

## Contingency Contracting



### Guiding Principles

A national emergency may result in what is considered a “contingency operation,” resulting in the increase of buying thresholds.

The granting of waivers and exemptions, and reduced documentation for acquiring services and supplies can only be used in support of the emergency and/or recovery.

When necessary, to support a contingency situation, use whatever authorities are permissible to effectively meet departmental procurement requirements.

Apply appropriate management controls to assure sound business decisions, price reasonableness and the appropriate level of documentation.

### Authorities:

#### **42 U.S.C. 5150, Robert T. Stafford Disaster Relief and Emergency Assistance Act, P.L. 93-288 as amended**

Preference shall be given to those organizations, firms, or individuals residing or doing business in the area affected for the purpose of debris clearance, distribution of supplies, reconstruction, and other major disaster or emergency assistance activities.

#### **Defense Priorities and Allocation System Program (DPAS)**

Title I of the Defense Production Act of 1950, as amended, authorizes the President to require preferential acceptance and performance of contracts or orders supporting certain approved national defense and energy programs, and to allocate materials (including equipment), services, and facilities in such a manner as to promote these approved programs.

The authority of the President under the Defense Production Act has been delegated to the Secretary of Commerce. Under DPAS delegation 2 dated July 1, 1998, the Department of Commerce (DOC) delegated limited authority to the Secretary of Energy.

The Department of Energy (DOE), Office of Procurement and Assistant Management is delegated authority (Delegation of Authority Order No. 00-0022004) for the implementation of section 101(a) of the Defense Production Act. Section 101(a) provides authority to place DO and DX priority rated contracts and orders in support of DOE programs. Rated orders take preference over all unrated orders as necessary to meet required delivery dates. Among rated orders, DX rated orders take preference over DO rated orders.

The DO priority rated contract and orders are in support of DOE programs determined by the Secretary as necessary or appropriate to promote the national defense with respect to energy production and construction, distribution and use, and direct related activities (approved programs). The DX priority rated contracts and orders are in support of those DOE approved energy programs determined by the President to be of the Highest National Priority as described in the Department of Defense (DoD) Master Urgency List.

Additional guidance on DPAS can be obtained from the Office of Contract Administration (MA-621).

### **Services Acquisition Reform Act of 2003 (Title XIV of P.L. 108-136)**

Provides special emergency procurement authorities to increase the amounts for micro purchase and simplified acquisition in support of a contingency operation or to facilitate the defense against or the recovery from a nuclear, biological, chemical, or radiological attack and treats such supplies and services as commercial.

### **Definitions**

*Agency Head* means: (1) The Secretary; (ii) Deputy Secretary; (iii) Under Secretaries of the Department of Energy and (iiii) the Chairman, Federal Energy Regulatory Commission (FERC) (see Department of Energy Acquisition Regulation (DEAR) 952.2).

*Contingency operation* (10 U.S.C. 101 (a)(13)) means a military operation that: (1) Is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against any enemy of the United States or against an opposing military force; or (2) Results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of 10 U.S.C., chapter 15 of 10 U.S.C., or any other provision of law during a war or during a national emergency declared by the President or Congress.

*Emergency acquisition flexibilities (defined within the new Federal Acquisition*

*Regulation(FAR) Part 18*) 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—

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

*Head of the contracting activity (HCA)*, is the official who has overall responsibility for managing the contracting activity.

## Overview

This chapter provides guidance to DOE contracting officers (COs) that will be tasked to acquire goods and services in the event of a contingency operation or an emergency, such as: attacks, accidents, floods, earthquakes, tornadoes, fires, etc. The FAR allows many methods for acquiring goods and services that can be used under certain conditions and that do not require an emergency declaration. In addition, the FAR prescribes additional streamlined methods that may be used only after an emergency declaration is made. Such declarations may result from Executive Orders with specific limitations, such as dollar levels, time limits, and funding appropriations. Thus, while the FAR provides contracting officers with sufficient latitude necessary to perform their duties, however, Executive orders, specific to a particular crisis such as Hurricane Katrina, can also provide higher thresholds and additional exceptions to regulations facilitating the response effort.

