition*

> means a procedure by which an agency needing supplies or services (the requesting agency) obtains them from another agency (the servicing agency), by an *assisted acquisition* or a *direct acquisition*. The term includes—(1) Acquisitions under the Economy Act (31 U.S.C. 1535); and (2) Non-Economy Act acquisitions completed under other statutory authorities, (e.g., General Services Administration, Federal Supply Schedules in subpart 8.4 [of the FAR] and Governmentwide acquisition contracts (GWACs)).[42]

A requesting agency engages in an *assisted* acquisition when another agency (servicing agency) acts on its behalf in conducting a procurement, such as awarding and administering a contract.[43] The requesting agency and servicing agency enter into an agreement pursuant to the Economy Act.[44]

A requesting agency participates in a *direct* acquisition when it "places an order directly against a servicing agency's" procurement vehicle, which could be, for example, GSA's Federal Supply Schedule (FSS, supply schedule, or schedule), a multi-agency blanket purchase agreement, or a multi-agency indefinite delivery contract.[45] The servicing agency establishes and manages the procurement vehicle but is not involved in ordering or administering the order.

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[38] Use of a letter contract is contingent upon "the head of the contracting activity or a designee" issuing a written determination "that no other contract is suitable" (FAR 16.603-3).

[39] FAR 16.603-2(a).

[40] FAR 16.603-1.

[41] FAR 16.603-2(a).

[42] FAR 2.101(b). Italics added to highlight key terms.

[43] FAR 2.101(b).

[44] The Economy Act states, in part: "The head of an agency or major organizational unit within an agency may place an order with a major organizational unit within the same agency or another agency for goods or services if—(1) amounts are available; (2) the head of the ordering agency or unit decides the order is in the best interest of the United States Government; (3) the agency or unit to fill the order is able to provide or get by contract the ordered goods or services; and (4) the head of the agency decides ordered goods or services cannot be provided by contract as conveniently or cheaply by a commercial enterprise" (31 U.S.C. §1535(a)).

[45] "Multi-agency contract (MAC) means a task-order or delivery-order contract established by one agency for use by Government agencies to obtain supplies and services, consistent with the Economy Act (see 17.502-2). Multi-agency contracts include contracts for information technology established pursuant to 40 U.S.C. 11314(a)(2)" (FAR 2.101(b)). A delivery-order contract or a task-order contract is a contract for supplies or services, respectively, "that does not procure or specify a firm quantity … (other than a minimum or maximum quantity) and that provides for the issuance of orders for the delivery of supplies" or the performance of tasks "during the period of the contract" (FAR 16.501-1).

Contracting with Certain Types of Small Businesses on a Sole Source Basis

The opportunity for federal agencies to engage in sole source contracting with certain types of small businesses could be an attractive option when the federal government is responding to or helping communities recover from natural disasters or other types of emergency.

If certain conditions are met and no exclusions apply,[46] a contracting officer is to consider making a contract award to either a Historically Underutilized Business Zone (HUBZone) small business[47] or a service-disabled veteran-owned small business (SDVOSB) on a sole source basis "before considering small-business set-asides."[48] To award a contract on a sole source basis means "a contract for the purchase of supplies or services … is entered into or proposed to be entered into by an agency after soliciting and negotiating with only one source."[49] One of the conditions that applies to both types of businesses is a dollar threshold: An agency may make a sole source award to a HUBZone business or an SDVOSB only if the anticipated value of the contract, including options, does not exceed $7 million for manufactured products or $4 million for any other type of good (or service).[50]

Emergency Acquisition Flexibilities

This section discusses two of the acquisition flexibilities described in subpart 18.2 of the FAR. Unlike the flexibilities identified in subpart 18.1, subpart 18.2 contains acquisition flexibilities whose use is available only under certain prescribed circumstances, as described below.

