

Responding to National Disasters and Emergencies: A Contract and Fiscal Law Primer

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Future Defense Support to Civilian Authorities (DSCA) planning and execution must consider the non-doctrinal use of military forces, yet remain within the constraints of federal law and regulations.¹

I. Introduction

Since the beginning of our Nation, the U.S. military has been called upon to respond to all manner of domestic disasters and emergencies.² Such disasters, natural and man-made, have included hurricanes, typhoons, fires, floods, earthquakes, tornados, massive explosions, and terrorist attacks.³ Other types of domestic disasters and national emergencies that may require military deployment and support include disease pandemics, major power blackouts, nuclear, biological, or chemical releases, and civil disturbances and insurrections, to name a few.⁴ As in all legal areas, including the fiscal and contracting realm, judge advocates deploying in support of a domestic disaster or emergency must be keenly aware of the types of support the military will be asked to provide and the legal factors that will affect the response.⁵ Despite the severity or catastrophic nature of a disaster, military support to civilian authorities must always remain within the fiscal and contracting laws and regulations that govern such assistance. While there are emergency acquisition rules to add flexibility in these situations, fiscal and contracting rules remain in effect as in all other military operations.⁶ Proactive coordination and close cooperation by judge advocates with all fiscal and contracting offices involved in the mission will ensure that standard procedures and rules are followed and that military funds and resources are not misapplied.

The purpose of this primer is to provide the judge advocate deploying in support of a domestic disaster or emergency a quick overview of the federal response scheme, highlight some lessons learned and unusual issues that arose in the past, and identify a recent addition to the Federal Acquisition Regulation (FAR) resulting from Hurricane Katrina. Note that a detailed discussion of government fiscal and contracting law procedures and regulations is beyond the scope of this primer. Judge advocates should closely review applicable references.

I. Federal Response General Scheme

A. Initial Overview

The Department of Defense (DOD) is expected to support civil authorities in response to national disasters and emergencies; thus, it is critical for the judge advocate to know the applicable legal framework. Some essential references

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¹ Lieutenant General Russell L. Honore & Colonel Barney Barnhill (Retired), *Joint Task Force Katrina: "See First—Understand First—Act First,"* J. DEP'T OPERATIONAL ART & CAMPAIGNING 15 (Spring 2006).

² Commander Jim Winthrop, *The Oklahoma City Bombing: Immediate Response Authority and Other Military Assistance to Civil Authority (MACA)*, ARMY LAW., July 1997, at 3.

³ *Id.*

⁴ See U.S. DEP'T OF DEFENSE, DIR. 3025.1, MILITARY SUPPORT TO CIVIL AUTHORITIES (MSCA) (15 Jan. 1993) [hereinafter DOD DIR. 3025.1].

⁵ See GOV'T ACCOUNTABILITY OFF., REP. NO. GAO-06-643, HURRICANE KATRINA: BETTER PLANS AND EXERCISES NEEDED TO GUIDE THE MILITARY'S RESPONSE TO CATASTROPHIC NATURAL DISASTERS (May 15, 2006) [hereinafter GAO-06-643].

⁶ See Federal Acquisition Regulation; FAR Case 2005-038, Emergency Acquisitions, 71 Fed. Reg. 128, 38247 (July 5, 2006) [hereinafter FAR Part 18, Emergency Acquisitions].

directing military support include the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act),⁷ DOD Directive (DOD Dir.) 3025.1, *Military Support to Civil Authorities* (MSCA),⁸ DOD Dir. 3025.15, *Military Assistance to Civil Authorities* (MACA),⁹ DOD Dir. 3025.12, *Military Assistance for Civil Disturbances* (MACDIS),¹⁰ Army Field Manual (FM) 100-19, *Domestic Support Operations*,¹¹ and the Department of Homeland Security (DHS) *National Response Plan*¹² (NRP). Note that there is a draft DOD Directive 3025.XX, *Defense Support of Civil Authorities*, pending approval and publication. This directive will update the doctrinal term of such support from MSCA to DSCA and will consolidate and supersede the DOD directives listed above. These main authorities govern DOD support during national disasters and emergencies and specify chains of command, approval authorities for different types of support, and sources of funding.¹³ While DOD support to civilian authorities may be the main effort during early stages of a national disaster or emergency, the civil authorities ultimately retain primary responsibility and DOD serves in a supporting capacity.¹⁴

Army FM 100-19 is the combined Army and Marine Corps manual providing doctrine for domestic support operations, and encompassing a much broader range of support than just disaster and emergency relief.¹⁵ The manual provides direction on the loan and lease of military materiel, but primarily refers to service-specific regulations for detailed guidance.¹⁶ For those operations where there are loans or leases, the traditional policy is that DOD must be reimbursed by the borrowing organization of all costs incident to the use, delivery, return, and repair of the military items.¹⁷ The borrowing agency must also reimburse for the full purchase price of consumables used and for any significant depreciation on nondurable goods.¹⁸ Service secretary level approval is required for loans of “arms, ammunition, combat vehicles, vessels, and aircraft.”¹⁹ The manual frequently and notably refers to the Stafford Act,²⁰ Economy Act,²¹ and DOD Operational Plan Garden Plot (Garden Plot)²² for specific reimbursement procedures.²³

Contracting is the key logistical component for purchasing, leasing, or renting supplies or services from non-federal entities when responding to a crisis.²⁴ Contracting is essential to procure “all classes of supplies, labor, mortuary affairs, laundry, showers, food, service, sanitation, billeting, transportation, maintenance and repair, access to communications networks, temporary real property leasing, and limited minor construction, that may be required during the military’s relief efforts.”²⁵ Warranted contracting officers must be immediately available in the earliest stages of the military response to ensure the rapid and proper accomplishment of resourcing all goods and services.²⁶ Initially, decentralized contracting is the

⁷ Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121–5206 (2000) as amended in the Department of Homeland Security Appropriations Act of 2007, Pub. L. No. 109–295, 120 Stat. 1355 (2006), and in Title VI of the Act, which is the Post-Katrina Emergency Management Reform Act of 2006 (notable addition to direct FEMA, to among other things, “coordinate and support precautionary evacuations and recovery efforts.”).

⁸ DOD DIR. 3025.1, *supra* note 4.

⁹ U.S. DEP’T OF DEFENSE, DIR. 3025.15, MILITARY ASSISTANCE TO CIVIL AUTHORITIES (MACA) (18 Feb. 1997) [hereinafter DOD DIR. 3025.15].

¹⁰ U.S. DEP’T OF DEFENSE, DIR. 3025.12, MILITARY ASSISTANCE FOR CIVIL DISTURBANCES (MACDIS) (4 Feb. 1994) [hereinafter DOD DIR. 3025.12].

¹¹ U.S. DEP’T OF ARMY, FIELD MANUAL 100–19, DOMESTIC SUPPORT OPERATIONS (1 July 1993) [hereinafter FM 100–19].

¹² U.S. DEP’T OF HOMELAND SECURITY, NATIONAL RESPONSE PLAN (May 2006) [hereinafter NRP].

¹³ INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 451 (2006) [hereinafter JA 422].

¹⁴ *Id.* at 438.

¹⁵ FM 100-19, *supra* note 11.

¹⁶ *Id.* at 3.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121–5206 (2000).

²¹ Economy Act, 31 U.S.C. § 1535 (2000).

²² U.S. DEP’T OF DEFENSE, CIVIL DISTURBANCE PLAN (GARDEN PLOT) (15 Feb. 1991) [hereinafter GARDEN PLOT].

