

An hourglass-shaped graphic with a globe in the top bulb and another globe in the bottom bulb. The hourglass is light blue and has a dark blue cap at the top. The globe in the top bulb is dark blue, while the globe in the bottom bulb is light blue. The text is centered within the hourglass shape.

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*Emergency Contracting Authorities*

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# CRS Report for Congress

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## Emergency Contracting Authorities

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### Summary

Hurricane Katrina has given rise to many emergency contracting situations. This report will attempt to identify and summarize the primary emergency contracting authorities which might be available to facilitate response to these situations. Generally, these authorities may be divided into two categories, general emergency authority, and emergency (or national interest) exceptions to general procurement statutes or regulations.

The general rules governing procurement by the Government are set out in federal procurement statutes, most codified in Title 41 of the United States Code (U.S.C.) and in the Federal Acquisition Regulation, codified in Title 48 of the Code of Federal Regulations. Some of these contracting authorities contain exemptions from certain rules in time of emergency. There are, also, some emergency statutes which contain more general emergency contracting authorities. This report will discuss these two types of provisions.

### General Emergency Authorities

**41 U.S.C. § 428a.** This section grants special emergency procurement authority to heads of executive agencies where such person determines that the procurement is to be used in support of a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack. “Agency Head” is defined to include the Secretary, Attorney General, Administrator, Governor, Chairman, or other chief official of an executive agency, unless otherwise indicated, including any deputy or assistant chief official of an executive agency.<sup>1</sup>

“Contingency Operation” means a military operation which 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 results in the call to order, or

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<sup>1</sup> Federal Acquisition Regulation (FAR) § 2.101.

retention on, active duty of members of the uniformed services under certain specified sections of Title 10 of the United States Code<sup>2</sup> or any other provision of law during a war or during a national emergency declared by the President or Congress.<sup>3</sup>

The authority granted under this section is to raise certain procurement thresholds. The micro purchase threshold is increased from \$2,500 to \$15,000.<sup>4</sup> If a procurement is a micro purchase, no competition is required. The order must be placed with a responsible source at a reasonable price.<sup>5</sup> The simplified acquisitions threshold is increased from \$100,000 to \$250,000.<sup>6</sup> Procurements under this threshold are relieved from the requirements of several laws, or portions thereof, listed in the FAR including, among others, the Miller Act,<sup>7</sup> the Anti-Kickback Act of 1986,<sup>8</sup> and Contract Work Hours and Safety Standards Act.<sup>9</sup> The threshold for purchases of commercial items is increased from \$5,000,000 to \$10,000,000.<sup>10</sup> A purchase of commercial items under the threshold is treated as a simplified acquisition.<sup>11</sup>

The Department of Defense has determined that procurements in support of Hurricane Katrina relief efforts are in support of a contingency operation. Therefore the increased thresholds of this section are to be used.<sup>12</sup>

**P.L. 109-62.** The Supplemental Appropriation for Katrina relief raises to \$10,000,000 the amount for which the simplified acquisition procedures may be used in the acquisition of commercial items. It, also, raises the micro purchase threshold to \$250,000, not the \$15,000 of section 428a.<sup>13</sup>

**50 U.S.C. § 1431.** This section permits the President to authorize agencies which exercise functions in connection with the national defense to award contracts without regard to other provisions of law in support of the national defense. The section states:

The President may authorize any department or agency of the Government which exercises functions in connection with the national defense, acting in accordance with

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<sup>2</sup> 10 U.S.C. §§ 688, 12301(a), 12302, 12304, 12305, 12406, and chapter 15 are specified.

<sup>3</sup> 41 U.S.C. § 428a(e) incorporating by reference the definition found at 10 U.S.C. § 101(a)(13).

<sup>4</sup> 41 U.S.C. § 428a(b)(1).

<sup>5</sup> 41 U.S.C. § 428 and FAR § subpart 13.2.

<sup>6</sup> 41 U.S.C. § 428a(b)(2).

<sup>7</sup> 40 U.S.C. § 270a, requiring performance and payment bonds on certain construction contracts.

<sup>8</sup> 41 U.S.C. § 57(a) and (b), requiring certain procedures by contractors to prevent and detect kick-backs by subcontractors.

<sup>9</sup> 40 U.S.C. §§ 327 to 333. For the complete list of provisions inapplicable to these procurements, *see*, FAR § 13.005.

<sup>10</sup> 41 U.S.C. § 428a(c).

<sup>11</sup> 41 U.S.C. § 427(f) and FAR § 13.500.

