

June 2019

Understanding and responding to emergencies

A CO's Guide to Emergency Contracting, Version 10.0

VAO Research Institute



EXECUTIVE SUMMARY



The federal government has several types of emergencies it addresses as distinct situations, ranging from national emergencies declared by the President or Congress to major disasters declared by the President as a result of natural disasters. And beyond these official emergencies, of course, are the occasional unusual and compelling needs that arise in the course of standard operations. Certain authorities, thresholds, or processes kick in when a given declaration is made. They can be made for a certain state(s), geographic area(s), or nation-wide. Some of these also apply to an international peacekeeping operation or humanitarian effort.



A variety of authorities and procedures are available to the contracting officer (CO; KO for Department of Defense (DoD)) when responding to a declared emergency situation. These include:

- Increased micropurchase (MPT) and simplified acquisition (SAT) thresholds, as well as an increased threshold for commercial item buys under Federal Acquisition Regulation (FAR) 13.5
- If the emergency or major disaster is declared under authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act a "preference" for local area contractors takes effect



Notwithstanding an official emergency declaration, several procurement options are available. The agency may:

- Leverage existing contract vehicles
- Consider simplified acquisition procedures
- Limit competition based on an "unusual and compelling urgency"
- Use FAR 19 sole-source authorities
- Issue oral requests for proposals
- Award letter contracts
- Award despite a protest

**Take the quiz,
earn your CLP!** ▶

Introduction

Responding to emergencies is a fundamental role of government, a role many defense and civilian agencies have been filling increasingly in recent years, and through which the government has realized the critical need to have in place a strategic plan for launching a coordinated response when necessary. The National Response Framework (NRF) is a guide to how the nation handles all hazard responses. It details the roles and responsibilities of federal, state, local, and tribal agencies, nongovernmental organizations, private sector entities, and the first responder and emergency management communities across the country. It establishes a plan for strong coordination among and between agencies and organizations to identify what is needed to respond to an emergency, so everyone is clear on their roles and responsibilities. The focus of the NRF is response actions as well as short-term recovery activities. The National Disaster Recovery Framework (NDRF) is a companion document that provides tools to encourage early integration of recovery considerations in response operations.

Once the government, agencies, and organizations have coordinated and identified needs that should be met through procurement, what next? Not surprisingly, an emergency declaration triggers a variety of changes to the contracting process. Those responsible for doing the contracting must have the know-how and tools and react quickly to acquire critical supplies/services. The key is to be able to identify the appropriate authorities, thresholds, and requirements pertinent to the emergencies referenced throughout law, regulations, and policies.

As we set out to untangle the web of emergency types, authorizations, waivers, and regulations, we discovered not a single thread but many, some of which are closely interwoven. In this Advisory, we attempt to bring clarity to an area that was, in many ways, previously unclear. We first explore the various types of emergency declarations and designations and how they affect contracting regulations. We then examine the authorities and procedures available to the CO when responding to an emergency situation.

What is an emergency?

In layman's terms, as defined by the [American Heritage dictionary](#), an emergency is a "serious situation or occurrence that happens unexpectedly and demands immediate action," or "a condition of urgent need for action or assistance," as in a state of emergency.

QUICK-ACCESS GUIDE

Looking for a specific question and answer? Click on any of the links below to go straight to that question and its response.

- [What is an emergency?](#)
- [Why is it helpful to understand the different types of emergencies?](#)

MAJOR DISASTER OR EMERGENCY

- [Has a major disaster or emergency been declared by the President under authority of the Stafford Act?](#)
- [What additional special procurement authorities come into effect?](#)
- [In addition to issuing contracts with commercial firms, can agencies seek outside help during major disasters or emergencies under the Stafford Act?](#)

NATIONAL EMERGENCY

- [Has a national emergency been declared by the President?](#)
- [Can authorized agencies use DPAS ratings during a national emergency?](#)
- [What FAR provisions are related specifically to a national emergency?](#)
- [Do any other requirements take effect during a national emergency?](#)

OTHER CIRCUMSTANCES AUTHORIZING SPECIAL PROCUREMENT AUTHORITY

- [What other circumstances authorize special procurement authority?](#)

NATIONAL DEFENSE

- [Has the agency head determined an action is necessary for the national defense?](#)

FLEXIBILITIES THAT CAN BE APPLIED IN ANY EMERGENCY SITUATION

- [Isn't SAP limited to purchases under \\$250,000?](#)
- [When using SAP, is competition required?](#)
- [Must simplified acquisitions be reserved for small businesses?](#)
- [What other contracting processes are available for emergency situations?](#)
- [What authorities, flexibilities, or waivers can be applied in emergency situations?](#)

Of course, the federal government has several types of emergencies it addresses as distinct situations, ranging from national emergencies declared by the President or Congress to major disasters declared by the President as a result of natural disasters. And beyond these official emergencies, of course, are the occasional unusual and compelling needs that arise in the course of standard operations.

Table 1 details official emergency declarations or designations, the definition of each or the situation to which it applies, and the official(s) responsible for making such a declaration or designation. This information sets the stage for the discussion that follows.

Why is it helpful to understand the different types of emergencies?

Certain authorities, thresholds, or processes kick in when a given declaration is made. For example, when an emergency or major disaster is declared under authority of the [Stafford Act](#), a “preference” for local area contractors takes effect, as well as increased procurement thresholds.

To facilitate the identification and application of such variables, following is a discussion of requirements, authorities, and/or thresholds that differ based on the type of emergency declared. In the interest of brevity, the discus-

Table 1: Types of Emergency Declarations and Designations

DECLARATION OR DESIGNATION	DEFINITION/SITUATION	DECLARED/ DESIGNATED BY
National Emergency Examples: <ul style="list-style-type: none"> • Terrorist attacks: September 11, 2001 • Securing the information and communications technology and services supply chain: May 2019 	A condition that authorizes certain emergency actions to be undertaken in the national interest. When declaring a national emergency, 50 USC 1631 requires the President to specify the powers and authorities being activated to respond to the exigency at hand. National emergency declarations expire in one year and can be renewed annually.	President
Major Disaster Examples: <ul style="list-style-type: none"> • Tropical storm Michael: January 2019 • Alaska earthquake: January 2019 • To date in 2019, 26 major disasters have been declared. View major disaster declarations on FEMA's website. 	A major disaster is declared as a direct result of a request from the governor of an affected state. It could result from a hurricane, earthquake, flood, tornado, or major fire that the President determines warrants supplemental federal aid. The event must be clearly more than state or local governments can handle alone. If declared, funding comes from the President's Disaster Relief Fund , which is managed by the Federal Emergency Management Agency (FEMA) and disaster aid programs of other participating federal agencies. The declaration of a major disaster activates federal aid under the Stafford Act (42 USC 5121 et seq.).	President
Emergency Examples: <ul style="list-style-type: none"> • Kansas flooding: May 2019 • Oklahoma flooding: May 2019 • To date in 2019, 3 emergencies have been declared. View emergency declarations on FEMA's website. 	Similar to the declaration process for major disasters; the President may, however, issue an emergency declaration without a gubernatorial request if primary responsibility rests with the federal government. An emergency declaration is more limited in scope and without the long-term federal recovery programs of a major disaster declaration. Generally, federal assistance and funding are provided to meet a specific emergency need or help prevent a major disaster from occurring. An emergency is “any occasion or instance” in which the President determines federal assistance is required for a given state. Emergency declarations usually supplement state and local efforts in providing emergency services, such as the protection of lives, property, public health, and safety, or to lessen or avert the threat of a catastrophe. The declaration of an emergency activates federal aid under the Stafford Act.	President

(Table continues on page 4)

sion is centered on what COs need to know to understand the emergency authority. These emergency-specific sections are followed by an examination of flexibilities

applicable: 1) regardless of the type of emergency; or 2) across a variety of types of emergencies. Table 2 on page 6 summarizes specific procurement authorities.