## Background

The Department of Defense (DoD) was the first to issue directives and instructions on contingency contracting after World War II. DoD recognized the need to provide guidance to contracting officers deployed within the theater of combat back in 1947 and has continued to issue new guidance and revisions necessary to support its mission abroad. Since September 11, 2001, potential threats against the homeland created the War on Terror. Recognizing the need to act quickly and efficiently, Congress granted special emergency procurement authority to heads of executive agencies where such persons determine that procurements are to be used in the support of a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack. Then the devastating severity and national impact of the 2005 hurricane season, precipitated the use of the “contingency operation” to include significant domestic events. By way of guidance issued by the Office of Federal Procurement Policy (OFPP) and the General Services Administration (GSA), a

contingency operation may be declared in the event of workforce preparedness for and participation in support of humanitarian missions, disaster relief, restoring order in civil disorders, drug interdiction, operations, contingencies and emergencies, and war (collectively referred to as contingencies and emergencies).

## ACQUISITION STRATEGIES

FAR Part 18 provides a single location for contracting personnel to reference the regulations pertaining to contingency and emergency contracting. In addition, at the end of this chapter there is a table entitled, “Contingency Contracting Thresholds and Flexibilities.” The table is a quick reference that will assist you in determining your next steps and documenting your file. Upon the receipt of the procurement request in a contingency contracting situation, DOE COs should consider the following acquisition alternatives in the order presented.

### Existing Contract Vehicles

The CO should first seek to satisfy competitive commercial requirements by placing task orders and delivery orders against existing DOE contracts and Blanket Purchase Agreements (BPAs). The General Services Agency (GSA) Federal Supply Schedules (FSS), Federal Supply Service Multiple Award Schedule (MAS), BPAs and Government Wide Acquisition Contracts (GWAC)s are also good sources available to the CO. GSA has grouped “disaster relief” services and products in one place on its website, at [www.gsaelibrary.gsa.gov/ElibMain/ElibHome](http://www.gsaelibrary.gsa.gov/ElibMain/ElibHome) in order to expedite searching for: construction services, building supplies, communication, furniture, law enforcement, medical/laboratory supplies, temporary staffing, vehicle leasing, and other common emergency necessities. The purchase card as a method of payment will expedite the award, however the CO is responsible for ensuring that the appropriate file documentation is created depending upon the micro purchase and SAP thresholds at the time.

### Micro purchase

The government purchase card is the preferred acquisition method in the federal government, providing reduced administrative costs and time for purchasing and paying for small dollar commercial goods and services. In the event of a contingency operation or emergency the micro purchase threshold will be raised to \$15,000.<sup>1 2</sup> Organizational Program Coordinators are expected to conduct closer oversight of their card systems during the contingency period when opportunities for fraud, waste and abuse are at

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<sup>1</sup> For any micro purchase card contract awarded and performed outside the United States, the threshold is increased to \$30,000.

<sup>2</sup> Dollar threshold is subject to change, see FAR 2.101 definitions for current threshold.

greater risk.

When using micro purchase procedures, card holders are not required to seek competition and there are no small business set-asides. Cardholders remain accountable for determining price reasonableness; therefore, making the best decision may include factors other than price such as lead times, delivery, and in accordance with the Stafford Act, give preference to those local businesses in the effected area where possible under the circumstances.