<sup>12</sup> [[http://www.acq.osd.mil/dpap/general/hurricane\\_katrina\\_relief.htm](http://www.acq.osd.mil/dpap/general/hurricane_katrina_relief.htm)]

<sup>13</sup> P.L. 109-62, § 101.

regulations prescribed by the President for the protection of the Government, to 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.<sup>14</sup>

This authority may not be used to obligate an amount in excess of \$50,000 without approval by an official at least at the Assistant Secretary level, nor may amounts in excess of \$25,000,000 be obligated without notifying the Armed Services Committees of Congress.<sup>15</sup>

Executive Order 10789, issued under the authority of this section,<sup>16</sup> authorizes the Secretary of Defense (and the Secretaries of the branches of the Armed Services) to enter into contracts without regard to provisions of law if such contracts will facilitate national defense. Part II of the order extends this authority to the heads of: the Departments of the Treasury, The Interior, Agriculture, Commerce, Health and Human Services, Transportation, and **Homeland Security** and the Atomic Energy Commission, General Services Administration, National Aeronautics and Space Administration, Tennessee Valley Authority, and the Government Printing Office.<sup>17</sup>

While the authority appears quite broad, it is limited in that the provisions of specified labor laws<sup>18</sup> must be applied.<sup>19</sup> Also, the act is not authority for: using a cost-plus-a-percentage-of-cost system of contracting; making any contract that violates existing law limiting profit or fees; providing for other than full and open competition for award of contracts for supplies or services.; or waiving any bid bond, payment bond, performance bond, or other bond required by law.<sup>20</sup>

“National defense” means programs for military and energy production or construction, military assistance to any foreign nation, stockpiling, space, and any directly related activity. **Such term includes emergency preparedness activities conducted pursuant to Title VI of the Robert T. Stafford Disaster Relief and Emergency Assistance Act.**<sup>21</sup> Emergency preparedness encompasses more than preparing for emergencies. It also covers activities to minimize the effects of a hazard and to effectuate

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<sup>14</sup> 50 U.S.C. § 1431.

<sup>15</sup> *Id.*

<sup>16</sup> 23 F.R. 8897 (November 14, 1958) as amended.

<sup>17</sup> *Id.* Emphasis added.

<sup>18</sup> I.e., the Walsh-Healey Act, 41 U.S.C. §§ 35 et seq., the Davis-Bacon Act, 40 U.S.C. § 3141 et seq., and the Copeland Act, 18 U.S.C. §874.

<sup>19</sup> E.O. 10789 paragraph (13).

<sup>20</sup> *Id.* at paragraph (12) and FAR § 50.203.

<sup>21</sup> 50 U.S.C. Appx. § 2152(13). Emphasis added.

emergency repair or restoration of vital utilities and facilities destroyed or damaged by the hazard.<sup>22</sup>

### **The Robert T. Stafford Disaster Relief and Emergency Assistance Act.**<sup>23</sup>

The Stafford Act has two provisions containing general emergency contracting authorities. In performing services under the act, any federal agency is authorized to: hire temporary personnel without regard to provisions of Title 5 of the U.S.C. governing appointments in the competitive service; employ experts and consultants without regard to provisions of Title 5 of the U.S.C. relating to classification and General Pay Schedules; and to enter into contracts for acquisition, rental, or hire of equipment, services, materials, and supplies for shipping, drayage, travel, and communications, and for supervision and administration of such activities.<sup>24</sup> In the expenditure of federal funds under contracts with private firms for debris clearance, distribution of supplies, reconstruction, and other major disaster or emergency assistance activities, preference shall be given, to the extent feasible and practicable, to organizations, firms, and individuals residing or doing business primarily in the area affected by the disaster or emergency.<sup>25</sup>

## **Emergency (or National Interest) Exceptions to General Procurement Statutes**

**The Competition in Contracting Act.** The general rule set out in the Competition in Contracting Act for Federal procurement is one of full and open competition.<sup>26</sup> Of the seven statutory exceptions to this general rule, two are readily available in an emergency situation. Other than full and open competition is permitted when the agency's need is of such unusual and compelling urgency that the Government would be seriously injured,<sup>27</sup> and the public interest would be better served by other than full and open competition.<sup>28</sup> The "urgency" exception has been referenced in a number of sole source contracts which have been awarded in response to the Katrina disaster.

**The Davis-Bacon Act.** The Davis-Bacon Act,<sup>29</sup> requires every construction contract in excess of two thousand dollars to which the federal government (or the District of Columbia) is a party to pay all laborers and mechanics not less than the locally prevailing wage. Construction includes alteration or repair (including dredging,

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<sup>22</sup> 42 U.S.C. § 5195a.

<sup>23</sup> Codified at 42 U.S.C. ch. 68, §§ 5121 et.seq.

<sup>24</sup> 42 U.S.C. § 5149.

<sup>25</sup> 42 U.S.C. § 5150. *See*, also, FAR § 26.200.

<sup>26</sup> 10 U.S.C. § 2304 which applies to the Department of Defense and NASA and 40 U.S.C. § 253 which applies to all other executive agencies. *See*, also, FAR part 6.

<sup>27</sup> 10 U.S.C. § 2304(c)(2), 40 U.S.C. § 253(c)(2), and FAR § 6.302.2.

<sup>28</sup> 10 U.S.C. § 2304(c)(7), 40 U.S.C. § 253(c)(7), and FAR § 6.302.7. The FAR does require a written, certified justification before any of the exceptions to full and open competition is used. *See*, FAR § 6.303-1.

