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**MONTEREY, CALIFORNIA**

**THESIS**

**UPPING THE EMERGENCY MANAGEMENT ANTE:  
THE ROLE OF PRIVATE SECTOR COLLABORATION  
IN EMERGENCY MANAGEMENT AND WHETHER  
STATE PROCUREMENT AND EMERGENCY  
MANAGEMENT LAWS ARE BUILT TO  
COLLABORATE**

by

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March 2016

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AND WHETHER STATE PROCUREMENT AND EMERGENCY  
MANAGEMENT LAWS ARE BUILT TO COLLABORATE**

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## **ABSTRACT**

The benefits of public-private collaborations for enhanced emergency management purposes are widely acknowledged, but the questions of when and how such collaborations would be most beneficial have been the subject of much debate. Arguably, it is at the preparedness stage that the private sector's resources, innovative technologies and business continuity expertise can best be used to create more robust risk reduction and preparedness plans. Collaborations at this stage also provide for the identification and proper competitive procurement of all reasonably foreseeable emergency-related goods and services, rather than overuse of the emergency "no-bid" exception to competitive procurement, which can result in contractor fraud and government abuse. But, do the appropriate legal mechanisms exist to support increased collaborations? Given that the discussion surrounding such collaborations is still current, the assumption was that legal reform would be necessary. Using the Best Practice Research methodology, a review of the states' procurement and emergency management laws actually reveals that they generally contain the necessary language to support increased public-private collaborations. But, some are more explicitly supportive of such collaborations than others. Accordingly, this thesis offers a statutory policy framework for agencies to consider to make greater use of private resources for better emergency management practices.

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# TABLE OF CONTENTS

<b>I.</b>	<b>PROBLEM STATEMENT .....</b>	<b>1</b>
<b>A.</b>	<b>RESEARCH QUESTION .....</b>	<b>2</b>
<b>B.</b>	<b>LITERATURE REVIEW .....</b>	<b>3</b>
	<b>1. Public-Private Collaborations.....</b>	<b>4</b>
	<b>2. Public-Private Collaborations at the Emergency Preparedness Stage .....</b>	<b>8</b>
	<b>3. Advantages of Collaborating with the Private Sector: Business Continuity and Supply Chain Management Expertise .....</b>	<b>9</b>
	<b>4. Private Sector Disadvantages of Public-Private Collaborations .....</b>	<b>11</b>
	<b>5. Formal Contracts between Public and Private Partners .....</b>	<b>12</b>
	<b>6. The Private Sector as a True Emergency Management Partner .....</b>	<b>14</b>
<b>C.</b>	<b>RESEARCH DESIGN .....</b>	<b>16</b>
	<b>1. Objectives.....</b>	<b>16</b>
	<b>2. Selection .....</b>	<b>16</b>
	<b>3. Limits .....</b>	<b>17</b>
	<b>4. Data Sources .....</b>	<b>18</b>
	<b>5. Type and Mode of Analysis.....</b>	<b>18</b>
	<b>6. Output .....</b>	<b>20</b>
<b>II.</b>	<b>INTRODUCTION.....</b>	<b>23</b>
<b>III.</b>	<b>EMERGENCY MANAGEMENT IN THE UNITED STATES: A HISTORICAL PERSPECTIVE .....</b>	<b>25</b>
<b>IV.</b>	<b>INCREASED “PRE-DISASTER” PUBLIC-PRIVATE COLLABORATIONS FOR BETTER EMERGENCY MANAGEMENT .....</b>	<b>29</b>
<b>A.</b>	<b>THE PRIVATE SECTOR AS A SOLUTION TO THE GOVERNMENTAL RESOURCE GAP.....</b>	<b>29</b>
<b>B.</b>	<b>THE INTEGRATION OF PRIVATE SECTOR BUSINESS CONTINUITY EXPERTISE INTO GOVERNMENTAL EMERGENCY PLANNING.....</b>	<b>31</b>
	<b>1. The Benefits of Competitive Procurement for the Private Sector.....</b>	<b>34</b>