Table 1: Types of Emergency Declarations and Designations *continued*

DECLARATION OR DESIGNATION	DEFINITION/SITUATION	DECLARED/ DESIGNATED BY
Unusual and Compelling Urgency Examples: <ul style="list-style-type: none"> Restoring power at a Department of Energy (DOE) site in North Dakota after winter storm damage: April 2012 Supplies/services required to respond to High Path Avian Influenza (HPAI) outbreak: May 2015 	When the agency's need for the supplies/services is of such an unusual and compelling urgency that the government would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals, full and open competition need not be provided for.	CO plus higher-level approving official, depending on dollar value of requirement (per FAR 6.304)
Contingency Operation Examples: <ul style="list-style-type: none"> Operation Freedom's Sentinel Operation Inherent Resolve 	A military operation that: <ul style="list-style-type: none"> 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 U.S. or an opposing military force; or Results in the call, order to, or retention of active duty members of the uniformed services under sections 688, 12301(a), 12302, 12304, 12304(a), 12305, or 12406 of 10 USC; chapter 15 of 10 USC; or any other provision of law during a war or national emergency declared by the President or Congress. 	Secretary of defense when members of the armed forces may become involved in military actions against an enemy of the U.S.; or President or Congress when members of the uniformed forces are called on active duty under 10 USC 2302 or any provision of law during a declared war or national emergency
Acquisitions of Supplies and Services Used to Support a Humanitarian or Peacekeeping Operation Examples of humanitarian operations: <ul style="list-style-type: none"> Hurricane Irma Hurricane Matthew <p>To date in 2019, the United Nations (UN) has led 14 peacekeeping operations.</p>	A military operation in support of the provision of humanitarian or foreign disaster assistance or peacekeeping operation under chapter VI or VII of the charter of the UN. The term does not include routine training, force rotation, or stationing (see 10 USC 101).	President or secretary of defense (peacekeeping operations subject to prior UN Security Council action)
Actions That Would "Facilitate the Defense against or Recovery from Cyber, Nuclear, Biological, Chemical, or Radiological Attack" Example: Actions related to the anthrax attacks of 2001	Not formally defined. Generally, any action that an agency head determines would help defend against or recover from an attack (cyber, nuclear, biological, chemical, or radiological).	Agency heads (see sidebar on page 7)
International Disaster Assistance	U.S. assistance for the relief and rehabilitation of people and countries affected by natural and man-made disasters to alleviate human suffering. Authorized under chapter 9 of part I of the Foreign Assistance Act of 1961 (22 USC 2292 et seq.).	Secretary of state or administrator of the U.S. Agency for International Development (USAID)
Actions in Support of the National Defense	Not formally defined. Certain agency heads, as delegated authority from the President, may "enter into contracts or into amendments or modifications of contracts heretofore or hereafter made and to make advance payments thereon, without regard to other provisions of law relating to the making, performance, amendment, or modification of contracts, whenever he deems that such action would facilitate the national defense," per 50 USC 1431 , Executive Order (EO) 10789 , 13232 , and 13286 .	Specific agency heads (see sidebar on page 7)

MAJOR DISASTER OR EMERGENCY

Has a major disaster or emergency been declared by the President under authority of the Stafford Act?

If so, a local area contractor preference is applicable, with contracting procedures implementing the Stafford Act are in [FAR 26.2](#).

When a major disaster or emergency has been declared for a specific state, under authority of the Stafford Act COs “shall” give preference “to the extent feasible and practicable” to organizations, firms, or individuals residing or doing business primarily in the area affected by the major disaster or emergency when contracting for activities such as debris clearance, distribution of supplies, or reconstruction. This preference is limited to the period of time for which the emergency was declared.

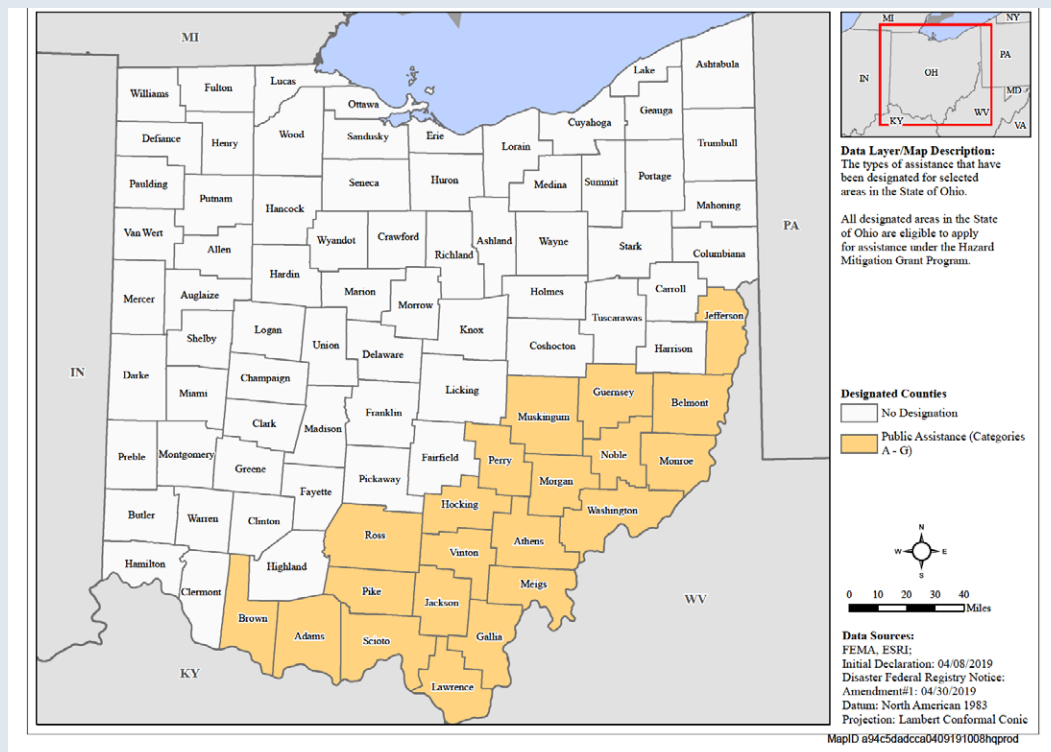
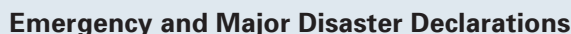
When a major disaster or emergency is declared, it is declared for a specific state. If an event has affected more than one state, a separate declaration is issued for each state.

As detailed in FAR 26.2, the CO (in consultation with the

requiring office) must first define the specific geographic areas for the local set-aside, which may be as broad as the counties identified in the disaster or emergency declaration. Then it is at the CO's discretion whether to set aside the requirement for local businesses or give preference to them by using locality as an evaluation factor. If the requirement is processed as a set-aside, no justification or determination and findings (D&F) is required; however, when implementing the preference using procedures other than a set-aside, a justification for use of the authority is required by [FAR 6.303](#).

In addition, Section 2108 of the Recovery Improvements for Small Entities (RISE) After Disaster Act of 2015 ([Public Law \(PL\) 114-88](#)) amended the Small Business Act ([15 USC 644](#)) to mandate a contracting preference for small business concerns in the area covered by a major disaster declaration. This provision is still to be incorporated in Small Business Administration (SBA) regulations and the FAR, but it is a statutory requirement. Check with your agency procurement policy office or legal counsel if you have questions about its application.

Prime contractors receiving awards that support a major disaster or emergency are restricted from sub-contracting with firms outside the affected area, per the clause at [FAR 52.226-5](#).



FEMA maintains a [website](#) that details emergency and major disaster declarations by year and state. The site notes the counties to which a specific declaration applies and includes visuals.