DOE's "Policy and Operating Procedures for Use of the GSA Smart Pay Purchase Card by DOE and Authorized Contractor Personnel" and "Charge Card Management Plan" have incorporated OMB's updated OMB Circular A-123, Appendix B - Improving the Management of Government Charge Card Programs. DOE's card policy requires that a system of internal controls are implemented through :

1. performing periodic reviews of spending and transaction limits;
2. conducting internal card program reviews;
3. monitoring reports to identify split purchases;
4. performing periodic reviews of the number of cards in use and the span of control for approving officials;
5. keeping current on new and innovative solutions to detect and prevent fraud and misuse, such as:
  - data mining
  - blocking high risk merchant codes
  - restrict limits during inactivity
  - review cardholder accounts
  - cancel accounts when employees terminate employment

### **Simplified Acquisition Procedures (SAP)**

The threshold for SAP will be increased to \$300,000<sup>3 4</sup> when a contingency operation or emergency is declared. DOE COs are reminded to promote competition to the maximum extent as practicable, however, as prescribed by FAR 13.106-1, contracting officers may solicit from a single source if it is determined that circumstances deem that only one source is "reasonably" available (e.g., urgency, exclusive licensing agreements, or industrial mobilization). In accordance with FAR 13.104, when not using FACNET or posting solicitation information on the Government Point of Entry (GPE) FedBizops, three sources within the local trade area are considered as promoting competition to the maximum extent practicable. Preference shall be given in accordance with FAR 26.202,

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<sup>3</sup> For any contract to be awarded and performed or purchases to be made, outside the United States, the threshold is increased to \$1,000,000.

<sup>4</sup> Dollar threshold is subject to change, see FAR 2.101 definitions for current threshold.

to the extent feasible and practicable, to those organizations, firms, or individuals residing or doing business primarily in the area affected by the disaster or emergency.

DOE COs may use standing price quotes that are current and reflect maximum discounts before award, rather than requesting separate quotes with each order. In addition, the CO may solicit multiple quotes on supplies and services prior to the placement of the first order, requesting that the vendor guarantee those prices as standing price quotations for consideration on future orders, thus expediting subsequent orders and complying with the intent of competitive requirements.

### **Commercial Item Test Program**

Orders up to \$6.5 million for commercial items and \$12 million<sup>5</sup> for any supplies or services that are determined by the head of the agency (not delegable) to be used for contingency operations or to facilitate the defense against or recovery from nuclear, biological, chemical, or radiological attack, may use the simplified procedures of FAR Part 13, allowing for limited competition. Preference shall be given to the extent feasible and practicable, to those organizations, firms, or individuals residing or doing business primarily in the area affected by the disaster or emergency under the authority of the Stafford Act. All procurements conducted under the Commercial Item Test Program, must be documented, per FAR 13.501(b). The contract types are limited to firm fixed price or firm fixed price with economic adjustment. The documentation required shall include:

- a brief description of the procedures used to award the contract, including the detail that the test procedures in FAR 13.5 were used,
- the number of offers received,
- an award decision explanation, appropriate for the size and complexity of the contract, and
- any justification approved for the use of a Sole Source Contract in accordance with FAR 13.501.

### **Letter Contracts**

Authority to use a letter contract is not new, however it is a procurement method that is used when the situation requires work to begin immediately and there is not enough time to negotiate a formal contract. A written determination must be made by the HCA that a letter contract can be issued. If the letter contract is based on price competition, the CO shall include an overall price ceiling in the letter contract. Each letter contract shall contain a negotiated definitization schedule that includes: dates for the contractor's price

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<sup>5</sup> Dollar threshold is subject to change, see FAR 13.5 for current threshold.

proposal, required cost and pricing data, and subcontracting plans. Definitization of the letter contract shall be at the earliest time practicable, usually within 180 days of the date of the letter contract or before 40 percent of the work is completed, whichever comes first. The CO shall assign a DPAS priority rating to the letter contract if it is appropriate under DEAR 911.602 and follow any other DOE policies or procedures required.

