



MEMORANDUM

ERIE COUNTY

DEPARTMENT OF LAW

TO: Mark Poloncarz, County Executive
Richard Tobe, Deputy County Executive
Jennifer Hibit, Chief of Staff

FROM: Michael A. Siragusa, County Attorney

DATE: February 8, 2012

RE: OIG Audit - - 2006 October Storm
Initial Findings - - Stafford Act Applicability

Question:

Do the Stafford Act provisions and the DHS Appropriations Act of 2007 supersede the Code of Federal Regulations (44 CFR 13.36(c)(ii)) provision?

Initial Answer:

Yes – The rule that the Inspector General’s Office based its objection to local contracting on was first adopted in 1988 and last amended in 1995 – before the local preferences laws were adopted. At the time of the October 12, 2006 storm, both the Local Community Recovery Act of 2006 (signed into law by President Bush on April 20, 2006) and Section 694 of the Department of Homeland Security Appropriations Act of 2007 (signed into law by President Bush on October 4, 2006) were in effect, therefore, making the County of Erie’s actions appropriate and legal.

Brief Analysis:

The Inspector General’s report bases their objection to local contracting on 44 C.F.R §13.36. The rule was first adopted in 1988 and was last amended in 1995 – well before

the local preferences laws were adopted in response to Hurricane Katrina. At 13.36(c)(ii), the rule prohibits “the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference.” Emphasis added: the rule itself does not absolutely ban local contracting, but prohibits it unless there’s a federal statute on point encouraging it.

Additionally, there is 42 U.S.C. §5150, which expressly authorizes local contracting: “In the expenditure of Federal funds for debris clearance [the OIG report notably objects to Erie County’s contracts covering “vegetative debris removal and disposition, storm-damaged tree removal, and the monitoring of these activities], distribution of supplies, reconstruction, and other major disaster or emergency assistance activities which may be carried out by contract or agreement with private organizations, firms, or individuals, preference shall be given, to the extent feasible and practicable, to those organizations, firms, and individuals residing or doing business primarily in the area affected by such major disaster or emergency.”

This suggests that rather than needing to avoid the rule, the rule itself authorizes local contracting: this is a case where a federal statute expressly encourages geographic preference. 42 U.S.C. §5150 was adopted October 4, 2006.

Furthermore, the newer statute is supported by other rulemaking: the Federal Acquisition Regulation has adopted the new rule, and states, at part 6.208: “To fulfill the statutory requirements relating to 42 U.S.C. 5150, contracting officers may set aside solicitations to allow only offerors residing or doing business primarily in the area affected by such major disaster or emergency to compete.” 48 C.F.R. §6.208. The rulemaking prior to this states that the law “strengthens the government’s ability to promote local economic recovery.”