For example, the declaration of a major disaster in Ohio following severe storms, flooding, and landslides includes a depiction of the geographic area included in the declaration, as shown at left.

The colors represent the types of individual and public assistance available, the details of which are beyond the scope of this *Advisory*.

The Government Accountability Office (GAO) issued a disaster contracting [report](#) in April 2019 that states:

Based on a review of 23 contract files from FEMA [Federal Emergency Management Agency], USACE [U.S. Army Corps of Engineers], the Defense Logistics Agency, and the Coast Guard, GAO identified challenges in the planning of selected contracts. For example, GAO found USACE officials were not consistently aware of the regulation that defines “local area.” GAO also found that COs at FEMA, USACE, and the Coast Guard did not consistently write justifications for awards to non-local vendors outside the disaster area, as required. FEMA devel-

oped guidance to address this, but the Coast Guard and USACE have not issued guidance or tools to address this requirement. Without addressing planning challenges, agencies may miss opportunities to award contracts to local businesses in the disaster area to the extent feasible and practicable, which could help jump-start the local economy.

GAO issued 10 recommendations, of which a few are mentioned here:

- Provide training or guidance to ensure COs are aware of the regulatory definition of “local area.”

Table 2: Increased Thresholds for Contingency Operations, Defense/Recovery from Certain Attacks, International Assistance, Emergencies, and Natural Disasters

PROCUREMENT LEVEL	THRESHOLD		REFERENCE	EXCEPTION	COMMENTS
	INCREASED FROM	INCREASED TO			
Micropurchases	\$10,000 generally	\$20,000 within the U.S. \$30,000 outside the U.S.	FAR 13.201(g)(1) (i) and (ii) CAAC Letter 2018-02 DoD Class Deviation 2018-00018	Construction contracts subject to the Construction Wage Rate Requirements statute (threshold remains at \$2,000 unless the President suspends the act in response to the emergency). Service contracts subject to Service Contract Labor Standards (threshold remains at \$2,500).	No competition required under the MPT. Simply place an order with a responsible source at a reasonable price. The Buy American Act does not apply below the MPT.
Simplified Acquisitions	\$250,000	\$750,000 within the U.S. \$1.5M outside the U.S.	FAR 2.101 and 13.003(b)(1) CAAC Letter 2018-02 DoD Class Deviation 2018-00018	NA	Provides relief from the applicability of several laws, provisions, and clauses listed at FAR 13.005 .
Simplified Procedures for Certain Commercial Items	\$7M	\$13M	41 USC 1903	NA	Allows use of FAR 13.5 simplified procedures for commercial items above the SAT. Acquisitions are exempt from FAR 6 requirements. However, sole-source acquisitions (including brand name) must be justified in writing, properly approved, and reflect that FAR 13.5 procedures were used in accordance with 41 USC 1901 or authority of 41 USC 1903 .
Commercial Item Procedures for Noncommercial Items	NA	Any amount	FAR 12.102(f)(1)	NA	Sole-source actions over \$19M are not exempt from cost accounting standards or cost and pricing data requirements.

- Provide additional clarification on how COs should determine whether offerors reside or primarily do business in a disaster area for the purposes of a local area set-aside contract.
- Provide guidance and tools for contracting officials to use to ensure requirements concerning contracting with local vendors, including justification requirements for use of non-local vendors, are consistently met.

Provisions Applicable to Local Area Set-Asides

- [52.226-3](#), Disaster or Emergency Area Representation
- [52.226-4](#), Notice of Disaster or Emergency Area Set-aside
- [52.226-5](#), Restrictions on Subcontracting Outside Disaster or Emergency Area

Source: [FAR 26.206\(a\), \(b\), \(c\)](#)

What additional special procurement authorities come into effect?

In the event of an emergency or disaster, the MPT increases to \$20,000 and the SAT increases to \$750,000 for any contract to be awarded and performed or purchase to be made inside the U.S. For any outside the U.S., the thresholds increase to \$30,000 and \$1.5 million, respectively. Effective June 5, 2019, [FAC 2019-02](#) implemented changes from the fiscal year (FY) 2017 National Defense Authorization Act (NDAA; [PL 114-328](#)) that extended special emergency procurement authority under [41 USC 1903](#) to include emergencies or major disasters declared under the Stafford Act.

Per [FAR 13.201\(g\)\(2\)](#), “Purchases using this authority must have a *clear and direct relationship*” (emphasis added) to the emergency or major disaster.

Increasing these thresholds will help agencies significantly in an emergency situation. Orders up to the \$20,000 MPT will not require competition so long as the ordering official considers the price to be reasonable. Orders up to \$750,000 may be processed via the SAP outlined in [FAR 13](#) allowing a limited competition.

In addition, [41 USC 1903](#) allows agencies to use commercial item procedures for noncommercial items for emergency and major disaster contracts. However, [FAR 12.102\(f\)\(2\)](#) provides that if the contract is greater than \$19 million and awarded on a sole-source basis, it is not exempt from cost accounting standards or cost or pricing data requirements. Use of SAP for commercial items is addressed in more detail on page 13.

In addition to issuing contracts with commercial firms, can agencies seek outside help during major disasters or emergencies under the Stafford Act?

Yes. Section 5149 of the Stafford Act allows “any [f]ederal agency” to appoint temporary personnel, experts, and consultants to assist in responding to emergency and major disaster situations. Agencies may incur obligations “by contract or otherwise” for the acquisition, rental, or hire of

Who Is an Agency Head?

“Agency head” or “head of the agency” means the secretary, attorney general, administrator, governor, chairperson, or other chief official of an executive agency, unless otherwise indicated, including any deputy or assistant chief official of an executive agency ([FAR 2.101](#)).

Note: In our experience, the “agency head” procurement authority normally is delegated to the assistant secretary for management; chief financial, acquisition, or procurement officer; component acquisition executive; or senior procurement executive.

equipment, services, materials, and supplies for shipping, drayage, travel, and communications, and for the supervision and administration of such activities “in such amount as may be made available to it by the President.”

In addition, the Stafford Act authorizes “any [f]ederal agency” to accept and use the services or facilities of any state or local government. A more detailed treatment of agency planning in preparation for disaster response is available in part I of the Office of Federal Procurement Policy’s (OFPP’s) January 2011 [emergency acquisitions guide](#).

NATIONAL EMERGENCY

Has a national emergency been declared by the President?

The declaration of a national emergency does not in itself create any special waivers from significant contracting requirements (although there are a few FAR references, which we will cover shortly). The reason is, when declaring a national emergency, the President must indicate in writing the powers and authorities being activated to respond to the exigency at hand.

A long list of available authorities is detailed in a Congressional Research Service (CRS) [report](#), an excerpt from which explains the requirements of the National Emergencies Act:

Those authorities that require a declaration of national emergency as a predicate for coming into effect are not automatically activated by such a declaration. National emergency powers can be exercised only pursuant to the strictures of the National Emergencies Act. In addition to requiring that the President publicly declare a national emergency, that Act requires that he specify the emergency statutory authorities that he intends to use prior to their use and that he publish that information in the Federal Register and report it to Congress. (On September 14, 2001, President Bush, for example, took this step by issuing a “Declaration of National Emergency by Reason of Certain Terrorist Attacks” and specifying ten statutory authorities that he intended to use.) Moreover, the Act provides that Congress can terminate a declared emergency at any time by joint resolution and that, in any event, the emergency declaration and any statutory powers activated pursuant to it expire after one year unless the President specifically renews the declaration.

Among the many authorities the President may activate during a national emergency is a waiver of the Construction Wage Rate Requirements statute (formerly known as the Davis-Bacon Act), which mandates that laborers and mechanics on federal and Washington DC construction and public works projects be paid prevailing wages. U.S. Code at [40 USC 3147](#) also allows the President to suspend the requirements of the statute. For example, the President suspended the Construction Wage Rate Requirements statute on September 8, 2005 following the Hurricane Katrina national emergency. The statute was [reinstated](#) November 8, 2005.