In accordance with FAR 16.603-4, the following clauses shall be included in the solicitation and contract when a letter contract is contemplated:

- 52.216-1 TYPE OF CONTRACT, unless for a fixed price acquisition made under SAP),
- The clause required for the type of definitized contract contemplated,
- 52.216-23 EXECUTION AND COMMENCEMENT OF WORK (may be omitted from letter contracts awarded on SF 26),
- 52.216-24 LIMITATION OF GOVERNMENT LIABILITY, and
- 52.216-25 CONTRACT DEFINITIZATION

### **Oral Requests for Proposals (RFP)s**

SAP allow for the use of oral RFPs at any time; however, per FAR 5.202, oral RFPs are authorized and a notice is not required when preparing a written solicitation that would delay the receiving of perishable items or be a detriment to the support of a contingency operation or emergency. Use of an oral RFP still requires following FAR acquisition planning. The contract file documentation shall include:

- a description of the requirement,
- rationale for use of an oral solicitation,
- market research,
- list of sources solicited, including date, time, names of individuals contacted and prices offered, and
- the solicitation number provided to the prospective offerors.

### **OTHER CONSIDERATIONS**

#### **Exemption from Registration in the Central Contractor Registration (CCR) Database**

Contractors doing business with the Federal Government are required to be registered in the CCR database. However, FAR 4.1102 (a) exempts registration when contracts are awarded by,

- deployed contracting officers in the course of military operations, including, but not limited to, contingency operations, as defined in 10 U. S. C. 2302(7); or
- contracting officers 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)*.

### **Exemption from Electronic Funds Transfer (EFT)**

Normally, contract payments by the government are to be made by EFT, however during contingency operations and emergencies it may be necessary to contract with firms that do not have an EFT mechanism. FAR 32.1103(e) provides for the exemption of the payment mechanism in situations of military operations, contingency operations, and emergencies, where requiring the EFT would seriously injure the acquisition of supplies and services necessary to meet the mission.

### **Exemptions and Suspensions with Labor Statutes**

The Office of Federal Contract Compliance (OFCC) may exempt or waive some of the requirements of: Executive Order 11246, as amended, Section 503 of the Rehabilitation Act, as amended, and Section 4212 of the Vietnam Era Veterans' Readjustment Assistance Act as amended, in contracts that would include any part of the equal opportunity clause when special circumstances in the national interest require the exemption or waiver. The exemption and waiver are related to the development of a written affirmative action program, reports, or notices administered by OFCC.

The President may suspend the enforcement of certain statutes, such as the Davis-Bacon Act, for all contracts performed in a specific jurisdiction (the affected areas) during a specified period of time consistent with the disaster and recovery efforts. Contractors would not be required to pay workers the prevailing wage rates set by the Department of Labor for construction contracts and could pay wages relative to the competitive marketplace.

### **Use of Other Than Full and Open Competition**

There are two authorities that will most likely be used in the event of a contingency or emergency, FAR 6.302-2, Unusual And Compelling Urgency and FAR 6.302-5, Authorized Or Required By Statute. Documentation requiring the use of either authority will remain in effect and the written Justification shall be signed by the appropriate officials as described in the DOE Acquisition Guide Chapter 6.1 (November 2010).

- **FAR 6.302-2 Unusual and Compelling Urgency**



COs may cite the authority of 41 U.S.C. 253(c)(2) in the event 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. The contracting officer need not submit a notice required by FAR 5.201, on the Government Point of Entry (GPE) FedBizops. The file in accordance with FAR 6.304 shall contain an approved justification for a sole source contract, however the justification may be prepared and approved by the required officials within a reasonable time after contract award.

- **FAR 6.302-5 Authorized or required by statute**

In the event that an emergency declaration is made by the President of the United States under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U. S. C. 5150) the CO may use other than full and open competition, citing FAR 6.302-5(b)(5) as its authority. The use of this authority only applies to acquisitions made during the term of a major disaster or emergency for activities such as, debris clearing, distribution of supplies, or reconstruction. Preference shall be given to local trade firms, organizations, or individuals within the effected areas. The CO need not submit a notice required by FAR 5.201, on the Government Point of Entry (GPE) FedBizops. Justifications may be made on an individual or class basis and shall contain signature approvals at the required thresholds.