²³ FM 100-19, *supra* note 11.

²⁴ *Id.* at 4-2.

²⁵ *Id.*

²⁶ *Id.*

preferred means to rapidly respond to disaster demands.²⁷ However, the contracting function should become increasingly more centralized as the crisis stabilizes, permitting the military to shift the resourcing task to civil agencies to allow the eventual military withdrawal and redeployment.²⁸

Resource managers must have early and complete involvement in all operational aspects to ensure proper management of costs and project code accounting for tracking all reimbursable and other types of support.²⁹ Resource managers must plan and account for vast expenditures in support of the military mission and always do so with a mindset that an audit is just around the corner.³⁰

The Economy Act provides the “authority for federal agencies to order goods and services from other federal agencies (including other military Departments and Defense agencies) and to pay the actual costs of those goods and services.”³¹ An agency may place an order with another federal agency for goods or services so long as:

1. Funds are available; 2. The head of the requesting agency or unit decides the order is in the best interests of the United States (U.S.) Government; 3. The agency or unit to be asked to fill the order is able to provide the ordered goods and services; and 4. The head of the agency decides that ordered goods or services cannot be provided as conveniently or economically by a commercial enterprise.³²

Economy Act orders may also be placed under interservice support agreements and interagency agreements.³³ However, even when these types of agreements authorize support and reimbursement, the basic tenets of government fiscal law, such as “purpose, time, and amount,” still apply at all times.³⁴

B. The Stafford Act

The Stafford Act is the governing authority directing the military to support civil authorities in protecting lives, property, and the public health and safety.³⁵ The DOD may provide such necessary support, including “personnel, equipment, supplies, facilities, and managerial, technical and advisory services” to local relief efforts, with or without reimbursement.³⁶ The Stafford Act provides four situations authorizing DOD support for domestic disasters and emergencies.³⁷ The first situation is when the President declares a “major disaster” in response to a natural catastrophe or emergency, regardless of cause, anywhere in the United States and its territories.³⁸ This declaration requires the affected state’s governor to request federal assistance after being unable to effectively respond with only state resources, and to guarantee that the state will certify compliance with all cost-sharing provisions of the Stafford Act.³⁹ There is no dollar amount or time limit on such federal assistance.⁴⁰ This authority was recently used in 2005 to respond to Hurricane Katrina.⁴¹

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 4-4.

³⁰ *Id.*

³¹ Economy Act, 31 U.S.C. §§ 1535–1536 (2000); *see* U.S. DEP’T OF DEFENSE, REG. 7000.14–R, FINANCIAL MANAGEMENT REGULATION ch. 3 (Nov. 2007) [hereinafter DOD FMR], available at <http://www.defenselink.mil/comptroller/fmr>.

³² §§ 1535–1536; *see* DOD FMR, *supra* note 31.

³³ §§ 1535–1536; *see* DOD FMR, *supra* note 31.

³⁴ JA 422, *supra* note 13, at 247.

³⁵ Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5192 (2000).

³⁶ *Id.*

³⁷ JA 422, *supra* note 13, at 452.

³⁸ § 5122.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ GOV’T ACCOUNTABILITY OFF., REP. NO. GAO–06–44T, HURRICANE KATRINA: GAO’S PRELIMINARY OBSERVATIONS REGARDING PREPAREDNESS, RESPONSE, AND RECOVERY (Mar. 8, 1996) [hereinafter GAO–06–44T]; SELECT BIPARTISAN COMMITTEE, 109TH CONG., A FAILURE OF INITIATIVE, FINAL REPORT OF THE SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA (2006) [hereinafter 109TH CONG. REP.].

The second situation is when the President declares an “emergency,” defined as “any occasion or instance for which, in the determination of the President, federal assistance is needed to supplement state and local efforts and capabilities to save lives and to protect property and public health and safety, or to lesson or to avert the threat of a catastrophe” in the United States and its territories.⁴² The governor of the affected state must meet the same criteria as in a major disaster, but must also define the specific type and amount of federal support required.⁴³ The Stafford Act limits federal assistance for a single emergency to \$5 million unless the President determines that there is a continuing risk and further emergency assistance is immediately required.⁴⁴ Other than these differences, there is no operational distinction between an emergency and a major disaster.⁴⁵

The third category is the President’s “10-day emergency authority” during which DOD assets may be used on an emergency basis to “preserve life and property.”⁴⁶ As in the first two situations, the governor for the affected state must request federal assistance. This category differs from the first two in that the emergency work is limited to ten days for clearing and removing debris and wreckage, and temporarily restoring essential public facilities and services.⁴⁷

The fourth category is when an emergency exists in an area for which the Federal Government has “primary responsibility” for response pursuant to the Constitution and federal law.⁴⁸ As this authority arises in an area where the Federal Government has “primary responsibility,” such as over areas with exclusive, concurrent, or proprietary jurisdiction, the state governor need not request aid.⁴⁹ This type of authority was used in response to the Oklahoma City bombing of the Murrah Federal Building in 1995.⁵⁰

While the Stafford Act provides for reimbursement of disaster and emergency relief provided by the military, DOD is only reimbursed for incremental costs incurred in providing requested support to civil authorities, not personnel costs.⁵¹ Incremental costs are “those incurred by the agency providing the military assistance that—but for the request for assistance—would not otherwise have incurred these expenses.”⁵² Personnel costs of military and DOD civilians are generally not included as reimbursable incremental costs, as these are considered fixed costs incurred by the DOD regardless of any disaster assistance rendered.⁵³ However, extra costs such as temporary additional duty and federal civilian employee overtime are considered incremental costs instead of fixed costs for reimbursement purposes.⁵⁴

The MSCA is the primary DOD reference for the military when responding to domestic disasters and emergencies under Stafford Act authority.⁵⁵ It requires DOD components to comply with all “legal and accounting requirements for the loan, grant, or consumption of DOD resources for MSCA, as necessary, to ensure reimbursement of costs to the DOD components under the Stafford Act . . . or other applicable authority.”⁵⁶ The DOD policy is that resources should be provided on a reimbursable basis, but provision of resources that will “save lives, prevent human suffering, or mitigate great property damage” should not be precluded if the requesting civil agency is not able to commit to reimbursement.⁵⁷

⁴² § 5122.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ JA 422, *supra* note 13, at 452.

⁴⁶ § 5170b(c); *see also* JA 422, *supra* note 13, at 452.

⁴⁷ § 5170b(c); *see also* JA 422, *supra* note 13, at 452.

⁴⁸ § 5170b(c); *see also* JA 422, *supra* note 13, at 452.

⁴⁹ § 5170b(c); *see also* JA 422, *supra* note 13, at 452.

⁵⁰ JA 422, *supra* note 13, at 453.

⁵¹ GOV’T ACCOUNTABILITY OFF., REP. NO. GAO/NSIAD-93-180, DISASTER ASSISTANCE: DOD’S SUPPORT FOR HURRICANES ANDREW AND INIKI AND TYPHOON OMAR 8 (June 18, 1993) [hereinafter GAO/NSIAD-93-180]; CENTER FOR LAW & MIL. OPERATIONS, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER AND SCHOOL, U.S. ARMY, DOMESTIC OPERATIONAL LAW HANDBOOK FOR JUDGE ADVOCATES VOL. 1, 286 (2006) [hereinafter DOPLAW HANDBOOK].

⁵² DOPLAW HANDBOOK, *supra* note 51.