<sup>29</sup> Ch. 411, 46 Stat. 1494 (March 3, 1931). Codified at 40 U.S.C. §§ 3141 thru 3148.

excavation, and painting) of buildings, structures, or other real property.<sup>30</sup> The term “construction” has been found to include many types of activities that will be included in the recovery from Hurricane Katrina such as contracts for improvements to bridges, dams, highways, streets, subways, tunnels, sewers, power lines, cemeteries, pumping stations, railways, airports, docks, piers, lighthouses, jetties, breakwaters, levees, canals, and channels.

Under section 6 of the act, the President may suspend the requirements of the act during a “national emergency.”<sup>31</sup> On September 8, 2005, President Bush issued a Proclamation suspending the application of the Davis-Bacon Act to contracts to be performed in the counties included in the Hurricane Katrina disaster area.<sup>32</sup>

**The Buy American Act.** The Buy American Act,<sup>33</sup> is the major domestic preference statute governing procurement by the federal government. The act attempts to protect domestic labor by providing a preference for American goods in government purchases. In determining what are American goods, the place of mining, production, or manufacture is to be controlling. The nationality of the contractor is not to be considered when determining if a product is of domestic origin. This act is quite broad in scope, applying to all federal procurements unless the procurement comes under one of the five exceptions.<sup>34</sup> Two of these five exceptions might come into play in an emergency situation. The act excepts procurements to which application would be inconsistent with the public interest and those for less than the micro threshold.<sup>35</sup> As noted above, the micro threshold for procurements to be used in support of Hurricane Katrina rescue and relief operations has been raised to \$250,000.<sup>36</sup> Therefore, such procurements would be exempt from the requirements of the Buy American Act.

**Oral Requests for Proposals.** Generally, a request for proposals (RFP) is to be in writing and published in a certain timely manner.<sup>37</sup> Oral RFP’s may be used for procurements under the simplified acquisition threshold<sup>38</sup> or during contingency

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<sup>30</sup> 40 U.S.C. § 3142(a).

<sup>31</sup> 40 U.S.C. § 3147.

<sup>32</sup> 70 F.R. 54,227 (September 8, 2005), available at [<http://www.whitehouse.gov/news/releases/2005/09/20050908-5.html>]. The proclamation also applies to the operation of the so-called “related acts” to the extent they reference the Davis-Bacon Act. For an in depth analysis and discussion of the emergency waiver of the Davis-Bacon Act for the response to Hurricane Katrina, see, CRS Report RS22265, *Prevailing Wage Requirements and the Emergency Suspension of the Davis-Bacon Act*, by John R. Luckey and Jon O. Shimabukuro.

<sup>33</sup> 41 U.S.C. §§ 10a through 10d.

<sup>34</sup> 41 U.S.C. §§ 10a & 10b. For more complete discussion of the Buy American Act and its exceptions, see, CRS Report 97-765, *The Buy American Act: Requiring Government Procurements to Come from Domestic Sources*, by John R. Luckey.

<sup>35</sup> P.L. 103-355, 108 Stat. 3346-7, 103<sup>rd</sup> Cong., 2<sup>nd</sup> Sess. (1994) codified at 41 U.S.C. 10a.

<sup>36</sup> P.L. 109-62, § 101.

<sup>37</sup> FAR § 15.2.

<sup>38</sup> This threshold is raised to \$250,000 under § 428a.

operations.<sup>39</sup> They may, also, be used when processing a written solicitation would delay the acquisition of supplies or services to the detriment of the Government.<sup>40</sup>

**Electronic Funds Transfer Requirements.** Generally, the Government is required to make all contract payments via electronic funds transfer (EFT).<sup>41</sup> Contracts awarded in the course of a contingency operation or in the conduct of emergency operations are exempted from the EFT requirement if EFT is not known to be possible or EFT payment would not support the objectives of the operation.<sup>42</sup>

**Central Contractor Registration.** Prospective contractors with the federal government are required to register with the Central Contractor Registration data base. Contracts awarded in the course of a contingency operation, in the conduct of emergency operations, or under the urgency exception to the Competition in Contracting are exempted from the registration requirement.<sup>43</sup>

**Award Letters.** An award letter is a written preliminary contractual instrument that authorizes the contractor to begin immediately manufacturing supplies or performing services. These letters may be used when the Government's interests demand that the contractor be given a binding commitment so that work can start immediately and negotiating a definitive contract is not possible in sufficient time to meet the requirement.<sup>44</sup>

**Use of Patented Technology Under the North American Free Trade Agreement.** Under NAFTA, a user of technology covered by a valid patent is required to make a reasonable effort to obtain authorization prior to use of the patented technology. Exception is made for national emergencies or situations of extreme urgency.<sup>45</sup>

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<sup>39</sup> FAR § 13.106.

<sup>40</sup> FAR § 15.203.

<sup>41</sup> 31 U.S.C. §3332 and FAR § 32.11.

<sup>42</sup> FAR § 32.1103(e).

<sup>43</sup> FAR § 4.1102(a).

<sup>44</sup> FAR § 16.603..

<sup>45</sup> FAR § 27.208.