### **Protests**

FAR 33.104 allows for the HCA to make a non delegable written decision to make award due to urgent and compelling circumstances when a protest is received from the General Accountability Office (GAO) either *before award* or *after award*. The written determination shall state, “urgent and compelling circumstances that significantly impact the interest of the United States will not permit waiting for the GAO’s decision”.

### **Contract Close-out**

Contingency contracting does not provide any flexibilities or expedited procedures for contract close-out. A complete and properly documented file is still required, although in certain circumstances the documentation and approvals on justifications can be prepared after the contract award. Contracting Officers must be prepared to have any contingency contract files audited as early as 60 days after the date of the transaction. The documentation should be appropriate for the size and complexity of the acquisition and should be able to defend against auditors.

### **Documentation**

Although working in a contingency contracting environment is dynamic, uncertain, and risky for the taxpayer as well as the contractor, history has shown that logical well documented decisions, will best justify the choices that were made. DOE COs must document their decisions in order to maintain a proper “paper trail” of their actions for the inevitable follow-up reviews. A contingency contracting situation is no excuse for contracting officers to abandon: reasonable and prudent judgment, adherence to federal acquisition principles, or proper business acumen in their role as stewards of the taxpayers’ dollars.

In contingency situations contract documentation and file maintenance may have greater visibility particularly because of the Congressional interest related to disaster relief efforts. DOE COs are not relieved from and remain responsible for ensuring that contract files are complete and comply with the documentation requirements set forth in the FAR and the DOE Acquisition policy Guide, Letters, and Flashes. Below is a list of documents that should be included in a contingency contract file.

- procurement request
- independent government estimate
- certified funding
- market research
- D&F when required
- Justifications and Approvals as required
- Headquarters’ Clearance documentation
- Deviation approvals
- COR delegation
- Solicitation or written description of the requirement for an Oral RFP
- List of sources solicited
- Contractor’s proposal or notes documented from the Oral RFP
- technical evaluation
- cost/price reasonableness determination
- source selection statement
- other memorandum that may be important or necessary.

Certain documents listed above may not be required depending on the type of acquisition and method of procurement selected.

## CONTINGENCY CONTRACTING THRESHOLDS AND FLEXIBILITIES TABLE

	Micro Purchase	SAT	Commercial Test Program	FSS Schedule/GWACs Task or Delivery Orders	Letter Contracts	Contracts	Modifications
Buying Threshold	\$15K <sup>6</sup>	\$300K <sup>7</sup>	\$12M <sup>8</sup>	Review Schedule	All amounts	All amounts	All amounts
Certified Funds	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Contract Type	FFP	FFP, T&M & LH	FFP & FFP/EA	FFP, TM & LH	All types	All Types	All types
Set-Aside for Small Business	Not Required	Not Required	Not Required	N/A	Not Required	Not Required	N/A
Price Ceiling Established	N/A	T&M & LH	N/A	T&M and LH	T&M, LH, FFP & Cost Type	T&M & LH	T&M, LH & UCA
JWOD & FPI	Not Mandatory	Not Mandatory	Not Mandatory	N/A	Not Mandatory	Not Mandatory	N/A
Synopsis	N/A	Not Required for Open Market	Not Required	N/A	Not Required	Not Required	Not Required
Use of Oral RFPs	Yes	Yes	Yes	Yes	Yes	Yes	Yes
CCR Registration	Not Required	Not Required	Not Required	Not Required	Not Required	Not Required	Not Required
EFT Required	Not Required	Not Required	Not Required	Not Required	Not Required	Not Required	Not Required
FAR 6.302-2 Unusual and Compelling Approval	N/A	Yes for Open Market Items	Yes	Yes	Yes	Yes	Yes to Increase Scope
FAR 6.302-5 Authorized by Statute	N/A	Yes for Open Market Items	Yes	Yes	Yes	Yes	Yes to Increase Scope

6 Dollar threshold is subject to change, see FAR 2.101 definitions for current threshold.

7 Dollar threshold is subject to change, see FAR 2.101 definitions for current threshold.

8 Dollar threshold is subject to change, see FAR 13.5 for current threshold.