

The United States Law Week

INSIGHT: Coronavirus and the Stafford Act—What It Means for Contractors

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President Trump’s national emergency declaration triggered the Stafford Act and more federal funding for contractors. Covington attorneys looks at what that entails and the opportunities and considerations for businesses not used to dealing with the federal government.

President Donald Trump declared a national emergency March 13 in response to the new coronavirus pandemic, activating the authorities available to him under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (the Stafford Act) to provide federal assistance to state and local governments responding to the emergency, including financial assistance.

The federal assistance is coordinated and provided through the Federal Emergency Management Agency (FEMA) under the National Response Framework. Although the Stafford Act generally does not make funding directly available to private businesses, a large portion of the nearly \$50 billion that the president said will be available to FEMA may be used to procure goods and services from contractors assisting the relief effort.

Stafford Act Authorities and the President’s Emergency Declaration

The Stafford Act authorizes the president to issue two types of declarations that allow the federal government to provide assistance to state and local governments in responding to an emergency.

An “emergency” is any situation in which the president determines that “federal assistance is needed to supplement State and local efforts...to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe...”

A “major disaster,” by contrast is any “natural catastrophe” that the president determines “causes damage of sufficient severity and magnitude to warrant major disaster assistance.”

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The president's March 13 letter to cabinet secretaries declared the Covid-19 pandemic to be an "emergency" triggering his Title V authorities, but left open the possibility that he may later declare a "major disaster."

The major distinction between these two types of declarations is in the range of federal assistance that can be made available as a result of the declaration.

Under an emergency declaration, the president may direct federal agencies to use their resources to support state and local efforts, coordinate all disaster relief assistance, and assist in the distribution of medicine, food and other consumable supplies.

Direct financial assistance can also be provided to state and local governments through congressionally-appropriated funds in the Disaster Relief Fund. This assistance generally is capped at \$5 million per emergency, but the president may authorize additional funds if he determines that (1) continued emergency assistance is immediately required; (2) there is a continuing and immediate risk to lives, property, public health or safety; and (3) necessary assistance will not otherwise be provided on a timely basis.

If the president subsequently declares a major disaster, additional federal assistance may be provided, including direct assistance to individuals and additional support such as crisis counseling services, relocation assistance, food distribution, and legal aid services, among other things.

Considerations for Companies That Want to Help

Unlike a natural disaster that causes damage in a defined geographic area, the Covid-19 pandemic is novel, causing widespread challenges throughout the U.S.

In addition to those companies that may have capabilities in the pharmaceutical and medical supply industries, we may see immediate needs for local staff augmentation and call center services, logistics and technical support services, local food and consumer goods delivery services, homecare services, decontamination services, and distribution of sanitary and household supplies, just to name a few.

Presumably, private sector companies that never before have conducted business with federal funding will have a role in this effort.

To help with relief efforts, the federal government likely will be procuring significant amounts of goods and services directly. State and local governments inevitably will use their federal funds to ramp up their purchases of required goods and services as well. Companies that would like to help should consider taking steps now.

Companies that wish to assist with these efforts should register in the Disaster Response Registry in the Federal Government's System for Award Management (SAM) to ensure that they are eligible for federal contract awards, and also monitor solicitations posted on SAM.gov. Such contracts may be set aside for local firms. See Federal Acquisition Regulation (FAR) 26.202 and 26.204.

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Companies that wish to support state and local efforts can monitor similar state and local websites for new solicitations. Those companies with novel solutions that governments may not otherwise contemplate should also consider submitting unsolicited proposals to the relevant authorities.

Companies new to federally funded contracting should be particularly mindful of the risks and responsibilities that accompany such contracts. Public funding, and federal funding in particular, is tied to numerous compliance obligations that do not apply in the commercial arena.

Federal contracts will be governed by the FAR and may require certification of compliance with numerous socio-economic, labor, and supply chain and cyber requirements, and in some cases, record keeping requirements, particularly regarding incurred costs.

State and local government issued contracts also impose compliance obligations pursuant to local statutes and regulations and, because of the use of federal funds, will impose additional federally-mandated requirements.

These may include record-keeping and government auditing requirements, compliance with “pay to play” laws, and unique accounting requirements. Failure to comply with any of these triggers exposure under the federal False Claims Act and state equivalents.

Although these risks can present challenges to companies that do not have government contracting experience, they can be mitigated with careful upfront planning—including making certain that companies read and fully understand the contract before committing to the obligations.

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