⁵³ GAO/NSIAD-93-180, *supra* note 51, at 8.

⁵⁴ *Id.*

⁵⁵ DOD DIR 3025.1, *supra* note 4.

⁵⁶ *Id.* at 4.4.8.1.

⁵⁷ *Id.* at 4.5.1 and 4.5.2.

One contracting provision worth noting in the Stafford Act is the preference for contracting with local firms and individuals from the affected areas, “to the extent feasible and practical,” for “debris clearance, distribution of supplies, reconstruction, and other major disaster or emergency assistance activities.”⁵⁸

C. Immediate Response Authority

The MSCA authorizes local military commanders to respond immediately to sudden and imminently serious emergencies or attacks in order to “save lives, prevent human suffering, or mitigate great property damage” when there is no time for authorization from the requisite approval levels.⁵⁹ Authorized types of support under this “Immediate Response Authority” include “rescue, evacuation, and emergency treatment of casualties; emergency restoration of essential public services; emergency removal of debris and explosive ordnance; and recovery and disposal of the dead.”⁶⁰ Under this authority, military support should be conducted on a cost-reimbursable basis, but recent guidance directs that such support “should not be denied because the requester is unable or unwilling to commit to reimbursement,” as may be the case.⁶¹ The military agency providing support under the immediate response authority should explicitly request reimbursement for all support rendered.⁶² In most instances, support rendered under a commander’s immediate response authority will be conducted using operation and maintenance (O&M) funds.⁶³

D. Civil Disturbances and Insurrection

The DOD may also be called upon to provide support to civil disturbances and other types of emergencies requiring military support, such as in response to terrorist attacks and incidents involving weapons of mass destruction (WMD).⁶⁴ While the MSCA is primarily focused on supporting the Stafford Act in disaster situations, it does not provide the authority to support civilian law enforcement agencies.⁶⁵ Other DOD regulations govern support to civilian law enforcement agencies during domestic disasters and emergencies, including the MACA,⁶⁶ the MACDIS,⁶⁷ and Garden Plot.⁶⁸ These authorities permit multiple types of domestic support to civilian law enforcement agencies in the areas of civil disturbance operations, key asset protection, disaster relief, and responding to acts and operations involving terrorism.⁶⁹ Similar to the reimbursement provisions under disaster response, these other types of responses to domestic situations, such as civil disturbances, also require a written request for DOD support. These requests must also contain a fund citation in accordance with the Economy Act,⁷⁰ other reimbursement authority, or at least some sort of statement guaranteeing reimbursement by the local or state agency requesting support.⁷¹ Any requests for non-reimbursable support must provide a “legal and factual justification for a waiver of reimbursement.”⁷²

⁵⁸ Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5150 (2000). See GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 26.200–26.201 (Nov. 7, 2007) [hereinafter FAR], available at <http://www.arnet.gov/far/>.

⁵⁹ DOD DIR 3025.1, *supra* note 4; DOPLAW HANDBOOK, *supra* note 51, at 287.

⁶⁰ DOD DIR 3025.1, *supra* note 4, at 4.5; DOPLAW HANDBOOK, *supra* note 51, at 287.

⁶¹ DOD DIR 3025.1, *supra* note 4, at 4.5.2; DOPLAW HANDBOOK, *supra* note 51, at 287. See Winthrop, *supra* note 2, at 3 (providing a good discussion of a commander’s immediate response authority).

⁶² DOPLAW HANDBOOK, *supra* note 51, at 288.

⁶³ *Id.*

⁶⁴ *Id.* at 290; DOD DIR. 3025.15, *supra* note 9.

⁶⁵ DOD DIR 3025.1, *supra* note 4.

⁶⁶ DOD DIR. 3025.15, *supra* note 9.

⁶⁷ DOD DIR. 3025.12, *supra* note 10.

⁶⁸ GARDEN PLOT, *supra* note 22.

⁶⁹ DOD DIR. 3025.15, *supra* note 9; see DOD DIR. 3025.12, *supra* note 10; GARDEN PLOT, *supra* note 22.

⁷⁰ Economy Act, 31 U.S.C. § 1535 (2000) (providing a statutory mechanism for reimbursable support between federal agencies).

⁷¹ DOD DIR. 3025.15, *supra* note 9, at 4.10.

⁷² *Id.*; see GARDEN PLOT, *supra* note 22, at ann. P (detailing guidance on funding, reimbursement, costing, financing, and reporting).

An authorized DOD response or assistance to civil authorities during a civil disturbance is an unplanned or “unprogrammed” emergency fiscal requirement, meaning that it is not budgeted.⁷³ Therefore, to cover the costs of providing this assistance, DOD policy is that all assistance be provided on a reimbursable or “cost reclaimable basis in accordance with the Economy Act”⁷⁴ or any other “reimbursement mechanism.”⁷⁵ Department of Defense units shall account for these costs using standard procedures.⁷⁶ As in requests for disaster assistance, all requests for civil disturbance assistance shall be reimbursable by the supported civil authorities (federal, state, or local) and must be in writing.⁷⁷ Any requests for non-reimbursable support must be in writing with a “legal and factual justification” supporting the request for the waiver of reimbursement.⁷⁸ Approval levels for waivers of reimbursement are the Secretary of Defense for federal agency requests, and differing levels in accordance with DOD Dir. 5525.5, *DOD Cooperation with Civilian Law Enforcement Officials*, for state and local authorities.⁷⁹ Reimbursement waivers are only appropriate in limited situations where military assistance is incidental to military operations, serves a military purpose and provides training or operational benefits. Furthermore, the reimbursement waiver must not adversely affect military preparedness.⁸⁰

E. The National Response Plan

The Federal Emergency Management Agency (FEMA), under the Department of Homeland Security (DHS), directs the federal response to national disasters and emergencies and prepares and manages the National Response Plan (NRP).⁸¹ The NRP defines twelve emergency support functions (ESFs) and assigns primary and supporting assignments to certain federal agencies based on functional abilities to serve as the primary responder.⁸² The DOD (Army Corps of Engineers) has primary responsibility for only one ESF, ESF #3, Public Works and Engineering, and is a supporting agency for all the other ESFs.⁸³ For example, while the Department of Agriculture has primary responsibility for ESF #4, Firefighting, the DOD occasionally plays an important supporting role, typically in the West.⁸⁴

In response to a disaster or emergency, the DHS, normally through FEMA, will establish a joint field office (JFO) to serve as the local multi-agency coordination center.⁸⁵ The JFO is headed by the principal federal official (PFO) who will serve to coordinate the federal response in cooperation with and in support of the state and local officials.⁸⁶ A federal coordinating officer (FCO) will be assigned to assist the PFO in coordinating all of the federal response support and will serve as the lead coordinator in case no PFO is assigned to the JFO.⁸⁷ Whenever DOD is involved in the federal response, a defense coordinating officer (DCO), in the grade of O-6 or higher, is assigned to the FCO to serve as the single DOD point of contact in the JFO. Some exceptions exist, such as when the National Guard supports in a State Active Duty or Title 32 status, rather than in a Title 10 status.⁸⁸

⁷³ GARDEN PLOT, *supra* note 22, at P-1.

⁷⁴ *Id.*

⁷⁵ DOD DIR. 3025.15, *supra* note 9, at 4.10.

⁷⁶ GARDEN PLOT, *supra* note 22, at P-1.

⁷⁷ *Id.*

⁷⁸ DOD DIR. 3025.15, *supra* note 9, at 4.10–4.12.