2.	The Emergency Management Legal Framework Governing the Integration of Private Sector Resources.....	36
3.	Privatization: Its Advantages and Pitfalls .....	39
C.	THE EMERGENCY “NO BID” EXCEPTION TO COMPETITIVE PROCUREMENT AND THE DANGER IT POSES.....	42
D.	FORMAL CONTRACTING AS AN ARGUABLE CURE TO PRIVATIZATION AND THE “NO-BID” EMERGENCY EXCEPTION CONCERNS .....	48
1.	Formal Contracts as Mechanisms for Accountability .....	49
2.	Formal Contracts as “Litigation Mitigation” .....	53
3.	The Argument for the Most Effective Confirmation of Contractor Performance .....	55
V.	THE PRIVATE SECTOR AS MORE THAN A COLLABORATOR; RATHER, AS A TRUE EMERGENCY MANAGEMENT PARTNER .....	59
A.	THE CROSS-DISCIPLINE CROSS-SECTOR APPROACH TO EMERGENCY MANAGEMENT .....	59
B.	THE EMERGENCY MANAGEMENT LEGAL FRAMEWORK AND THE EMERGENCY MANAGEMENT PARTNER CONCEPT.....	64
VI.	POLICY RECOMMENDATIONS .....	67
A.	THE PRIVATE SECTOR AS A TRUE PARTNER IN EMERGENCY MANAGEMENT .....	67
B.	THE EMERGENCY “NO-BID” EXCEPTION AS A TRUE PROCUREMENT METHOD OF LAST RESORT .....	69
C.	AN EMERGENCY MANAGEMENT POLICY THAT EXPLICITLY INTEGRATES THE PRIVATE SECTOR .....	70
VII.	CONCLUSION .....	73
	LIST OF REFERENCES .....	75
	INITIAL DISTRIBUTION LIST .....	83

## **LIST OF ACRONYMS AND ABBREVIATIONS**

DHS	Department of Homeland Security
EMAC	Emergency Management Assistance Compact
EOC	Emergency Operations Center
FEMA	Federal Emergency Management Agency
MOU	Memorandum of Understanding
NASPO	National Association of State Procurement Officials
NIMS	National Incident Management System
NRF	National Response Framework
NRP	National Response Plan

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## EXECUTIVE SUMMARY

A robust emergency preparedness plan is necessary for an effective and successful emergency response and recovery effort following a disaster or emergency event, whether natural or man-made. The public sector has long recognized the importance of interstate and intrastate collaborative relationships to supply the necessary goods, resources and services when the needs of a devastated community are beyond what its government can provide.<sup>1</sup> The NRF has made it clear, though, that “[g]overnment resources alone cannot meet all of the needs of those affected by major disasters.”<sup>2</sup> Rather, for an emergency management plan to be most effective, from preparedness through recovery, all stakeholders, both public and private, must take an active role.<sup>3</sup>

The concept of public-private collaborations in the specific context of emergency management is not new. Scholars are largely in agreement as to the benefits of collaborating with the private sector, citing its abundant resources, business continuity and supply chain management expertise as well as its innovative technologies.<sup>4</sup> The question that necessarily arises is at what stage would such collaborations work best? This thesis makes the argument that it is at the emergency preparedness stage that greater public-private collaborations would be most beneficial. It is during this planning stage where the risk assessment data is collected, reviewed and analyzed, and plans, procedures

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<sup>1</sup> “Preparedness,” FEMA, accessed January 28, 2016, <https://www.fema.gov/national-preparedness>.

<sup>2</sup> United States Department of Homeland Security, *National Response Framework*, 2nd ed. (Washington, DC: U.S. Department of Homeland Security), 4, accessed January 28, 2016, [http://www.fema.gov/media-library-data/20130726-1914-25045-1246/final\\_national\\_response\\_framework\\_20130501.pdf](http://www.fema.gov/media-library-data/20130726-1914-25045-1246/final_national_response_framework_20130501.pdf).

<sup>3</sup> United States Department of Homeland Security, *National Response Framework*, 26; “Preparedness.”