What is the bottom line for COs? Carefully review each national emergency declaration to identify which authorities have been activated.

Can authorized agencies use DPAS ratings during a national emergency?

Yes. During a national emergency, agencies that have been so authorized may apply the Defense Priorities and Allocations System (DPAS) to facilitate industry mobilization and rapid delivery of supplies without additional authorization. Simply stated, this means authorized agencies can put a priority rating on their orders, requiring preferential treatment by contractors and subcontractors. DPAS, established under the Defense Production Act of 1950:

... is used to prioritize national defense-related contracts/orders throughout the U.S. supply chain in order to support military, energy, *homeland security, emergency preparedness*, and critical infrastructure requirements (*emphasis added*)

Stafford Act

Sec. 306. Performance of Services ([42 USC 5149](#))

- a. Utilization of services or facilities of State and local governments
In carrying out the purposes of this Act, any Federal agency is authorized to accept and utilize the services or facilities of any State or local government, or of any agency, office, or employee thereof, with the consent of such government.
- b. Appointment of temporary personnel, experts, and consultants; acquisition, rental, or hire of equipment, services, materials and supplies
In performing any services under this Act, any Federal agency is authorized —
 1. to appoint and fix the compensation of such temporary personnel as may be necessary, without regard to the provisions of title 5 [USC], governing appointments in competitive service;
 2. to employ experts and consultants in accordance with the provisions of section 3109 of such title [[5 USC § 3109](#)], without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title [[5 USC §§ 5101 et seq.](#) and [5331 et seq.](#)] relating to classification and General Schedule pay rates; and
 3. to incur obligations on behalf of the United States by contract or otherwise for the acquisition, rental, or hire of equipment, services, materials, and supplies for shipping, drayage, travel, and communications, and for the supervision and administration of such activities. Such obligations, including obligations arising out of the temporary employment of additional personnel, may be incurred by an agency in such amount as may be made available to it by the President.

Procedures for placing rated orders under DPAS authority are detailed in [FAR 11.603](#).

The Department of Commerce is responsible for implementing DPAS and authorizes agencies to apply priority ratings to contracts and orders that support the authorized program categories. There are two ratings: DX and DO. DX to those of the highest national priority and DO is assigned to programs that are vital to national defense. Agencies and programs that have been delegated DO authority are detailed in [DPAS Schedule I](#), which is reproduced in Table 3 on page 9. Only a few programs — all of which are in DoD — have authority to issue the higher-priority DX orders.

We note DPAS as one tool available for immediate response to emergencies. DPAS may be used for homeland security, emergency preparedness pursuant to Title VI of the Stafford Act, and critical infrastructure protection and restoration activities. The Defense Production Act’s

Table 3: Schedule I to Part 700 — Approved Programs and Delegate Agencies

PROGRAM ID SYMBOL	APPROVED PROGRAM	AGENCY(IES)
Defense Programs		
A1	Aircraft	DoD
A2	Missiles	DoD
A3	Ships	DoD
A4	Tank—Automotive	DoD
A5	Weapons	DoD
A6	Ammunition	DoD
A7	Electronic and communications equipment	DoD
B1	Military building supplies	DoD
B8	Production equipment (for defense contractor's account)	DoD
B9	Production equipment (Government owned)	DoD
C1	Food resources (combat rations)	DoD
C2	DoD construction	DoD
C3	Maintenance, repair, and operating supplies (MRO) for DoD facilities	DoD
C9	Miscellaneous	DoD
Military Assistance to Canada		
D1	Canadian military programs	Commerce
D2	Canadian production and construction	Commerce
D3	Canadian atomic energy program	Commerce
Military Assistance to Other Foreign Nations		
G1	Certain munitions items purchased by foreign governments through domestic commercial channels for export	Commerce
G2	Certain direct defense needs of foreign governments other than Canada	Commerce
G3	Foreign nations (other than Canada) production and construction	Commerce
Critical Infrastructure Assistance to Foreign Nations		
G4	Foreign critical infrastructure programs	Commerce
Co-Production		
J1	F-16 Co-Production Program	Commerce and DoD
Atomic Energy Programs		
E1	Construction	DOE
E2	Operations—including maintenance, repair, and operating supplies (MRO)	DOE
E3	Privately owned facilities	DOE
Domestic Energy Programs		
F1	Exploration, production, refining, and transportation	DOE
F2	Conservation	DOE
F3	Construction, repair, and maintenance	DOE
Other Defense, Energy, and Related Programs		
H1	Certain combined orders (see section 700.17(c))	Commerce
H5	Private domestic production	Commerce
H6	Private domestic construction	Commerce
H7	Maintenance, repair, and operating supplies (MRO)	Commerce
H8	Designated Programs	Commerce
K1	Federal supply items	GSA
Homeland Security Programs		
N1	Federal emergency preparedness, mitigation, response, and recovery	DHS
N2	State, local, tribal government emergency preparedness, mitigation, response, and recovery	DHS
N3	Intelligence and warning systems	DHS
N4	Border and transportation security	DHS
N5	Domestic counter-terrorism, including law enforcement	DHS
N6	Chemical, biological, radiological, and nuclear countermeasures	DHS
N7	Critical infrastructure protection and restoration	DHS
N8	Miscellaneous	DHS

- DoD includes: The Office of the Secretary of Defense, the military departments, the joint staff, the combatant commands, the defense agencies, the defense field activities, all other organizational entities in DoD and, for purposes of this part, the Central Intelligence Agency (CIA) and National Aeronautics and Space Administration (NASA) as associated agencies.
- The Department of Commerce is also listed as an agency in the third column for programs where its authorization is necessary to place rated orders.

Source: 15 CFR 700

authorities are available not only for emergency response but for actions “designed or undertaken to prepare for or minimize the effects of a hazard upon the civilian population.” Thus, they can be used for activities and measures undertaken “in preparation for, during, or following a natural disaster or accidental or man-caused event.”

A White House [report](#) on lessons learned from Hurricane Katrina cited the Norfolk Southern Railway’s use of a DPAS-rated contract as a good example. Norfolk Southern used DPAS to procure switch equipment and generators so it could repair railway automated signals.

What FAR provisions are related specifically to a national emergency?

Interestingly, there is only one provision other than DPAS that applies only to a national emergency:

Fixed-price construction contracts. When entering into a fixed-price construction contract during a period of national emergency, the CO may use the clause at FAR [52.249-10](#) Default (Fixed-Price Construction) with its Alternate II when a fixed-price contract for construction is contemplated, or with its Alternate III when a contract for dismantling, demolition, or removal of improvements is contemplated.

There are other provisions in the FAR, however, that mention their applicability during times of “national emergency or other circumstances of extreme urgency” and “national emergencies or natural disaster.” These are related to the waiver of advance authorization for patented technology and use of a no-setoff provision. Because

these apply to more than just national emergencies, we list them later in this *Advisory*.

Do any other requirements take effect during a national emergency?

While not indicated in the FAR, a national emergency also means yet another reporting requirement. U.S. Code at [50 USC 1641](#) establishes a reporting requirement with regard to expenditures made that are “directly attributable to the exercise of powers and authorities conferred by such declaration.” The code reads:

When the President declares a national emergency or Congress declares war, the President shall transmit to Congress, within ninety days after the end of each six-month period after such declaration, a report on the total expenditures incurred by the United States Government during such six-month period which are directly attributable to the exercise of powers and authorities conferred by such declaration. Not later than ninety days after the termination of each such emergency or war, the President shall transmit a final report on all such expenditures.

OTHER CIRCUMSTANCES AUTHORIZING SPECIAL PROCUREMENT AUTHORITY

What other circumstances authorize special procurement authority?