Emergency acquisition flexibilities is defined as

> flexibilities provided with respect to any acquisition of supplies or services by or for an executive agency that, as determined by the head of any executive agency, may be used—(a) In support of a contingency operation as defined in [FAR] 2.101; (b) To facilitate the

An indefinite delivery vehicle may be a delivery-order contract or a task-order contract. "A blanket purchase agreement (BPA) is a simplified method of filling anticipated repetitive needs for supplies or services by establishing "charge accounts" with qualified sources of supply." (FAR 13.303-1.)

[46] Neither subpart 19.13 (HUBZone small businesses) nor subpart 19.14 (SDVOSBs) of the FAR applies to the following procurements: "(a) Requirements that can be satisfied through award to—(1) Federal Prison Industries, Inc. (see subpart 8.6); (2) AbilityOne participating non-profit agencies for the blind or severely disabled (see subpart 8.7); (b) Orders under indefinite-delivery contracts (see subpart 16.5). (But see 16.505(b)(2)(i)(F) for discretionary set-asides of orders); (c) Orders against Federal Supply Schedules (see subpart 8.4). (But see 8.405-5 for discretionary set-asides of orders); or (d) Requirements currently being performed by an 8(a) participant or requirements SBA has accepted for performance under the authority of the 8(a) program, unless SBA has consented to release the requirements from the 8(a) program" (FAR 19.1304(a)-(d) and FAR 19.1404(a)-(d)). Additionally subpart 19.13 does not apply to procurements that do not exceed the micro-purchase threshold (generally $10,000) or include commissary or exchange resale items (FAR 19.1304(e) and (f)).

[47] "The purpose of the HUBZone Program is to provide Federal contracting assistance for qualified small business concerns located in historically underutilized business zones, in an effort to increase employment opportunities, investment, and economic development in those areas" (FAR 19.1301(b)). Only those entities that the Small Business Administration has determined are and certified as HUBZone small businesses may be eligible for HUBZone preferences, such as sole source contract awards (FAR 19.1303).

[48] FAR 19.1306(a) and FAR 19.1406(a). A set-aside is an acquisition "exclusively or partially reserved for the participation of small business concerns pursuant to the Small Business Act, 15 U.S.C. §644. A set-aside restricts the competition to small business concerns that qualify under the applicable standards" (Nash et al., *Government Contracts Reference Book*, p. 518).

[49] FAR 2.101(b).

[50] FAR 19.1306(a)(2) and FAR 19.1406(a)(2). See FAR 19.1306(a) and FAR 19.1406(a) for the complete list of conditions that apply to HUBZone sole source awards and SDVOSB awards, respectively.

> defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack against the United States; (c) In support of a request from the Secretary of State or the Administrator of the United States Agency for International Development to facilitate the provision of international disaster assistance; or (d) When the President issues an emergency declaration, or a major disaster declaration.[51]

The Stafford Act Preference for Local Firms and Individuals

When the President declares a major disaster or emergency pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act),[52] agencies are to give a preference, "to the extent feasible and practicable," to local entities and individuals when contracting for supply distribution, debris clearance, reconstruction, and other types of major disaster or emergency assistance. To qualify as "local," an entity or individual must be located or doing business primarily in "the area affected by [a] major disaster or emergency."[53] A contracting officer may use a local area set-aside (i.e., issue a solicitation for which only local firms and individuals may respond) or an evaluation preference.[54]

Written justification is required in any case where an emergency response contract is not awarded to a local firm and must be included in the contract file.[55] The justification, which is to be approved by the contracting officer, "should include consideration for the scope of the major disaster or emergency and the immediate requirements or needs of supplies and services to ensure life is protected, victims are cared for, and property is protected."[56]

Increases in the Micro-Purchase Threshold and Simplified Acquisition Threshold

When an agency head determines that goods or services are "to be used to facilitate defense against or recovery from" certain types of attacks (which are identified below), contracting officers may use the acquisition flexibilities described in FAR 18.202.[57] Each of the four acquisition flexibilities listed in this section capitalizes on the ability of federal agencies to use simplified acquisition procedures, which are found in Part 13 of the FAR. Simplified procedures "are intended to (1) reduce administrative costs, (2) improve opportunities for small business concerns and small disadvantaged business concerns, (3) promote efficiency and economy in contracting, and (4) avoid unnecessary burdens for agencies and contractors."[58]

When an agency head "determines the supplies or services are to be used to facilitate defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack; to facilitate provision of international disaster assistance; or to support response to an emergency or major disaster," the micro-purchase threshold (MPT) and the simplified acquisition threshold (SAT) increase, and "contracting officers may treat any acquisition of supplies or services as an

[51] FAR 18.001.