⁷⁹ DOD DIR. 3025.15, *supra* note 9, at 4.12 (citing U.S. DEP’T OF DEFENSE, DIR. 5525, DOD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS (15 Jan. 1986)).

⁸⁰ GARDEN PLOT, *supra* note 22, at P-2.

⁸¹ DOPLAW HANDBOOK, *supra* note 51, at 286; NRP, *supra* note 12.

⁸² DOPLAW HANDBOOK, *supra* note 51, at 286; NRP, *supra* note 12.

⁸³ DOPLAW HANDBOOK, *supra* note 51, at 286; NRP, *supra* note 12; *see* DOD DIR. 3025.1, *supra* note 4.

⁸⁴ *See* Captain Francis A. Delzompo, USMC, *Warriors on the Fire Line: The Deployment of Service Members to Fight Fires in the United States*, ARMY LAW., Apr. 1995, at 51, 53 (citing the Reciprocal Fire Protection Agreements Act of 1955, 42 U.S.C.A. § 1856 (1994)).

⁸⁵ NRP, *supra* note 12.

⁸⁶ JA 422, *supra* note 13, at 454; *see* NRP, *supra* note 12.

⁸⁷ JA 422, *supra* note 13, at 454; *see* NRP, *supra* note 12.

⁸⁸ DOPLAW HANDBOOK, *supra* note 51, at 286; NRP, *supra* note 12.

The DCO will coordinate all “Mission Assignments” (MAs) issued by the FCO to the DOD, defining the task issued and the maximum allowable reimbursement amount for such assistance.⁸⁹ A recent example of a FEMA MA to DOD was one for \$75 million for search and rescue, recovery, evacuation, and collection support during Hurricane Katrina relief operations.⁹⁰

The combatant commanders responsible for developing and executing domestic disaster and emergency response plans are the United States Northern Command (NORTHCOM), the United States Pacific Command (PACOM), and the United States Southern Command for their respective areas of responsibility.⁹¹ These commands will normally establish a joint task force (JTF) to execute a domestic disaster or emergency response.⁹² Judge advocates, DOD resource managers, and contracting personnel must be synchronized with and work through their JTF chain of command to ensure that all military support falls within the applicable scope of the MAs. If support rendered is outside the scope, DOD may not be reimbursed by FEMA.

III. FAR Part 18 Addition: Compilation of Emergency Acquisition Authorities

Following Hurricane Katrina, federal agencies sought ways to expedite emergency responses, prompting an addition to the FAR.⁹³ While there has been of yet no FAR change to the current acquisition rules, all existing rules in the FAR are now consolidated for ease of reference in FAR Part 18, Emergency Acquisitions.⁹⁴ Part 18 was revised to “provide a single reference to the acquisition flexibilities already available in the FAR to facilitate and expedite acquisitions of supplies and services during all types of emergencies.”⁹⁵ These emergency acquisition authorities cover a broader scope of emergencies beyond natural disasters, to include all contingency operations and responses to “nuclear, biological, chemical, or radiological attack against the United States.”⁹⁶ Part 18 is attached as Appendix A.

IV. Fiscal and Contracting Lessons Learned from Recent Domestic Disasters and Emergencies

A. Hurricane Katrina 2005

While DOD plays a supporting role to civil authorities, the military may be called upon to assume the lead during the initial stages of relief operations. In the White House’s report on lessons learned in the aftermath of Hurricane Katrina, there was a recommendation that DOD develop plans to take a leading role, when necessary in logistics response, during an extraordinary catastrophe, such as a “nuclear incident or multiple simultaneous terrorist attacks.”⁹⁷

During the initial response to Hurricane Katrina, FEMA became so overwhelmed by the scope of the disaster that DOD effectively took over the massive logistics function for relief efforts.⁹⁸ Four days after Katrina’s landfall, FEMA gave DOD the lead for “procurement, transportation, and distribution of ice, water, food, fuel, and medical supplies and it authorized DOD to spend up to \$1 billion to accomplish this mission.”⁹⁹ This mission was complicated by FEMA’s immediately losing visibility in tracking shipments and supply delivery.¹⁰⁰ When DOD was tasked to assume the lead for logistics support from

⁸⁹ DOPLAW HANDBOOK, *supra* note 51, at 286; NRP, *supra* note 12.

⁹⁰ Federal Emergency Management Agency Mission Assignment (MA) No. 1603DR-LA-DOD-29, Hurricane Katrina Response, to Department of Defense (Sept. 6, 2005) [hereinafter MA No. 1603DR-LA-DOD-29] (on file with author).

⁹¹ Execute Order Message from Chairman of the Joint Chiefs of Staff, DOD Support to Civil Authorities (8 June 07) (unclassified) (authorizing CDRUSNORTHCOM, CDRUSSOUTHCOM, and CDRUSPACOM to provide “defense support to civilian authorities (DSCA) in response to actual or potential natural or man-made disasters, incidents of national significance, or other emergencies requiring DOD-augmented support within their Areas Of Responsibility (AOR).”).

⁹² JA 422, *supra* note 13, at 131.

⁹³ See FAR Part 18, Emergency Acquisitions, *supra* note 6.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ THE WHITE HOUSE, HURRICANE KATRINA LESSONS LEARNED 54 (Feb. 23, 2006), available at <http://whitehouse.gov/reports/Katrina-lessons-learned.pdf>.

⁹⁸ 109TH CONG. REP., *supra* note 41, at 204.

⁹⁹ GAO-06-643, *supra* note 5, at 7, 30.

¹⁰⁰ *Id.*

FEMA, DOD was not able to regain visibility in tracking these previously ordered supplies and services.¹⁰¹ The DOD also had initial problems with FEMA regarding unclear MAs which failed to specify what exactly FEMA was tasking DOD to do and what was specifically reimbursable.¹⁰² To resolve this problem, DOD essentially took over the process of drafting FEMA's requests for assistance (RFAs) to DOD, and then sent the DOD drafts to FEMA to copy and direct DOD to comply.¹⁰³

Another problem between DOD and FEMA involved the bungled delivery of a large air shipment of meals-ready-to eat (MREs) from the DOD. Once DOD flew in the requested MREs, DOD mistakenly refused to allow FEMA-provided ground transportation under the incorrect assumption that agency regulations required shipment on only DOD-approved carriers, instead of FEMA approved carriers.¹⁰⁴ This mistake and the resulting confusion led to an unnecessary delay in delivering these critical food supplies.¹⁰⁵ Despite such problems, the overall military response to Hurricane Katrina was very impressive. In Louisiana alone, the DOD provided the following support: "40,000 [military] troops; trailers of water, ice and food; commercial buses; base camps; staging areas; amphibious personnel carriers; deployable morgues; urban search and rescue teams; airlift; temporary housing; and communications systems."¹⁰⁶ The military also provided vast support to FEMA efforts in Mississippi, Alabama, Florida, and Texas.¹⁰⁷

Some examples of FEMA-directed reimbursable MAs to DOD include: One MA for \$75 million for search and rescue, collection and evacuation of the displaced, and the collection and removal of the dead;¹⁰⁸ \$7.5 million for amphibious assault personnel carriers,¹⁰⁹ and \$3 million for helicopter support to airlift casualties.¹¹⁰

The DOD also provided the U.S. Naval Ship the USNS *Comfort*, a hospital ship, to assist with casualties and provide medical support.¹¹¹ However, military lawyers were quickly called in to clarify the level of reimbursable support authorized within the scope of medical support under the FEMA MA.¹¹² This initial uncertainty of what constituted authorized reimbursable support for medical care caused FEMA to issue three amending MAs defining the scope of reimbursable medical care support to adjust to the shifting needs of the response.¹¹³

While the Stafford Act requires a contracting preference for the use of local firms and individuals from the affected areas, if practical, this was evidently not done during the Hurricane Katrina response.¹¹⁴ There were reports that debris clearance contracts were largely given to big multi-state firms, resulting in some local companies going out of business.¹¹⁵ One senior federal contracting official reported some confusion regarding the "geographical preferences allowed and required by the Stafford Act."¹¹⁶ The Governor of Louisiana even sent a letter to the President requesting that local firms in her state be given a contracting priority to help the local economy recover.¹¹⁷

¹⁰¹ *Id.* at 30.