[41 USC 1903](#) identifies three additional circumstances under which special emergency procurement authority may come into effect. These are when the head of an ex-

FAR 52.226-5 Restrictions on Subcontracting Outside Disaster or Emergency Area (November 2007)

- (a) *Definitions.* The definitions of the following terms used in this clause are found in SBA regulations at [13 CFR 125.6\(e\)](#): cost of the contract, cost of contract performance incurred for personnel, cost of manufacturing, cost of materials, personnel, and subcontracting.
- (b) The Contractor agrees that in performance of the contract in the case of a contract for —
- (1) Services (except construction). At least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the Contractor or employees of other businesses residing or primarily doing business in the area designated in the clause at [FAR 52.226-4](#), Notice of Disaster or Emergency Area Set-Aside;
 - (2) Supplies (other than procurement from a non-manufacturer of such supplies). The Contractor or

employees of other businesses residing or primarily doing business in the set-aside area shall perform work for at least 50 percent of the cost of manufacturing the supplies, not including the cost of materials;

- (3) General construction. The Contractor will perform at least 15 percent of the cost of the contract, not including the cost of materials, with its own employees or employees of other businesses residing or primarily doing business in the set-aside area; or
- (4) Construction by special trade Contractors. The Contractor will perform at least 25 percent of the cost of the contract, not including the cost of materials, with its own employees or employees of other businesses residing or primarily doing business in the set-aside area.

ecutive agency determines that procurements of property or services are:

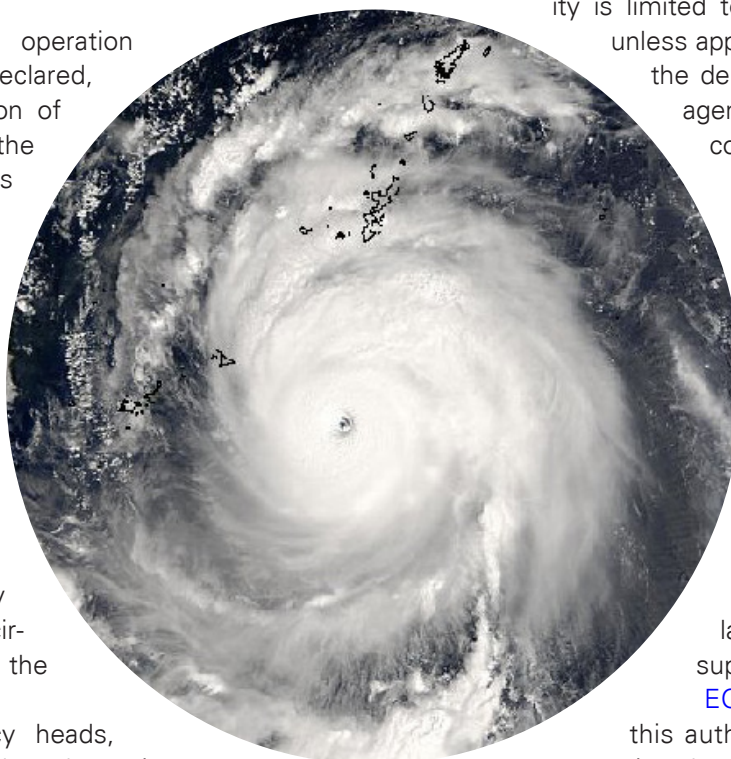
- In support of a contingency operation (as defined in section 101(a) of title 10)
- To facilitate defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack against the U.S.
- In support of a request from the secretary of state or administrator of USAID to facilitate the provision of international disaster assistance pursuant to chapter 9 of part I of the Foreign Assistance Act of 1961 ([22 USC 2292 et seq.](#))

Even if a contingency operation has not been officially declared, a situation fits the definition of contingency operation if the President or Congress has declared a national emergency and troops have been called to or retained on active duty.

The FY2017 NDAA expanded the permissible uses of special emergency procurement authorities to include facilitating international disaster assistance and defense against or recovery from a cyberattack. These circumstances were added to the FAR with FAC 2019-02.

If authorized by agency heads, the thresholds are increased as shown in Table 2 on page 6 for these acquisitions. Also, the same guidelines as for emergencies or major disasters apply:

- Purchases must have a clear and direct relationship to the contingency operation, attack, or international disaster
- Orders up to the \$20,000 MPT will not require competition so long as the ordering official considers the price to be reasonable. Orders up to \$750,000 may allow for a limited competition under [FAR 13](#).
- Agency heads may authorize use of commercial item procedures for noncommercial items per [FAR 12.102\(f\)\(1\)](#) without dollar restriction. However, as noted earlier, sole-source contracts over \$19 million using this authority are subject to cost accounting standards and cost and pricing data requirements.



NATIONAL DEFENSE

Has the agency head determined an action is necessary for the national defense?

If so, and your agency head is one of those mentioned in the bulleted list in the next column, you may be able to enter into contracts “without regard to other provisions of law” whenever “such action would facilitate the national defense.” This is the thrust of [FAR 50](#). Such authority is limited to orders of \$70,000 or below

unless approved by an official at or above the deputy assistant secretary of the agency. Above \$34 million, the congressional armed services committees must be notified 60 days in advance (with Congress in continuous session). This authority also allows use of advance payments on such contracts per [FAR 32.401\(c\)](#).

As background, under the authority of [50 USC 1431](#), the President may authorize some agencies to award contracts without regard to other provisions of law (with a few exceptions) in support of the “national defense.” [EO 10789](#), as amended, took

this authority one step further by delegating the President’s authority. Part I of the order authorizes the secretary of defense to enter into contracts without regard to the provisions of law:

... whenever, in the judgment of the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, or the Secretary of the Air Force, or the duly authorized representative of any such Secretary, the national defense will be facilitated thereby.

The secretaries may delegate this authority to any other military or civilian officers or officials and may confer to those officials the power to make further delegations of such authority within their respective commands or organizations.

Part II of that EO extended the authority to the heads of other agencies. As amended, the other agencies now include:

- Department of Agriculture (USDA)
- Department of Commerce
- DOE, for functions transferred to that department from other authorized agencies
- Department of Health and Human Services (HHS)
- Department of Homeland Security (DHS; originally listed as FEMA)
- Department of the Interior (DOI)
- Department of Transportation (DOT)
- Department of the Treasury
- General Services Administration (GSA)
- Government Printing Office (GPO)
- NASA
- Tennessee Valley Authority (TVA)

That EO was modified via [EO 13286](#) in March 2003 to change FEMA to DHS and add a new Part III, which addresses use of the authority for anti-terrorism technologies:

Part III — Coordination with Other Authorities

After March 1, 2003, no executive department or agency shall exercise authority granted under paragraph 1A of this order with respect to any matter that has been, or could be, designated by the Secretary of Homeland Security as a qualified anti-terrorism technology as defined in section 865 of the [Homeland Security Act of 2002](#), unless — (a) in the case of the Department of Defense, the Secretary of Defense has, after consideration of the authority provided under subtitle G of title VIII of the Homeland Security Act of 2002, determined that the exercise of authority under this order is necessary for the timely and effective conduct of United States military or intelligence activities; and (b) in the case of any other executive department or agency that has authority under this order, (i) the Secretary of Homeland Security has advised whether the use of the authority provided under subtitle G of title VIII of the Homeland Security Act of 2002 would be appropriate, and (ii) the Director of the Office and Management and Budget has approved the exercise of authority under this order.

Contracts authorized to be made include:

... agreements of all kinds (whether in the form of letters of intent, purchase orders, or otherwise) for all types and kinds of property or services necessary, appropriate, or convenient for the national defense, or for the invention, development, or production of, or research concerning, any such property or services, including, but not limited to, aircraft, missiles, buildings, vessels, arms, armament, equipment or supplies of any kind, or any portion thereof, including plans, spare parts and equipment therefore, materials, supplies, facilities, utilities, machinery, machine tools, and any other equipment without any restriction of any kind as to type, character, location, or form.