<sup>4</sup> John Copenhaver, “Integrating the Private Sector in Homeland Security Preparation and Response,” in *A Legal Guide to Homeland Security and Emergency Management for State and Local Governments*, ed. Ernest B. Abbott and Otto J. Hetzel (Chicago: ABA Publishing, 2005), 250; Jeremiah Jones, “Privatization of Disaster Preparedness: Increasing Resilience through Planning,” in *The Private Sector’s Role in Disasters: Leveraging the Private Sector in Emergency Management*, ed. Alessandra Jerolleman and John J. Kiefer (Boca Raton: Taylor & Francis Group, LLC, 2016), 99; Takako Izumi and Rajib Shaw, “Overview and Introduction of the Private Sector’s Role in Disaster Management,” in *Disaster Risk Reduction: Methods, Approaches and Practices*, ed. Takako Izumi and Rajib Shaw (Japan: Springer, 2015), 3.

and strategies are developed and integrated into a cohesive emergency management protocol.<sup>5</sup> It is also at this stage that emergency managers are charged with identifying those goods and services that must be procured, and engaging in the competitive procurement process, as required by law, to ensure that all reasonably foreseeable goods and services are in place well before a disaster occurs.<sup>6</sup> Generally, all states have legislatively recognized the important role the private sector plays in all phases of emergency management. Some states, however, are much more express and explicit in this recognition, which arguably provides a more sound foundation to support the increased public-private collaborations advocated in this thesis.

As stated, as part of an effective emergency management policy, it is critical for the government to obtain the “best emergency product” for the “best price” in enough time to meet the disaster or emergency.<sup>7</sup> To do so, officials must utilize the competitive procurement process, and all states’ procurement laws generally recognize this requirement. Importantly, though, states also include an emergency “no-bid” exception to competitive procurement when “prompt purchases become necessary for health and safety reasons.”<sup>8</sup> The danger associated with this exception arises from its overuse or improper use, which can render a jurisdiction vulnerable to inflated prices, contractor exploitation as well as lead to the opportunity for government abuse.<sup>9</sup> While such an exception is admittedly necessary to protect citizens in an emergency situation when an unforeseen circumstance is present and an unanticipated good or service is required, it should be clearly legislatively relegated to a procurement method of last resort so as to minimize the potential for abuse to the greatest extent possible. Proper use of the competitive procurement method also allows time to enter into a negotiated contract,

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<sup>5</sup> United States Department of Homeland Security, *National Response Framework*, 24.

<sup>6</sup> Jude Egan and Thomas Anderson, “Considerations for a Model of Public-Private Sector Collaboration in the Provision of Disaster Relief: Incentives and Limits,” in *Emergency Management and Disaster Response Utilizing Public-Private Partnerships*, ed. Marvine Paula Hamner et al. (Hershey: IGI Global, 2015), 8.

<sup>7</sup> La. Admin. Code tit. 34, pt. V, §1109 (West, Westlaw through rules published in the Louisiana Register dated November 20, 2015).

<sup>8</sup> Karl Oakes, J.D., “Competitive Bidding,” 73A C.J.S. *Public Contracts* §15 (June 2015).

<sup>9</sup> Jessie Schultz and Tina Søreide, “Corruption in Emergency Procurement,” *Disasters* 32, no. 4 (May 2008): 518–19, accessed January 28, 2016, doi:10.1111/j.0361-3666.2008.01053.x.

which will further protect a jurisdiction from the potential vulnerabilities that a “no-bid” situation incites by offering clear delineations of the responsibilities and oversight tasks of each of the parties, thereby ensuring accountability.<sup>10</sup> Integrating private-sector expertise at the preparedness stage and creating an emergency management protocol that is built on the expertise of both public and private-sector representatives will allow agencies to best plan for potential emergency events in accordance with competitive procurement law, and to provide citizens with thoughtful and well-researched emergency management initiatives.

Despite the seemingly overwhelming positive implications associated with public-private collaborations, scholars have noted the skepticism associated with the privatization of traditional governmental functions.<sup>11</sup> Such skepticism is primarily based on issues regarding ultimate accountability for preparedness and response efforts as well as the motives of the private sector in fulfilling governmental functions.<sup>12</sup> Critics have argued that privatization essentially allows private companies to use public resources for their own ends, as opposed to the benefit of the general public.<sup>13</sup> The counterargument to this skepticism is that the two are not necessarily mutually exclusive. Both governmental agencies and the private sector have the same end goal: the continuity of operations.<sup>14</sup> By taking advantage of the private sector’s resources, efficient business operations, technologies and expertise, the government can provide its citizens with the best emergency management initiatives that would not otherwise be available. Also, this thesis is not advocating for the wholesale transfer of emergency management to private companies; rather, simply an increased effort to collaborate with and reap the benefits of the private sector.