¹⁰² 109TH CONG. REP., *supra* note 41, at 204.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 214.

¹⁰⁵ *Id.*

¹⁰⁶ Letter from Kathleen Blanco, Governor of La., to George W. Bush, President of the United States (Sept. 2, 2005), *available at* <http://www.gov.state.la.us> [hereinafter Blanco Letter].

¹⁰⁷ *See* Honore & Barnhill, *supra* note 1.

¹⁰⁸ MA No. 1603DR-LA-DOD-29, *supra* note 90.

¹⁰⁹ Federal Emergency Management Agency, Mission Assignment (MA) No. 1603DR-LA-DOD-17, Hurricane Katrina Response, to Department of Defense (Sept. 2, 2005) (on file with author).

¹¹⁰ Federal Emergency Management Agency, Mission Assignment (MA) No. 1603DR-LA-DOD-06, Hurricane Katrina Response, to Department of Defense (Aug. 31, 2005) (on file with author).

¹¹¹ E-mail from Colonel Marcia J. Bachman, Joint Operations Ctr. Judge Advoc., USNORTHCOM, to various Judge Advocate staff (Sept. 14, 2005, 16:15 EST) (on file with author).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ 109TH CONG. REP., *supra* note 41, at 331.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 333.

¹¹⁷ Blanco Letter, *supra* note 106.

Just a few weeks into the Hurricane Katrina relief efforts, federal micro-purchase thresholds were raised to \$250,000 for the acquisition of property and services supporting the relief and rescue efforts.¹¹⁸ This increase in the purchasing threshold applied to all types of micro-purchases, but was mainly directed at purchases made with the government wide purchase card.¹¹⁹ All acquisition laws and regulations continued in effect, especially those geared towards ensuring price value and procurement integrity.¹²⁰ The Office of Federal Procurement Policy (OFPP) under the Office of Management and Budget, encouraged federal agencies supporting relief efforts to “avail themselves of the simplified acquisition methods to conduct open market purchases under the simplified acquisition threshold” and to use existing procurement vehicles, including the General Services Administration (GSA) Multiple Award Schedule.¹²¹ However, less than three weeks later, the OFPP sent new guidance requesting agencies not to use the increased limits unless faced with extraordinary circumstances, due to the diminished need for such authority.¹²²

The General Accounting Office’s (GAO) preliminary review of contracting for Hurricane Katrina’s relief effort identified how the federal response during disasters increasingly relies on contractors to accomplish the mission of providing critical supplies and services, such as ice, water, food, and debris clearance.¹²³ The GAO cautioned against sloppy contracting practices during such catastrophes, despite the chaos and unpredictable nature of what must be supplied and supported.¹²⁴ The GAO specifically addressed in this report the need to have a skilled and trained acquisition workforce and sufficient numbers of oversight personnel to “monitor contractor performance and ensure accountability.”¹²⁵ The GAO addressed how careless contracting practices, notably poor planning and execution, led to failure in procuring “quality goods and services on-time” in a “cost-effective manner.”¹²⁶ Interagency contracting, under the authority of the Economy Act or other reimbursement mechanism, was another area highlighted as having a “system-wide weakness in key areas of acquisition” in the federal response to Hurricane Katrina.¹²⁷ Fortunately for DOD, most of the GAO contracting criticisms were focused on DHS; yet, these criticisms still provide useful lessons learned for the military.¹²⁸

A separate GAO report on the Katrina response noted that federal agencies need to improve intra-agency acquisition capabilities.¹²⁹ The GAO specifically recommended that federal agencies “adequately anticipate requirements for needed goods and services, clearly communicate responsibilities across agencies and jurisdictions, and deploy sufficient numbers of personnel to provide contractor oversight.”¹³⁰

After action review (AAR) comments from one Marine Corps judge advocate deployed to New Orleans reports that support by his unit was mostly provided on a “reactionary” basis to RFAs from FEMA and local authorities.¹³¹ This judge advocate noted that some of the military support fell outside the permissible parameters of the Stafford Act, in that military troops were inadvertently used to effect repairs and debris clearance to private property that was not incident to preserve life,

¹¹⁸ Memorandum, Administrator, Office of Fed. Procurement Policy, Off. of Mgmt. & Budget, Executive Off. of the President, to Chief Acquisition Officers & Chief Fin. Officers, subject: Implementing Management Controls to Support Increased Micro-Purchase Threshold for Hurricane Katrina Rescue and Relief Operations (Sept. 13, 2005) (on file with author).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* See Gov’t Accountability Off., <http://gsa.gov/portal/gsa/ep/home.do?tabid=0> (last visited Mar. 16, 2007) (under “GSA Contracts and Schedules,” GSA has grouped together all disaster relief services and products in one consolidated site for ease of use).

¹²² Memorandum, Deputy Director for Management, Office of Management and Budget, Executive Office of the President, to Heads of Executive Departments and Agencies, subject: Limitations on Use of Special Micro-Purchase Threshold Authority for Hurricane Katrina Rescue and Relief Operations (Oct. 3, 2005).

¹²³ GOV’T ACCOUNTABILITY OFF., REP. NO. GAO-06-246T, HURRICANES KATRINA AND RITA: PRELIMINARY OBSERVATIONS ON CONTRACTING FOR RESPONSE AND RECOVERY EFFORTS (Nov. 8, 2005) [hereinafter GAO-06-246T].

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ GOV’T ACCOUNTABILITY OFF., REP. NO. GAO-06-442T, HURRICANE KATRINA: GAO’S PRELIMINARY OBSERVATIONS REGARDING PREPAREDNESS, RESPONSE, AND RECOVERY (Mar. 8, 2006) [hereinafter GAO-06-442T].