[FAR 50.101-2](#) provides that this authority may not: 1) be used in a manner that encourages carelessness and

laxity on the part of persons engaged in the defense effort; or 2) be relied on when other adequate legal authority exists within the agency. No contract, amendment, or modification can be made under this authority unless the approving authority finds that the action will “facilitate the national defense.” Detailed requirements for using this authority are in [FAR 50](#).

The bottom line for COs? This is an authority of last resort, when other legal authority does not exist for an action necessary in the interest of national defense.

Image © 2011 TheNewPhobia

FLEXIBILITIES THAT CAN BE APPLIED IN ANY EMERGENCY SITUATION

Sometimes emergency situations aren’t officially declared or designated but nonetheless arise in the course of day-to-day operations. Fortunately, a variety of existing regulations — and contracting vehicles — allow for efficient and effective contracting in any emergency situation. Many allow for a limited competition or consideration of standing quotations and offer plenty of leeway for both meeting the mission and complying with regulations.

The following guidance applies to any emergency situation, including but not limited to those above (except where indicated).

Leverage existing contract vehicles.

Ordering from established contracts is a great first option, given that the competition has already been conducted, terms and conditions established, and prices determined as fair and reasonable. If existing contracts are multiple-award contracts, you must follow the “fair opportunity” requirements of the contract in selecting a task (or delivery) order awardee, but these processes typically are relatively minimal compared with the conduct of a more extensive competitive procurement. In fact, [FAR 16.505\(b\)\(2\)\(i\)](#) allows for exceptions to the fair opportunity process that can be applied in emergency situations. It provides:

The contracting officer shall give every awardee a fair opportunity to be considered for a delivery-order or task-order exceeding \$3,500 unless one of the following statutory exceptions applies:

(A) The agency need for the supplies or services is so urgent that providing a fair opportunity would result in unacceptable delays.

(B) Only one awardee is capable of providing the supplies or services required at the level of quality required because the supplies or services ordered are unique or highly specialized.

(C) The order must be issued on a sole-source basis in the interest of economy and efficiency because it is a logical follow-on to an order already issued under the contract, provided that all awardees were given a fair opportunity to be considered for the original order.

(D) It is necessary to place an order to satisfy a minimum guarantee.

(E) For orders exceeding the simplified acquisition threshold, a statute expressly authorizes or requires that the purchase be made from a specified source.

(F) In accordance with section 1331 of Public Law 111-240 (15 U.S.C. 644(r)), contracting officers may, at their discretion, set aside orders for any of the small business concerns identified in 19.000(a)(3). When setting aside orders for small business concerns, the specific small business program eligibility requirements identified in part 19 apply.

Existing contracts can include governmentwide acquisition contracts (GWACs), multi-agency contracts (MACs), as well as existing agency-specific indefinite-delivery, indefinite-quantity (IDIQ) contracts and blanket purchase agreements (BPAs). GSA's Federal Supply Schedule (FSS) contracts are an option as well, but do not follow the fair opportunity rules of FAR 16. They are subject to their own procedures, detailed in FAR 8.4.

FAR 8.405-6(a) provides for limiting sources under specified circumstances:

(A) An urgent and compelling need exists, and following the procedures would result in unacceptable delays;

(B) Only one source is capable of providing the supplies or services required at the level of quality required because the supplies or services are unique or highly specialized; or

(C) In the interest of economy and efficiency, the new work is a logical follow-on to an original Federal Supply Schedule order provided that the original order was placed in accordance with the applicable Federal Supply Schedule ordering procedures. The original order or BPA must not have been previously issued under sole-source or limited-sources procedures.

When one of these justifications is used, it must be posted on Federal Business Opportunities (FedBizOpps), the governmentwide point of entry, within 14 days (FAR 8.405-6(a)(2)), unless to do so would create a security risk.

FAR 8.405-6(b) addresses limiting sources based on items peculiar to one manufacturer.

Consider SAP.

To some COs, the first thought that comes to mind is the "unusual and compelling urgency" exception to full and open competition of FAR 6, which must be justified, certified, and approved in writing. However, we suggest that — beyond considering existing contracts — your thoughts go to SAP. (Note: As referenced in FAR 6.001, SAP acquisitions are exempt from the requirements in FAR 6.) While FAR 5.101(a)(1) specifies that all procurement actions greater than \$25,000 must be posted in FedBizOpps, FAR 5.202(a)(2) provides that the CO need not submit the notice for simplified acquisitions "if unusual and compelling urgency precludes competition to the maximum extent practicable ... and the [g]overnment would be seriously injured if the agency complies with the time periods specified in 5.203."

The vast majority of emergency-related requirements can likely be met via simplified procedures.

Isn't SAP limited to purchases under \$250,000?

Not necessarily, and not in emergency situations. While the SAT typically is \$250,000, 41 USC 1903 authorizes agency heads to increase the threshold:

- During a contingency operation
- To facilitate the defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack
- In support of international disaster assistance
- In support of an emergency or natural disaster under the Stafford Act

In these scenarios, agency heads can raise the thresholds to \$750,000 for purchases within the U.S. and \$1.5 million for purchases outside the country for any types of supplies/services. For example, DoD raised the threshold for contingency operations in response to the California wildfires in 2018.

Agency heads also may designate items required in these situations for treatment as commercial. Note that commercial items are not limited to products; services can be considered commercial items as well. The definition of a commercial item at FAR 2.101 includes:

... services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions.

Many of the products and services associated with recovery, relief, and clean-up efforts are available in the commercial marketplace.

When using SAP, is competition required?

Not necessarily. While competition should be promoted to the “maximum extent practicable,” [FAR 13.103](#) allows use of standing price quotations as opposed to requesting individual quotations for each purchase. In responding to an emergency situation, an agency might consider requesting multiple quotes on its first orders of supplies/services and asking vendors to hold those prices open as standing price quotations for consideration on potential subsequent orders. Considering standing price quotations would expedite the placement of subsequent orders while complying with the intent of competitive requirements.

We are not suggesting that orders be split, only that subsequent needs may not be known at the time a first order is placed. Requesting standing price quotations can assist with filling subsequent needs for the same requirements.

[FAR 13.104](#) indicates that, for purchases not publicized through FedBizOpps, “maximum practicable competition” can be obtained by soliciting quotes from sources within the local trade area. The FAR recommends (but does not require) ordering officials to “consider solicitation of at least three sources to promote competition to the maximum extent practicable.”

For purchases not exceeding the SAT, COs may solicit from a single source “if the CO 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),” per [FAR 13.106-1\(b\)\(1\)](#). The absence of competition would need to be justified in the file.

Must simplified acquisitions be reserved for small businesses?

Yes. As in nonemergency situations, acquisitions below the SAT are automatically reserved “exclusively for small business concerns and shall be set aside” for small business unless the CO determines there is not a reasonable expectation of obtaining offers from two or more responsible small business concerns that are competitive in terms of market price, quality, and delivery.

Invoking the authority under [41 USC 1903](#) (during contingency operations; to facilitate defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack; for international assistance; or in support of an emergency or natural disaster under the Stafford Act) raises the threshold for any contract to be awarded and performed or purchase to be made inside the U.S. to \$750,000 (see [FAR 19.203\(b\)](#)). Per [FAR 19.502-2](#), if the CO does not proceed with the small business set-aside and



instead purchases on an unrestricted basis, the CO shall include in the contract file the reason for this unrestricted purchase. If the CO receives only one acceptable offer from a responsible small business concern in response to a set-aside, the CO should make an award to that firm.

In addition, as noted earlier, section 2108 of the [RISE After Disaster Act of 2015](#) mandates a contracting preference for small business concerns in a disaster area at any dollar level.

What other contracting processes are available for emergency situations?