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<sup>10</sup> Donald F. Kettl, “The Job of Government: Interweaving Public Functions and Private Hands,” *Public Administration Review* 75, no. 2 (March/April 2015): 220, accessed January 11, 2016, doi:10.1111/puar.12336.

<sup>11</sup> Kevin Fox Gotham, “Disaster, Inc.: Privatization and Post-Katrina Rebuilding in New Orleans,” *Perspectives on Politics* 10, no. 03 (September 2012): 634, accessed January 28, 2016, doi:10.1017/S153759271200165X.

<sup>12</sup> *Ibid.*, 634–35.

<sup>13</sup> *Ibid.*, 635.

<sup>14</sup> Copenhaver, “Integrating the Private Sector in Homeland Security Preparation and Response,” 253.

While some agencies have already integrated the private sector to a certain extent in their emergency management initiatives, this thesis makes the argument that more can be done, based on the fact that the currently existing emergency management laws generally allow for such increased integration. Moreover, scholars have noted the increased trend of government agencies filling the role of a “manager” or “administrator” of contracts, as opposed to the “provider” of goods and services.<sup>15</sup>

Based on the foregoing, this thesis ultimately makes three policy recommendations. First, the private sector should be a true emergency management partner with governmental agencies and should occupy a seat, if not several seats, on the various agencies’ emergency management committee(s). These seats would ideally be filled through the competitive procurement process pursuant to which certain factors such as past emergency experience, proposed emergency-related solutions and prior record of performance would be considered. Second, the emergency “no-bid” exception should truly be made a procurement method of last resort. By implementing more robust emergency preparedness and management initiatives through public-private collaborations, governmental agencies will be able to forecast with a great deal of precision the goods and services that will become necessary for response efforts, and will be able to competitively procure those goods and services in a sufficient amount of time prior to the disaster event. Third, to support the foregoing recommendations, this thesis sets forth certain emergency management statutory or policy provisions that more expressly integrate the private sector, which are based on the “best of” the states’ laws which are currently in place. These provisions can be adopted in whole or in part and integrated into the states’ respective currently existing statutory or policy frameworks, to the extent desired and feasible. The goal of this thesis is to provide a framework of options and considerations to enable any agency to enhance its emergency preparedness and management initiatives by making use of all available resources to the greatest degree possible well before the disaster occurs.

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<sup>15</sup> John Adler, Dugan Petty, and Rebecca Randall, “Public Procurement: Past, Present and Future,” *The Council of State Governments* (2006): 451, accessed January 28, 2016, [http://knowledgecenter.csg.org/kc/system/files/Adler\\_Article.pdf](http://knowledgecenter.csg.org/kc/system/files/Adler_Article.pdf).

## I. PROBLEM STATEMENT

A sound, well-researched and wide-reaching emergency preparedness plan is the key to effective emergency management. An essential component of such a preparedness plan is the identification and execution of necessary collaborative and mutual aid agreements to augment otherwise limited governmental resources. The major overarching mutual aid emergency response framework currently in place is the national interjurisdictional compact, EMAC, which provides a federally declared clear and uniform response structure for governor-declared states of emergency. But, application of this federal standard alone in emergency preparedness plans does not encompass all reasonably foreseeable response mechanisms and types of disasters. To begin, it is not “activated” and, thus, does not apply to every disaster that may occur, only to governor-declared states of emergency. Moreover, it only addresses assistance and resource-sharing initiatives during disasters, as opposed to “pre-disaster” preparedness initiatives. Finally, and, most notably, it only governs interjurisdictional (public sector) assistance, and does not govern public-private collaborations. The increased role of the private sector in all phases of emergency management but, most importantly, in the preparedness stage, can fill these gaps and, in fact, enhance governmental entities’ emergency preparedness and management plans and response efforts.

Private entities have significant resources, access to cutting-edge innovations, and business continuity and supply chain management expertise that could serve to greatly benefit public agencies and their citizens in disaster events. Indeed, governmental agencies at the federal, state and local levels have become increasingly aware of the benefits that the private sector can provide to public safety agencies during all phases of emergency management, and states have statutorily provided general permissibility to enter into partnerships in that regard. Yet, some state and local governments fail to take full advantage of these private resources. Why? Much of the research conducted suggests that the idea of the privatization of certain governmental functions is still held at arms’ length by some entities, as it triggers issues of ultimate accountability and liability for emergency preparedness and response as well as issues of transparency of governmental

action. This hesitation could cause agencies to miss opportunities to take advantage of the private sector's resources and expertise during the initial stages of emergency planning activities, despite the flexible statutory language available to support such collaborations. An additional consideration is the fact that while the states' various statutory provisions that comprise their procurement and emergency management laws are permissive with regard to public-private collaborations, certain local governments have ordinances or local laws in place prohibiting them from taking advantage of what state law otherwise allows, such as multi-award and cooperative purchasing contracts.