¹³¹ Staff Judge Advocate, Marine Corps Special Purpose Marine Air-Ground Task Force Katrina Hurricane Relief Operations, After Action Review (Sept. 2005) [hereinafter Katrina AAR] (unpublished, on file with author).

health, or prevent great property damage.¹³² This judge advocate further stressed the importance of legal review to ensure all support provided is within scope of the reimbursable MA from FEMA, and that all expenses are closely tracked and recorded.¹³³ While much permissible federal military support was initially provided, such as rescuing stranded civilians and delivering food and water to preserve life and health, the mission quickly shifted to one better suited for non-federalized (non-Title 10) forces that are not so constrained by the Stafford Act or Posse Comitatus Act (PCA) limitations.¹³⁴ In some areas, the emergent need for federal military forces was for less than a week.¹³⁵ The inadvertent provision of supplies among military forces, between those operating in a Title 10 status and those operating in a Title 32 or State Active Duty status, is another problem area requiring close legal attention.¹³⁶

In an article he co-wrote about the military's Katrina response, Lieutenant General Russell L. Honore, JTF Katrina Commander, acknowledged that mission planning and execution were both guided by legal considerations.¹³⁷ He recommended eleven "quick fixes" to improve the coordinated federal and state response, including: "Establish[ing] external support (push packages/funding) to fill common resource shortfalls in order to facilitate the delivery of basic humanitarian relief supplies;" and "Pre-arrange[ing] support contracts for required resources in order to quickly back-fill shortfalls in basic humanitarian relief supplies and services in order to facilitate the delivery of supplies to local authorities and citizens."¹³⁸

B. September 11th Terrorist Attacks

Following the terrorist attacks in the United States on September 11, 2001, the President declared a major disaster in New York City, authorizing federal assistance to civil authorities under the NRP.¹³⁹ Under the NRP, the military provided "supplies, equipment, and lodging on military installations and transporting people, supplies and equipment."¹⁴⁰ The DOD also provided military health system support to civil authorities under the NRP. For example, upon request of local authorities, DOD provided a "Ruggedized Advance Pathogen Identification team . . . to detect, identify, and confirm suspected anthrax cases."¹⁴¹ This support was provided on a reimbursable basis.¹⁴² The DOD also received RFAs for the deployment of a hospital ship (the USNS *Comfort*), the provision of body bags, and the set up of a mobilization center for a mortuary team.¹⁴³ The RFA for the USNS *Comfort* was eventually revised from having the ship serve as a medical platform to treat casualties to having it serve as a lodging and support platform for the rescue workers.¹⁴⁴

While the military was extremely responsive following the events of September 11th, the Air Force was later criticized for being a bit *too* responsive.¹⁴⁵ Following the September 11th attacks, the Air Force quickly moved medical personnel and equipment to McGuire Air Force Base near New York City, anticipating the need to provide support to civil authorities.¹⁴⁶ The Air Force initiated this action without having received an RFA by FEMA and without being directed to do so by the

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*; e-mail from Major Devin Young, Staff Judge Advocate, 24th Marine Expeditionary Unit, U.S. Marine Corps, to author (Sept. 27, 2006, 22:11 EST) [hereinafter Young e-mail] (on file with author). This assertion is based on the author's recent professional experiences as the Staff Judge Advocate, 11th Marine Expeditionary Unit, supporting Special Purpose Marine Air-Ground Task Force Katrina Hurricane Relief Operations, during September 2005 [hereinafter Professional Experience].

¹³⁵ Katrina AAR, *supra* note 131; Young e-mail, *supra* note 134; Professional Experience, *supra* note 134.

¹³⁶ Katrina AAR, *supra* note 131; Young e-mail, *supra* note 134; Professional Experience, *supra* note 134.

¹³⁷ Honore & Barnhill, *supra* note 1, at 13.

¹³⁸ *Id.* at 14.

¹³⁹ U.S. DEP'T OF DEFENSE INSPECTOR GENERAL REPORT, D-2002-087, HEALTH CARE: DOD MEDICAL SUPPORT TO THE FEDERAL RESPONSE PLAN 1 (10 May 2002).

¹⁴⁰ *Id.* at 4.

¹⁴¹ *Id.* at 2.

¹⁴² *Id.*

¹⁴³ *Id.* at 4.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

DOD.¹⁴⁷ These resources were not required and because there was no request for such support, the Air Force's cost of \$500,000, was not reimbursed.¹⁴⁸ While the Air Force's authority to move these resources was permissible under the immediate response authority, the Air Force failed to comply with the MSCA directive, leading to critical comments in a DOD IG report about incurring this unnecessary expense.¹⁴⁹

Following the September 11th attacks, the DOD invoked its authority to declare that a "contingency operation" was ongoing.¹⁵⁰ Under a "contingency," the DOD may use all of the contingency contracting provisions in the FAR and DFARS.¹⁵¹ A useful authority under the contingency contracting provision is the doubling of the simplified acquisition threshold from \$100,000 to \$200,000.¹⁵²

One AAR from an Army judge advocate supporting September 11th relief operations noted legal efforts to ensure reimbursements were properly accomplished under the Stafford Act for military support, and noted legal efforts in providing contract review.¹⁵³

C. Oklahoma City Bombing 1995

Following the domestic terrorist bombing of the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma in 1995, the military provided critical disaster relief support. As the bombing location was a crime scene and disaster site, military missions were essentially grouped into three different categories, supporting the crime scene, rescue assistance, and disaster support.¹⁵⁴ In supporting the crime scene, DOD "provided bomb dogs, an explosive ordnance disposal detachment and Army Criminal Investigation Command assets [while] [t]he national guard provided site security."¹⁵⁵ Immediately after the bombing, under the immediate response authority, the military provided rescue assistance, including medical evacuation (MEDEVAC) helicopters and vehicle ambulances from nearby Fort Sill and Tinker Air Force Base, a mortuary affairs unit, and other logistics and transportation support.¹⁵⁶ The military provided disaster support supplies, such as thousands of sets of uniforms, boots, rain gear, and body bags.¹⁵⁷ The military also provided portable shower units to the rescuers, cargo aircraft to transport civilian rescue units, and mobile crime labs for the FBI.¹⁵⁸

As the Murrah Federal Building bomb site was both a disaster and crime scene site, FEMA took the lead agency role for all disaster (non-crime related) relief efforts and the FBI assumed the lead position for the crime scene.¹⁵⁹ This situation led to a legal "bifurcation" between what constituted permissible military support for disaster relief efforts and support to civil law enforcement agencies.¹⁶⁰ A major limitation on the scope of permissible support by federal military forces to civil law enforcement agencies is the PCA.¹⁶¹ One issue that aroused PCA concerns involved DOD's providing Defense Intelligence

¹⁴⁷ *Id.* at 7.

¹⁴⁸ *Id.* at i.

¹⁴⁹ *Id.* at ii, 7, 8.

¹⁵⁰ *Deployment and Contingency Contracting Update: Special Authorities Invoked in the Wake of the 11 September Attacks*, ARMY LAW., Jan./Feb. 2002, at 98, 99 (discussing the Presidential authorities invoked under 10 U.S.C. § 12,302 (2000), in the declaration of a "contingency," including the contingency provisions of the FAR and DFARS, the increase in the simplified acquisition threshold, and authorizing the recall of involuntary members of the Ready Reserve).

¹⁵¹ *Id.*

¹⁵² *Id.* (discussing the "simplified acquisition threshold," referencing 41 U.S.C. § 403 (2000) to define the term and FAR § 2.101 for the actual dollar amounts).

¹⁵³ Center for Law and Military Operations, Judge Advocate, New York National Guard, *After Action Review of the September 11, 2001 Relief Efforts* (n.d.) (unpublished, on file with author).

¹⁵⁴ Lieutenant Colonel Terry R. Youngbluth, Center for Law and Military Operations, *A Post-Hurricane Andrew Review of Trends in Department of Defense Disaster Relief Operations* (Apr. 1996) (unpublished, on file with author); Winthrop, *supra* note 2, at 13.

¹⁵⁵ Youngbluth, *supra* note 154; Winthrop, *supra* note 2, at 13, 14.

¹⁵⁶ Youngbluth, *supra* note 154.

¹⁵⁷ *Id.*; Winthrop, *supra* note 2, at 12.

¹⁵⁸ Winthrop, *supra* note 2, at 12.

¹⁵⁹ *Id.* at 13.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 13, 14 (citing the limitations imposed by the Posse Comitatus Act, 18 U.S.C. § 1385 (2000), on the federal military response).