Notwithstanding an official emergency declaration, several procurement options are always in the CO’s toolkit. We cite a few below:

Limit competition based on an “unusual and compelling urgency.”

[FAR 6.302-2](#) allows agencies to contract “without providing for full and open competition” when the agency’s need for the supplies/services is of such an unusual and compelling urgency that the government would be seriously injured unless the agency were permitted to limit the number of sources from which it solicits bids or proposals. Use of this authority allows COs to forgo the public notice in FedBizOpps (per [FAR 5.202\(a\)\(2\)](#)) normally required by [FAR 5.201](#). To use this authority for other than full and open competition, a written justification of the urgency is required by [FAR 6.303](#), although the FAR allows the justification to be prepared after contract award if approval prior to award would unreasonably delay the acquisition.

In addition to the unusual and compelling urgency exception, other exceptions to competition outlined in [FAR 6.302](#) may come into play during emergency situations, including:

- Only one responsible source and no other supplies/ services will satisfy agency requirements ([FAR 6.302-1](#))
- National security ([FAR 6.302-6](#))
- Public interest ([FAR 6.302-7](#))

Approvals required for actions subject to other than full and open competition by [FAR 6.304](#) are detailed in Table 4.

In addition to these governmentwide rules, DHS in August 2012 published a [final rule](#) limiting the duration of certain noncompetitive DHS disaster response and recovery contracts above the SAT. Effective September 21, 2012, the rule limits such contracts to 150 days, implementing section 695 of the Post-Katrina Emergency Management Reform Act of 2006 ([PL 109-295](#)).

Award sole-source contracts to 8(a), HUBZone, SDVOSB, or ED/WOSB.

If an 8(a), Historically Underutilized Business Zone (HUBZone), service-disabled veteran-owned small business (SDVOSB), or economically disadvantaged/ woman-owned small business (ED/WOSB) can meet the needs, awards under certain thresholds are permitted to these companies on a sole-source basis, which can minimize the time to award. Requirements and thresholds are:

- **8(a) contractors:** Per [FAR 19.805-1\(a\)\(2\)](#), agencies may award to 8(a) firms sole-source contracts worth \$7 million or less for requirements within the North American Industry Classification System (NAICS) codes for manufacturing and \$4 million or less for those in other NAICS codes. Sole-source contracts over this amount may be given to firms owned by Indian tribes or Alaska Native Corporations (ANCs), but must be justified in accordance with [FAR 6.303](#) if over \$22 million. For DoD this also includes contracts to Native Hawaiian Organizations.
- **HUBZone small businesses:** Per [FAR 19.1306](#), agencies may award sole-source contracts over the SAT and

?INpractice

Other procurement options for emergency situations:

- **Limit competition based on an “unusual and compelling urgency.”**
- **Award sole-source contracts to 8(a), HUBZone, SDVOSB, or ED/WOSB.**
- **Issue oral RFPs.**
- **Award letter contracts.**
- **Award despite a protest.**

up to the thresholds above to HUBZone small businesses if only one HUBZone small business can satisfy the requirement, the contractor has been determined to be responsible, the requirement is not currently being performed by an 8(a) firm, and award can be made at a fair and reasonable price.

- **SDVOSBs:** Per [FAR 19.1406](#), agencies may award sole-source contracts to SDVOSBs up to \$6.5 million for manufacturing and \$4 million for all other acquisitions. Four conditions apply: only one SDVOSB concern can satisfy the requirement, the requirement is not currently being performed by an 8(a) firm, the contractor has been determined to be responsible, and award can be made at a fair and reasonable price.
- **ED/WOSBs:** Per [FAR 19.1506](#), agencies may award sole-source contracts to ED/WOSB firms up to \$6.5 million for manufacturing or \$4 million for a requirement in any other NAICS code. The acquisition must be assigned a [NAICS code](#) in which SBA has determined that ED/WOSB concerns are underrepresented. Other conditions include that the CO does not have a reasonable expectation that offers would be received from two or more ED/WOSBs, the ED/WOSBs are determined to be responsible, and award can be made at a fair and reasonable price.

Table 4: Approval Requirements for Actions Subject to Other than Full and Open Competition

VALUE OF SOLE-SOURCE CONTRACT	APPROVING OFFICIAL
Not exceeding \$700,000	CO unless a higher approval level is established in accordance with agency procedures.
Over \$700,000 but not exceeding \$13.5M	Competition advocate for the procuring activity designated pursuant to FAR 6.501 or an official described in FAR 6.304(a)(3) or (a)(4). This authority is nondelegable.
Over \$13.5M but not exceeding \$68M (or \$93M for DoD, NASA, and Coast Guard)	Head of the procuring activity, or a designee who: (i) if a member of the armed forces, is a general or flag officer; or (ii) if a civilian, is serving in a position in a grade above GS-15 under the General Schedule (or a comparable or higher position under another schedule).
Over \$68M (or \$93M for DoD, NASA, and Coast Guard)	Senior procurement executive (SPE) of the agency. Not delegable except in the case of the under secretary of defense for acquisition and sustainment, acting as the SPE for DoD.

Issue oral RFPs.

While agencies may use oral requests for proposals (RFPs) at any time for procurements under the SAT (per [FAR 13.106-1\(c\)](#)), special authority to use oral solicitations also kicks in during contingency operations or other emergency situations.

For [FAR 15](#) acquisitions, oral solicitations may be used when “processing a written solicitation would delay the acquisition of supplies/services to the detriment of the government” and when a synopsis is not required for the procurement action. [FAR 15.203\(f\)](#) cites perishable items and support of contingency operations or other emergency situations as examples of procurements that do not require a synopsis and for which an oral RFP might be used.

Of course, the use of an oral RFP does not relieve the CO from complying with other applicable FAR requirements. [FAR 15.203\(f\)\(1\)](#) requires that the contract files supporting oral solicitations include a description of the requirement, rationale for using an oral solicitation, sources solicited, and the solicitation number provided to prospective offerors.

Award letter contracts.

The award of letter contracts expedites the start of work and is authorized by [FAR 16.603](#). A letter contract is a preliminary contract issued when time is of the essence and the government’s interests demand that the contractor be given a binding commitment so work can start immediately. Negotiation of specific terms and conditions (such as final price) must be definitized in a contract within a specified period of time thereafter. A letter contract, of course, should be as complete and definite as feasible under the circumstances.

Award despite a protest.

For any procurements protested to GAO, [FAR 33.104\(b\)\(1\)\(i\)](#) and [33.104\(c\)\(2\)](#) allow the head of a contracting activity to make a written determination that “urgent and compelling circumstances which significantly affect the interest of the United States will not permit awaiting the decision of the GAO,” and subsequently award a contract, as long as this action is taken within 30 days of the written determination.

For a protest filed with the agency, [FAR 33.103\(f\)](#) allows such a determination to be approved at a level above the CO, or by another official in accordance with agency procedures.

Of course, discretion is required in determining appropriate procedures and the extent to which certain actions should be waived. Where there is potential for imminent loss of life or to prevent additional damage, the most ex-

pedited procedures are warranted (that is, use of a letter contract or purchase card order).

What authorities, flexibilities, or waivers can be applied in emergency situations?

Following are some additional authorities and flexibilities that can be applied in a variety of emergency-type situations.

