

# FLASH Newsletter

Volume 1  
Issue 5  
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FEMA LAW ASSOCIATES, PLLC  
Latest FEMA Law Developments At a Glance

FEMA Law Associates is a private law firm that specializes in Emergency Management and Homeland Security issues. For more information on our services please visit our website at [www.fema-law.com](http://www.fema-law.com). Previous issues of this Newsletter can be obtained on the FEMA Law site.

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## Message From the President of FEMA Law Associates

In its pre-election rush to adjournment, Congress enacted several pieces of legislation amending the Federal law of emergency management and disaster response. This Newsletter is the third in our series summarizing these amendments. This issue describes the amendments in “Subtitle F—Prevention of Waste, Fraud and Abuse” of the “Post-Katrina Emergency Management Reform Act” (“PKEMRA”). PKEMRA was enacted as Subtitle VI of the Department of Homeland Security Appropriations Act, 2007, P.L.109-295, 120 Stat 1355 (2006). – *Ernie Abbott*

## Fraud, Waste, and Abuse

**Sec. 691. Advance Contracting** – demonstrates Congressional impatience with FEMA’s contracting in Hurricane Katrina: there were inadequate pre-existing contracts for goods and services that turned out to be critical response requirements – and this forced DHS and FEMA into a number of expensive emergency sole source procurements. Section 691 directs the FEMA Administrator to submit to Congress within 90 days (by January 2, 2007) – and every 90 days thereafter – a report “on each disaster assistance contract entered into... by other than competitive procedures.” The Administrator must then, within 180 days (i.e., by April 2, 2007) submit to Congress a report identifying (1) “recurring disaster response requirements... which the agency is capable of contracting for in advance of a natural disaster or act of terrorism or other man-made disaster” (2) “recurring disaster response requirements ... the agency *cannot* contract in advance;” and (3) “a contracting strategy that maximizes the use of advance contracts. Finally, the Administrator must, by October 4, 2007, execute at least one contract for each type of good or service that this report found can be contracted for in advance.

The pre-disaster contracting process required by this statute will be complicated by several factors. First, the Administrator is to consider how pre-disaster contracts can give preference, after a disaster, to firms ‘residing or doing business primarily in the area affected by the disaster.’ Second, the Administrator shall coordinate the pre-disaster contracts that FEMA enters into with those being entered into by state and local governments. And finally, the Administrator must comply with regulations to be issued by the DHS Secretary limiting tiering of subcontractors (see Section 692 discussion below).

While FEMA’s own contracting is the primary target of this provision, Section 691(b)(4) also requires the Administrator to “encourage State and local governments to establish pre-negotiated contracts with vendors...”

**Sec. 692. Limitations on Tiering of Subcontractors** – directs the Secretary of DHS to promulgate regulations to minimize the excessive reliance on subcontractors by contractors to perform the principal work of the contract. Not more than 65 percent of the cost of any individual task or delivery order is to be handled by subcontracts unless the Secretary finds this requirement to be infeasible or impractical. Since subcontracting is a principal means available for a contractor to obtain “surge” capabilities in response to a catastrophic event, the 65% limit may well prove troublesome in practice.

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**Sec. 693. Oversight and Accountability of Federal Disaster Expenditures** – This provision assures that any agency given a disaster response mission will have appropriate funds for audit and contract oversight: The Administrator is authorized to designate up to 1 percent of the total amount provided to a Federal agency for a mission assignment to be used by the recipient agency for performing oversight of activities. The oversight amount so designated may be used for monitoring, tracking, auditing expenditures of funds; ensuring that efficient management and internal control mechanisms are available so that Agency funds are spent appropriately and in accordance with all applicable laws and regulations; reviewing selected contracts and other activities; investigating allegations of fraud involving Agency funds; conducting and participating in fraud prevention activities with other Federal, State, and local government; and preparing plans and reports. Oversight funds may not be used to finance existing agency oversight responsibilities. Oversight activities may be carried out directly or by contract. Evaluations and audits shall be carried out by the inspector general of the agency. If an agency receives oversight funds, the head of the agency shall prepare a plan describing oversight activities.

**Sec. 694. Use of Local Firms and Individuals** – Section 307 of the Stafford Act has for many decades provided that a “preference” in procurement should be given to individuals and firms residing in or doing business primarily in the area affected by the disaster. Congress believed use of local firms for disaster response contracts after Katrina was inadequate, and in April, amended the Stafford Act to allow this “preference” to be accomplished by a “set aside based on a specific geographic area.” (P.L. 109-218) PKEMRA Section 694 further strengthens the Stafford Act preference by requiring a written justification of any post disaster contracts awarded to firms or individuals outside the disaster area, and requiring a “transition” of work, if feasible, from non-local pre-disaster contracts to businesses in the area affected by the disaster. This transition is not to require the agency to “breach or negotiate any contract in effect before the... disaster,” although many predisaster contracts are written for an indefinite quantity of work and would not be breached by the transition of work to other firms in the aftermath of a disaster.

**Sec. 695. Limitation on Length of Certain Noncompetitive Contracts.** – Congress’ concern with non-competitive contracting by DHS and FEMA during Hurricane Katrina has led to a statutory restriction of the contract period of future disaster response “contract entered into using procedures other than competitive procedures...to the minimum contract period necessary.” This minimum period is not to exceed 150 days unless the Secretary determines that exceptional circumstances apply. This section applies to any contract in an amount greater than the simplified acquisition threshold as defined by the Office of Federal Procurement Policy Act.

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**Sec. 696. Fraud, Waste, Abuse Controls** – requires that all FEMA disaster assistance programs have proper internal management controls and that any application databases tracking eligible recipients of FEMA grants must record disbursements, identify ineligible applicants, and integrate information from applications for assistance with payment records. Audits and reviews by the Inspector General of the Agency are required.

This amendment also adds a new subsection to section 408 of the Robert T. Stafford Act: **Verification Measures for Individuals and Households Program** – This provision requires the President to develop a system that shall allow the President to verify the identity and address of recipients; minimize risk of making duplicative payments or payments for fraudulent claims; collect duplicated payments on a claim; provide instructions on proper use of assistance to recipients regardless of amount received; and create an expedited/simplified review and appeal process for denied claims.

**Sec. 697. Registry of Disaster Response Contractors** – this section establishes a public registry of contractors who are willing to perform debris removal, distribution of supplies, reconstruction and other disaster or emergency relief activities. Contractors may submit information about their services and capabilities on a voluntary basis – and must provide an “attestation that the information is true” and “documentation supporting the attestation.” FEMA had already created such a registry (on June 1); now a registry covering debris removal and other disaster relief services is required. The section includes definitions of the terms “registry” and “small business concern.”

**Sec. 698. Fraud Prevention Training Program** – the Administrator shall develop and implement a pilot program to provide training on the prevention of waste, fraud, and abuse of Federal disaster relief assistance relating to the response to or recovery from natural disasters and acts of terrorism or other man-made disasters and ways to identify such potential waste, fraud, and abuse.

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