Agency linguists, deemed as “intelligence personnel,” to support the FBI’s request for translator assistance on a reimbursable basis under Economy Act authority.¹⁶² Another issue that required a PCA “work-around” involved the United States Marshals Service’s request for military bomb sniffing dogs to work security.¹⁶³ The request was ultimately granted, but with significant limitations on the use of the dog teams because of the restrictions imposed by the PCA, other statutes, and DOD regulations concerning not just the dogs, but also their military handlers.¹⁶⁴

D. Other

Domestic disaster and emergency relief efforts under the Stafford Act extend beyond the continental United States to Hawaii, Alaska, and all U.S. Territories, such as during the response to Hurricane Iniki in Hawaii and Typhoon Omar in Guam in 1992.¹⁶⁵ Another such example is the federal military response to Hurricane Marilyn relief efforts in the U.S. Virgin Islands in 1995.¹⁶⁶ During that hurricane response, DOD provided “1,043 sorties carrying over 7,000 passengers and 7,000 tons of cargo” of relief supplies.¹⁶⁷ The military provided medical support, food, water, ice, equipment, and transportation support.¹⁶⁸ The military also provided aerial reconnaissance support to FEMA for current damage assessment reporting.¹⁶⁹

One last issue frequently arising during disaster and emergency relief efforts involves the permissible use of civilian volunteers directly assisting the military.¹⁷⁰ The issue lies in the Anti-Deficiency Act’s general prohibition against the federal Government accepting voluntary services.¹⁷¹ Permissible ways around this statutory prohibition include waiving compensation through gratuitous service agreements, or having volunteers offer their services to a nongovernmental relief agency, not the military forces.¹⁷² While the Anti-Deficiency Act does allow for an exception to the voluntary services prohibition in an “emergency involving the safety of human life or the protection of property,” it is generally recommended that FEMA make these determinations in such instances, as opposed to the military acting in support of FEMA.¹⁷³

V. Conclusion

Judge advocates need to be ready and well-prepared to advise in the areas of fiscal law and contracting during a domestic disaster and emergency, whether in response to a hurricane or other natural disaster, a terrorist incident, or some other catastrophic event like an influenza pandemic. Close legal involvement is critical to ensure military support is only provided when properly requested with clear authority to do so, and that all reimbursement and funding matters are addressed fully and promptly with the supported agency, whether through the authority of the Stafford Act, Economy Act, or other interagency or intra-agency reimbursable agreements.¹⁷⁴ All contracting matters must be handled through a warranted contracting officer under the applicable acquisition authorities (i.e., FAR and DFARS),¹⁷⁵ and government purchase card procurements must

¹⁶² *Id.* at 14, 15 (noting that because these linguists qualified as “intelligence personnel,” there were requirements for special approval by the General Counsel to the DIA, “in addition to the normal approval required by the applicable DoD or service regulation”).

¹⁶³ *Id.* at 15.

¹⁶⁴ *Id.* (noting that military working dogs are considered “pieces of equipment” under 10 U.S.C. § 372, and the handlers are considered “expert advisors” under 10 U.S.C. § 373).

¹⁶⁵ Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121–5206 (2000).

¹⁶⁶ Youngbluth, *supra* note 154.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Colonel Thomas R. Lujan, *Legal Aspects of Domestic Employment of the Army*, PARAMETERS 82, 97 (Fall 1997).

¹⁷¹ *Id.* (citing The Anti-Deficiency Act, 31 U.S.C. § 1342 (2000)).

¹⁷² *Id.*; CONTRACT & FISCAL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, U.S. ARMY, FISCAL LAW DESKBOOK 6-26, 6-27 (2006–2007).

¹⁷³ Lujan, *supra* note 170, at note 14.

¹⁷⁴ See NRP, *supra* note 12; see also U.S. DEP’T OF HOMELAND SECURITY, QUICK REFERENCE GUIDE FOR THE NATIONAL RESPONSE PLAN 20 (May 22, 2006).

¹⁷⁵ See FAR, *supra* note 58; U.S. DEP’T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. (19 Dec. 2006).

comply with the rules. Simply put, acquisition rules are not waived due to catastrophes and contingencies, though emergency acquisition authorities, listed in FAR Part 18,¹⁷⁶ exist and may be used to facilitate and expedite operations.

¹⁷⁶ FAR PART 18, Emergency Acquisitions, *supra* note 6.

Appendix A

1. FAR Part 18: Compilation of Emergency Acquisition Authorities.

PART 18—EMERGENCY ACQUISITIONS

18.000 Scope of part.

18.001 Definition.

Subpart 18.1—Available Acquisition Flexibilities

18.101 General.

18.102 Central contractor registration.

18.103 Synopses of proposed contract actions.

18.104 Unusual and compelling urgency.

18.105 Federal Supply Schedules (FSSs), multi-agency blanket purchase agreements (BPAs), and multi-agency indefinite delivery contracts.

18.106 Javits-Wagner-O'Day (JWOD) specification changes.

18.107 Qualifications requirements.

18.108 Priorities and allocations.

18.109 Soliciting from a single source.

18.110 Oral requests for proposals.

18.111 Letter contracts.

18.112 Interagency acquisitions under the Economy Act.

18.113 Contracting with the Small Business Administration (The 8(a) Program).

18.114 HUBZone sole source awards.

18.115 Service-disabled Veteran-owned Small Business (SDVOSB) sole source awards.

18.116 Overtime approvals.

18.117 Use of patented technology under the North American Free Trade Agreement.

18.118 Bid guarantees.

18.119 Advance payments.

18.120 Assignment of claims.

18.121 Electronic funds transfer.

18.122 Protest to GAO.

18.123 Contractor rent-free use of Government property.

18.124 Extraordinary contractual actions.

Subpart 18.2—Emergency Acquisition Flexibilities

18.201 Contingency operation.

18.202 Defense or recovery from certain attacks.

18.203 Incidents of national significance, emergency declaration, or major disaster declaration.

18.204 Resources.

18.000 Scope of part.

(a) This part identifies acquisition flexibilities that are available for emergency acquisitions. These flexibilities are specific techniques or procedures that may be used to streamline the standard acquisition process. This part includes—

- (1) Generally available flexibilities; and
- (2) Emergency acquisition flexibilities that are available only under prescribed circumstances.

(b) The acquisition flexibilities in this part are not exempt from the requirements and limitations set forth in FAR Part 3, Improper Business Practices and Personal Conflicts of Interest.

18.001 Definition.

“Emergency acquisition flexibilities”, as used in this part, means flexibilities provided with respect to any acquisition of supplies or services by or for an executive agency that, as determined by the head of an executive agency, may be used—

- (a) In support of a contingency operation as defined in 2.101;
- (b) To facilitate the defense against or recovery from nuclear, biological, chemical, or radiological attack against the United States; or
- (c) When the President declares an incident of national significance, emergency declaration, or a major disaster declaration.

Subpart 18.1—Available Acquisition Flexibilities

18.101 General.

The FAR includes many acquisition flexibilities that are available to the contracting officer when certain conditions are met. These acquisition flexibilities do not require an emergency declaration or designation of contingency operation.

18.102 Central contractor registration.

Contracts awarded to support unusual and compelling needs or emergency acquisitions are exempt from the requirements pertaining to Central Contractor Registration. (See 4.1102.)

18.103 Synopses of proposed contract actions.

Contracting officers need not submit a synopsis notice when there is an unusual and compelling urgency and the Government would be seriously injured if the agency complied with the notice time periods. (See 5.202(a)(2).)