Consequently, this thesis will 1) investigate the argument for increased public-private collaborations from the public agency perspective, while also considering the concerns that private entities may have in forming such partnerships; 2) analyze the relevant state procurement and emergency management laws to determine whether and to what extent those laws support public-private collaborations; and 3) propose a "best practices" policy, which shall be based on a collection of the most supportive statutory language currently in force among the states. This policy may be used by public agencies to augment their currently existing emergency management frameworks to enhance their respective abilities to contract with private vendors "pre-disaster" to supplement what the government alone cannot provide during and after a disaster, to the extent they are not already doing so to their greatest advantage.

## **A. RESEARCH QUESTION**

The main research question addressed in this thesis is: Should there be a national framework, "best practices" policy or statutory reform on a state-by-state basis with regard to the competitive procurement of goods and services for emergency preparedness and management, which would provide a mechanism for increased public-private collaborations to ensure that each jurisdiction is as prepared as possible prior to a disaster or emergency event and/or can more easily obtain unanticipated but necessary goods and services in the midst of a dynamic emergency event?

There are several sub-questions that inevitably arise in connection with this overarching question that are also addressed in this thesis: 1) How well do the states'

procurement and emergency management laws allow for public-private collaborations in an emergency situation, if at all? 2) Can or should these laws be revised to provide for greater public-private collaborations? 3) Should there be a federal or national standard, framework or policy from which each of the states can reform their respective policies or laws to allow for the greatest use of resources to enhance emergency preparedness and management efforts?

## **B. LITERATURE REVIEW**

This thesis focused, in part, on the actual statutory language in force in each of the states to identify the current procurement and emergency management mechanisms in order to determine 1) what kind of reform is actually needed, if any, and 2) whether one or more states has a framework that supports public-private collaborations that can be used as a model. Accordingly, there is no “literature” regarding the precise statutory language apart from the pertinent interpretative case law, the most relevant of which is cited in this thesis for reference.

The academic literature on this topic addresses the impact of public-private collaborations on emergency preparedness and management efforts, and the most representative of these viewpoints is set forth below. The literature reviewed discusses the need for increased public-private collaborations, but also acknowledges the potential drawbacks and pitfalls attendant such collaborations. Of particular note is the literature’s consideration of the theory of privatization, and the fact that some government entities are hesitant to “contract out” traditional government functions to private companies. Nonetheless, to the extent these collaborations are formed, the literature reviewed focuses on the importance of memorializing these partnerships by way of formal contractual agreements to ensure that the unique needs of the governmental entity are met, and to ensure the accountability of each of the parties. But, the literature also acknowledges the arguments for and against formal contracts, especially in the context of a dynamic emergency environment. Lastly, the literature discusses the role of the private sector beyond that of simply a provider of emergency-related goods and services, and considers

the concept of the private sector as a true partner with the government throughout the entire emergency management enterprise, from planning through recovery.

## 1. Public-Private Collaborations

EMAC provides for mutual assistance between and among the states to provide various necessary resources in the event of governor-declared states of emergency. Kapucu, Augustin and Garayev label EMAC as “the cornerstone of national mutual aid.”<sup>1</sup> Additionally, both Stier and Goodman as well as Lynn recognize that this mutual aid, along with increased regional cooperation, can alleviate budgetary concerns for governmental agencies and enable them to better provide needed resources to citizens in response to an emergency situation.<sup>2</sup> It is suggested, though, that these cross-jurisdictional mutual aid agreements are not enough. Stewart, Kolluru and Smith argue for greater preparedness collaborations by highlighting the fact that the consequences of disasters essentially exploit the interdependency of the public and private sectors, and expose the resultant vulnerabilities.<sup>3</sup> Kapucu, Arslan and Collins argue that collaboration between the public and private sectors allows for the blending of the public accountability of government with the “market-driven” strategies of the private sector to create relationships to better prepare for catastrophes.<sup>4</sup> Urby and McEntire also point to the advantages of applying the market-based operations of the private sector to provide

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<sup>1</sup> Naim Kapucu, Maria-Elena Augustin, and Vener Garayev, “Interstate Partnerships in Emergency Management: Emergency Management Assistance Compact in Response to Catastrophic Disasters,” *Public Administration Review* 69, no. 2 (March/April 2009): 300, accessed February 19, 2016, doi:10.1111/j.1540-6210.2008.01975.x.