[52] 42 U.S.C. §§5121 et seq.

[53] 42 U.S.C. §5150(a)(1).

[54] FAR 26.202-1 and 26.202-2.

[55] FAR 26.204(a) and (b).

[56] FAR 26.204(a).

[57] As described in greater detail on the next page, the micro-purchase threshold and the simplified acquisition threshold increase when an agency head makes the appropriate determination (FAR 18.202(a) and (b)).

[58] Nash et al., *Government Contracts Reference Book*, p. 525.

acquisition of commercial items."[59] Specifically, the following four acquisition flexibilities may become available after an agency head makes such a determination:

1. The MPT increases from $10,000 to $20,000 for "any contract to be awarded and performed, or purchase to be made, inside the United States" and increases to $30,000 for "any contract to be awarded and performed, or purchase to be made, outside the United States."[60] Although any simplified acquisition method or procedure may be used for making a purchase whose value is less than the MPT, the preferred purchase method is a government credit card.[61]
2. The SAT increases from $250,000 to $800,000 for "any contract to be awarded and performed, or purchase to be made, inside the United States" and increases from $250,000 to $1.5 million for "any contract to be awarded and performed, or purchase to be made, outside the United States."[62] Generally, agencies "shall use simplified acquisition procedures to the maximum extent practicable for all purchases or supplies or services" that do not exceed the SAT.[63]
3. A contracting officer may treat the procurement of any type of good as an acquisition of commercial items.[64] The federal government's "preference for the acquisition of commercial items" is manifested in acquisition policies that "closely resemble those of the commercial marketplace."[65]
4. Finally, and related to the preceding flexibility, the SAT increases from $7.5 million to $15 million for purchases of commercial items.[66]

Concluding Remarks

As noted above, the federal government plays a significant role in helping individuals, communities, and regions respond to and recover from disasters and emergencies, which is reflected in the amounts of funds it has spent on a broad variety of goods and services over the years. Given the importance of procurement to the federal government's response and recovery efforts and the possible risks associated with acquisition flexibilities, it may be helpful to consider the following:

- Are the currently available acquisition flexibilities sufficient for procurement of essential goods and services during a disaster or emergency situation in a timely and efficient fashion? If not, what could be done differently?
- Would the federal acquisition community benefit from having a more detailed and/or prescriptive statutory and regulatory framework specific to disasters and

[59] FAR 18.202(a)-(c).

[60] FAR 2.101(b). For additional information regarding the MPT, see subpart 13.2 of the FAR.

[61] FAR 13.201(b) and (c).

[62] FAR 2.101(b). For additional information regarding the SAT, see FAR 13.003.

[63] FAR 13.003(a). See subpart 13.1 of the FAR for simplified acquisition procedures and subpart 13.3 for simplified acquisition methods, such as purchase orders.

[64] FAR 12.102(f)(1). According to the FAR, the definition of *commercial item* has several meanings. For example, it means "[a]ny item, other than real property, that is of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes, and—(i) Has been sold, leased, or licensed to the general public; or (ii) Has been offered for sale, lease, or license to the general public" (FAR 2.101(b)).

[65] FAR 12.000.

[66] FAR 13.500(c).

- emergencies? If so, under what circumstances would such a framework be activated?
- What steps, if any, might the federal government take to balance the need to streamline the procurement process in the event of a disaster or an emergency with the need to safeguard the government's interests and funding? What trade-offs are acceptable?
- How might the government boost transparency and accountability in emergency procurements without impeding agencies' efforts to buy essential goods and services?

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