18.104 Unusual and compelling urgency.

Agencies may limit the number of sources and full and open competition need not be provided for contracting actions involving urgent requirements. (See 6.302-2.)

18.105 Federal Supply Schedules (FSSs), multi-agency blanket purchase agreements (BPAs), and multi-agency indefinite delivery contracts.

Streamlined procedures and a broad range of goods and services may be available under Federal Supply Schedule contracts (see Subpart 8.4), multi-agency BPAs (See 8.405-3(a)(4)), or multi-agency, indefinite-delivery contracts (see 16.505(a)(7)). These contracting methods may offer agency advance planning, pre-negotiated line items, and special terms and conditions that permit rapid response.

18.106 Javits-Wagner-O'Day (JWOD) specification changes.

Contracting officers are not held to the notification required when changes in JWOD specifications or descriptions are required to meet emergency needs. (See 8.712(d).)

18.107 Qualifications requirements.

Agencies may determine not to enforce qualification requirements when an emergency exists. (See 9.206-1.)

18.108 Priorities and allocations.

The Defense Priorities and Allocations System (DPAS) supports authorized national defense programs and was established to facilitate rapid industrial mobilization in case of a national emergency. (See Subpart 11.6.)

18.109 Soliciting from a single source.

For purchases not exceeding the simplified acquisition threshold, contracting officers may solicit from one source under certain circumstances. (See 13.106-1(b).)

18.110 Oral requests for proposals.

Oral requests for proposals are authorized under certain conditions. (See 15.203(f).)

18.111 Letter contracts.

Letter contracts may be used when contract performance must begin immediately. (See 16.603.)

18.112 Interagency acquisitions under the Economy Act.

Interagency acquisitions are authorized under certain conditions. (See Subpart 17.5.)

18.113 Contracting with the Small Business Administration (The 8(a) Program).

Contracts may be awarded to the Small Business Administration (SBA) for performance by eligible 8(a) firms on either a sole source or competitive basis. (See Subpart 19.8.)

18.114 BZone sole source awards.

Contracts may be awarded to Historically Underutilized Business Zone (HUBZone) small business concerns on a sole source basis. (See 19.1306.)

18.115 Service-disabled Veteran-owned Small Business (SDVOSB) sole source awards.

Contracts may be awarded to Service-disabled Veteran-owned Small Business (SDVOSB) concerns on a sole source basis. (See 19.1406.)

18.116 Overtime approvals.

Overtime approvals may be retroactive if justified by emergency circumstances. (See 22.103-4(i).)

18.117 Use of patented technology under the North American Free Trade Agreement.

Requirement to obtain authorization prior to use of patented technology may be waived in circumstances of extreme urgency or national emergency. (See 27.208.)

18.118 Bid guarantees.

The chief of the contracting office may waive the requirement to obtain a bid guarantee for emergency acquisitions when a performance bond or a performance bond and payment bond is required. (See 28.101-1(c).)

18.119 Advance payments.

Agencies may authorize advance payments to facilitate the national defense for actions taken under Public Law 85-804 (see Part 50, Extraordinary Contractual Actions). These advance payments may be made at or after award of sealed bid contracts, as well as negotiated contracts. (See 32.405.)

18.120 Assignment of claims.

The use of the no-setoff provision may be appropriate to facilitate the national defense in the event of a national emergency or natural disaster. (See 32.803(d).)

18.121 Electronic funds transfer.

Electronic funds transfer payments may be waived for acquisitions to support unusual and compelling needs or emergency acquisitions. (See 32.1103(e).)

18.122 Protest to GAO.

When urgent and compelling circumstances exist, agency protest override procedures allow the head of the contracting activity to determine that the contracting process may continue after GAO has received a protest. (See 33.104(b) and (c).)

18.123 Contractor rent-free use of Government property.

Rental requirements do not apply to items of Government production and research property that are part of a general program approved by the Federal Emergency Management Agency and meet certain criteria. (See 45.404(a)(3) and (4).)

18.124 Extraordinary contractual actions.

Part 50 prescribes policies and procedures for entering into, amending, or modifying contracts in order to facilitate the national defense under the extraordinary emergency authority granted by Public Law 85-804 (50 U.S.C. 1431-1434). This includes—

- (a) Amending contracts without consideration (see 50.302-1);
- (b) Correcting or mitigating mistakes in a contract (see 50.302-2); and
- (c) Formalizing informal commitments (See 50.302-3).

Subpart 18.2—Emergency Acquisition Flexibilities

18.201 Contingency operation.

(a) *Contingency operation* is defined in 2.101.

(b) *Micro-purchase threshold*. The threshold increases when the head of the agency determines the supplies or services are to be used to support a contingency operation. (See 2.101 and 13.201(g).)

(c) *Simplified acquisition threshold*. The threshold increases when the head of the agency determines the supplies or services are to be used to support a contingency operation. (See 2.101.)

(d) *SF 44, Purchase Order-Invoice-Voucher*. The normal threshold for the use of the SF 44 is at or below the micro-purchase threshold. Agencies may, however, establish higher dollar limitations for purchases made to support a contingency operation. (See 13.306.)

(e) *Test program for certain commercial items*. The threshold limits authorized for use of the test program may be increased for acquisitions to support a contingency operation. (See 13.500(e).)

18.202 Defense or recovery from certain attacks.

(a) *Micro-purchase threshold.* The threshold increases when the head of the agency determines the supplies or services are to be used to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack. (See 2.101.)

(b) *Simplified acquisition threshold.* The threshold increases when the head of the agency determines the supplies or services are to be used to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack. (See 2.101.)

(c) *Commercial items to facilitate defense and recovery.* Contracting officers may treat any acquisition of supplies or services as an acquisition of commercial items if the head of the agency determines the acquisition is to be used to facilitate the defense against or recovery from nuclear, biological, chemical, or radiological attack. (See 12.102(f)(1) and 13.500(e).)

(d) *Test program for certain commercial items.* The threshold limits authorized for use of the test program may be increased when it is determined the acquisition is to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack. (See 13.500(e).)

18.203 Incidents of national significance, emergency declaration, or major disaster declaration.

(a) *Authorized or required by statute.* Agencies may limit the use of full and open competition when statutes authorize or require that the acquisition be made through another agency or from a specified source. This includes the Robert T. Stafford Disaster Relief and Emergency Assistance Act. (See 6.302-5 and Subpart 26.2.)

(b) *Disaster or emergency assistance activities.* Preference will be given to local organizations, firms, and individuals when contracting for major disaster or emergency assistance activities when the President has made a declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act. (See Subpart 26.2 and 6.302-5(b)(5).)

(c) *Ocean transportation by U.S. flag vessels.* The provisions of the Cargo Preference Act of 1954 may be waived in emergency situations. (See 47.502(c).)

18.204 Resources.

(a) *National Response Plan.* The National Response Plan (NRP) provides a single, comprehensive framework for the management of domestic incidents where Federal involvement is necessary as required by the Homeland Security Act of 2002 (Public Law 107-296). The NRP only applies to incidents of national significance, defined as an actual or potential high-impact event that requires a coordinated and effective response by an appropriate combination of Federal, State, local, tribal, nongovernmental, and/or private-sector entities in order to save lives, minimize damage, and provide for long-term community recovery and mitigation activities. The Department of Homeland Security is responsible for the NRP. The NRP is available at http://www.dhs.gov/dhspublic/interapp/editorial/editorial_0566.xml.