<sup>2</sup> Daniel D. Stier, J.D. and Richard A. Goodman, M.D., J.D., MPH, “Mutual Aid Agreements: Essential Tools for Public Health Preparedness and Response,” *American Journal of Public Health* Supplement 1, 97, no. S1 (2007): S62, accessed January 28, 2016, doi:10.2105/AJPH.2006.101626; Phil Lynn, “Mutual Aid: Multijurisdictional Partnerships for Meeting Regional Threats,” *New Realities: Law Enforcement in the Post-9/11 Era*, NCJ 210679, United States Department of Justice, Office of Justice Programs, Bureau of Justice Assistance (September 2005): 5, accessed February 22, 2016, <https://www.ncjrs.gov/pdffiles1/bja/210679.pdf>.

<sup>3</sup> Geoffrey T. Stewart, Ramesh Kolluru, and Mark Smith, “Leveraging Public-Private Partnerships to Improve Community Resilience in Times of Disaster,” *International Journal of Physical Distribution and Logistics Management* 39, no. 5 (2009): 344, accessed January 28, 2016, doi:10.1108/09600030910973724.

<sup>4</sup> Naim Kapucu, Tolga Arslan, and Matthew Lloyd Collins, “Examining Intergovernmental and Interorganizational Response to Catastrophic Disaster: Toward a Network-Centered Approach,” *Administration and Society* 42, no. 2 (2010): 228, accessed January 28, 2016, doi:10.1177/0095399710362517.

the community with the best products for the best prices, and taut that this can best be achieved through horizontal collaborative relationships.<sup>5</sup> Kapucu, Arslan and Collins agree that “[d]isasters create an atmosphere wherein organizations from different sectors feel the shared risk and willingly coordinate their shared responsibilities.”<sup>6</sup>

Busch and Givens state that governments can benefit from the private sector’s ability to conduct business with greater efficiency and to provide greater financial resources toward emergency preparedness initiatives and technological innovations.<sup>7</sup> Jones specifically notes that public agencies simply do not have the necessary resources, technology or expertise to identify and implement all reasonably foreseeable emergency preparedness and management plans.<sup>8</sup> Copenhaver agrees that the private sector must be included in the emergency preparedness as well as the response stages.<sup>9</sup>

Other research, such as that conducted by Prager, casts doubt on these arguments in favor of private-sector integration, and suggests that while the government does not have a profit-driven bottom-line motivator, incentives such as “[p]ower, prestige and ‘public service’” can drive governmental efficiency, if such efficiency is supported by the agency.<sup>10</sup> Prager emphasizes that the ability of private firms to enhance the efficiency of governmental initiatives is dependent upon the management and operational structure of the private entity, and whether that structure is conducive to efficient output.<sup>11</sup> Prager also brings to light a perspective not considered by the other scholars,

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<sup>5</sup> Heriberto Urby, Jr. and David A. McEntire, “Applying Public Administration in Emergency Management: The Importance of Integrating Management into Disaster Education,” *Homeland Security and Emergency Management* 11, no. 1 (2014): 54, 56, accessed January 11, 2016, doi:10.1515/jhsem-2013-0060.

<sup>6</sup> Kapucu, Arslan, and Collins, “Examining Intergovernmental and Interorganizational Response to Catastrophic Disaster,” 229.

<sup>7</sup> Nathan E. Busch and Austen D. Givens, “Public-Private Partnerships in Homeland Security: Opportunities and Challenges,” *Homeland Security Affairs* 8, art. 18 (October 2012): 6–7, accessed February 19, 2016, <https://www.hsaj.org/articles/233>.

<sup>8</sup> Jones, “Privatization of Disaster Preparedness,” 99.

<sup>9</sup> Copenhaver, “Integrating the Private Sector in Homeland Security Preparation and Response,” 250.