Exemption from registration in SAM

Contractors are typically required to be registered in SAM. In a variety of emergency situations, [FAR 4.1102\(a\)](#) provides this exception:

- Contracts awarded by —
 - Deployed COs in the course of military operations, including, but not limited to, contingency operations as defined in 10 U.S.C. 101(a)(13) or humanitarian or peacekeeping operations as defined in [10 U.S.C. 2302\(8\)](#); or
 - COs in the conduct of emergency operations, such as responses to natural or environmental disasters or national or civil emergencies, e.g., Robert T. Stafford Disaster Relief and Emergency Assistance Act ([42 U.S.C. 5121](#)). ...
- Contracts to support unusual or compelling needs (see [6.302-2](#))

The reference to the Stafford Act applies to a major disaster or emergency situations. Contractors are required to be registered in SAM to gain access to and be registered in the [Disaster Response Registry](#), which enables COs to determine the availability of contractors for debris removal, distribution of supplies, reconstruction, and other disaster or other emergency relief activities. To find registered contractors, the CO may look in SAM under an entity’s “Assertions.” For any entity, click on the “Details” box, then “Assertions.” If the entity is a participant, the information will be in the “Disaster Relief Information” box with the geographical area served. See [FAR 18.102](#) and [26.205](#) for a description of the requirement for registration.

Exemption from EFT requirements

The government generally is required to provide all contract payments through electronic funds transfer (EFT). However, during contingency operations or when responding to emergency situations, [FAR 32.1103\(e\)](#) provides this exception:

- (e) A contract is awarded by a deployed contracting officer in the course of military operations, including, but not limited to, contingency operations as defined in [2.101](#), or a contract is awarded by any contracting officer in the conduct of emergency operations, such as responses to natural disasters or national or civil emergencies, if —

- (1) EFT is not known to be possible; or
- (2) EFT payment would not support the objectives of the operation

Waiver of advance notice for AbilityOne specification changes

COs normally are required to provide 90 days advance notice to the AbilityOne participating nonprofit agency and appropriate central nonprofit agency when changes need to be made to a specification or scope of work. When changes are required to meet “emergency needs,” [FAR 8.712\(d\)](#) waives advance notification. In such cases, the contracting activity must inform the AbilityOne participating nonprofit agency and central nonprofit agency in writing of the reasons it cannot meet the 90-day notification requirement at the time it places the order or change notice.

Nonenforcement of qualification requirements

When a qualification requirement applies, normally only those offers identified as meeting the requirement or included on the qualified list are considered. However, [FAR 9.206-1\(b\)](#) allows agencies to not enforce a qualification requirement when an emergency exists. It provides:

Except when the agency head or designee determines that an emergency exists, whenever an agency elects, whether before or after award, not to enforce a qualification requirement which it established, the requirement may not thereafter be enforced unless the agency complies with [9.202\(a\)](#) ...

This requires a written justification by the agency head.

Retroactive overtime approvals

Ordinarily, approvals for using overtime during performance of cost-reimbursement, time-and-material, or labor-hour contracts are prospective. However, [FAR 22.103-4\(i\)](#) permits retroactive approvals “if justified by emergency circumstances.”

Waiver of bid guarantees

Bid guarantees are required whenever a performance bond or performance and payment bond is required. [FAR 28.101-1\(c\)](#) authorizes the chief of the contracting office to waive the requirement to obtain a bid guarantee when a performance bond or performance and payment bond is required if it is determined that a bid guarantee is “not in the best interest of the government for a specific acquisition (e.g., overseas construction, emergency acquisitions,

sole-source contracts).” Class waivers may be authorized by the agency head or designee.

Waiver of Cargo Preference Act

The provisions of the [Cargo Preference Act of 1954](#) require DoD to use only U.S.-flag vessels for ocean transportation of supplies for the Army, Navy, Air Force, or Marine Corps unless those vessels are not available at fair and reasonable rates. This requirement may be temporarily waived when “Congress, the President, or the Secretary of Defense declares that an emergency justifying a temporary waiver exists and so notifies the appropriate agency or agencies,” per [FAR 47.502\(c\)](#).

Waiver of advance authorization for patented technology

[FAR 27.204-1\(c\)](#) requires a user to “make a reasonable effort to obtain authorization prior to use of [a] patented technology” when the patent holder is from a country that is party to the North American Free Trade Agreement (NAFTA). This requirement can be waived during a “national emergency or other circumstances of extreme urgency,” except that the patent owner must be notified as soon as it is reasonably practicable to do so.

Use of a no-setoff provision

Ordinarily, if a contractor is indebted to the government, the government may collect its debt by reducing payments to the contractor under an existing contract, even if those payments have been “assigned” to a third party, such as a bank or trust. To facilitate a contractor’s ability to obtain financing in support of contract performance in the event of a national emergency or natural disaster, [FAR 32.803\(d\)](#) provides that use of a no-setoff provision may be appropriate. Use of such a provision provides that “payments by the designated agency to the assignee under an assignment of claims will not be reduced to liquidate the indebtedness of the contractor to the government.” Any contract of a designated agency (see [FAR 32.801](#)), except under which full payment has been made, may include a no-setoff commitment only when a determination of need is made by the head of the agency in accordance with the presidential delegation of authority dated October 3, 1995 and has been published in the *Federal Register*.

We recommend reviewing [FAR 18](#) for a summary of flexibilities available to the CO when certain conditions are met. These acquisition flexibilities do not require an emergency declaration or designation of contingency operation.

The nature of an “emergency” is that an urgent need for action or assistance exists.

Conclusion

Contracting in emergency situations can be challenging, but it doesn’t have to be. While there are myriad emergency types, the bottom line is that ample flexibilities are in place to allow for use of fast, streamlined procedures to ensure the mission is met and regulatory requirements are upheld. The key is in advance preparation: knowing the types of emergencies addressed in the regulations and understanding how they can affect procurement processes.

Acquisition professionals should develop and maintain their familiarity with [FAR 18](#), as well as the [OFPP guide](#) and local procedures for affirming an emergency declaration and the specific authorities they invoke. Heads of contracting activities should develop their plans in accordance with the guide, maintain a list of emergency authorities, and be prepared to take any agency-specific actions necessary to apply those authorities to contracting actions. Acquisition organizations should develop and maintain a centralized listing of existing contract vehicles

so they are prepared to react quickly during an emergency situation. In particular, it would be a worthwhile exercise to identify the types of commodities or services that may be required from an agency’s acquisition office and make advance arrangements to create contracting vehicles to accommodate these needs.

While this *Advisory* focuses on the regulations and procedures that pertain to emergencies, we suggest you always keep the guiding principles of [FAR 1.102-4](#) in mind:

If a policy or procedure, or a particular strategy or practice, is in the best interest of the Government and is not specifically addressed in the FAR, nor prohibited by law (statute or case law), Executive Order or other regulation, Government members of the Team should not assume it is prohibited. Rather, absence of direction should be interpreted as permitting the Team to innovate and use sound business judgment that is otherwise consistent with law and within the limits of their authority. Contracting officers should take the lead in encouraging business process innovations and ensuring that business decisions are sound.

The nature of an “emergency” is that an urgent need for action or assistance exists. As such, we offer these final thoughts: Keep the objective in mind. Apply the flexibilities as best you can in the emergency situation. And — keeping the guiding principles in mind — use sound business judgment to respond to the call for action. ♦

VAO Resources

- [Emergency Contracting Toolkit](#)
- Inquiry Q&As on [disaster contracting](#)
- [Tips for Agencies During a Major Disaster or Emergency](#)
- Acquisition checklists for emergency contracting:
 - [Emergency: Simplified – FAR](#)
 - [Emergency: Commercial – FAR](#)
 - [Emergency: Negotiated – FAR](#)
 - [Emergency: Simplified – DoD](#)
 - [Emergency: Commercial – DoD](#)
 - [Emergency: Negotiated – DoD](#)

DID YOU KNOW?

You can earn at least one CLP for reading this publication!
Visit the [My CLPs](#) section of the VAO to take your quiz today.

This *Advisory* is published as part of the Virtual Acquisition Office™ subscription service, www.GoToVAO.com. Information and opinions are based on best available information, but their accuracy and completeness cannot be guaranteed. VAO recommends consulting the relevant sections of your agency’s FAR supplement and policies for amplifying details and guidance.

Contents ©2019 by the Virtual Acquisition Office™. All rights reserved.