<sup>10</sup> Jonas Prager, “Contracting Out Government Services: Lessons from the Private Sector,” *Public Administration Review* 54, no. 2 (March-April 1994): 179, accessed January 28, 2016, <http://www.jstor.org/stable/976527>.

<sup>11</sup> *Ibid.*, 180.

namely, that perhaps public-private collaborations are simply a “second-best option” because there is “a lack of political will to establish efficiency as a high-level priority of government operations” thus making such collaborations necessary.<sup>12</sup> VanWagner, however, offers a counter-position to Prager’s argument and posits that the government’s need to reduce costs actually drives the increased efficiency of the private sector for the benefit of the government in that private companies will be more motivated to create new products to enhance effectiveness and affordability for governmental use.<sup>13</sup>

Further questioning the efficacy of the public-private collaborative scheme, Kapucu, Arslan and Demiroz make the argument that such collaborations are not overwhelmingly advantageous in the particular circumstance of a dynamic emergency situation in which decisions need to be made in a rapid manner.<sup>14</sup> As is discussed more fully in this thesis, their research also suggests that developing a formal collaborative mechanism, such as a contract, that governs the relationship can serve to offset this concern as well as support a long-term partnership in which each side develops habits of working together efficiently.<sup>15</sup> Interestingly, two of the three authors in the preceding article, Kapucu and Arslan, collaborated with Collins and lauded the particular efficiency of the private sector in response to Hurricanes Katrina and Rita, respectively, in 2005, and posited that the necessary resources were only able to be provided to Gulf Coast residents as a result of the efficient business and management structure of private firms.<sup>16</sup>

Gotham, however, decries the concept of expanded privatization in the context of emergency management, stating that “privatization obscures liability and accountability for problematic post-disaster outcomes,” and allows private entities “to use public

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<sup>12</sup> Prager, “Contracting Out Government Services,” 180.

<sup>13</sup> Kimberly VanWagner, “Privatization of Some Emergency Management Functions—Case Study: Innovative or Fraudulent?: The Role of Private Contractors in Post-Disaster Cleanup,” in *The Private Sector’s Role in Disasters: Leveraging the Private Sector in Emergency Management*, ed. Alessandra Jerolleman and John J. Kiefer (Boca Raton: Taylor & Francis Group, LLC, 2016), 29.

<sup>14</sup> Naim Kapucu, Tolga Arslan, and Fatih Demiroz, “Collaborative Emergency Management and National Emergency Management Network,” *Disaster Prevention and Management* 19, no. 4 (2010): 458, accessed January 28, 2016, doi:10.1108/09653561011070376.

<sup>15</sup> Ibid.

<sup>16</sup> Kapucu, Arslan, and Collins, “Examining Intergovernmental and Interorganizational Response to Catastrophic Disaster,” 231, 240.

resources and power to achieve what are essentially private aims.”<sup>17</sup> Busch and Givens, though, offer the counterargument that by contracting out some governmental services, such as evacuations and food stations, to private firms, governmental agencies can focus on more strategic planning initiatives, which would better serve the public.<sup>18</sup> The research, thus, suggests that greater use of private-sector resources can increase the effectiveness of governmental response to disasters and provide greater and more efficient emergency management initiatives for the benefit of citizens.

In espousing the advantages of public-private collaborations, Busch and Givens, as well as others, do not seem to account for or address the impact of the competitive selection process mandated by state procurement laws. They argue that private-sector consultants can be hired quickly for project-specific tasks and either discharged once the tasks are completed or kept on for other projects.<sup>19</sup> This argument ignores the constraints governmental agencies are under to comply with state and local statutes and ordinances, respectively, that require a competitive selection process before a private vendor can be retained. Indeed, notably absent from much of the research reviewed is the acknowledgment of state competitive selection requirements and how and/or whether emergency procurement practices fit in with such requirements, as well as the impact of those practices on the ability of governmental agencies to contract with private vendors. In one of the only identified articles to address this point, McEntire and Myers recognize the need for preparedness planning and the development of “pre-disaster” contracts to ensure that all necessary resources are in place prior to an emergency event, and to also ensure that the government is getting the best available price for the goods and services, as opposed to an emergency “no-bid” procurement that could result in price-gouging and exploitation.<sup>20</sup> Schultz and Søreide agree, finding that the urgency associated with

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<sup>17</sup> Gotham, “Disaster, Inc.: Privatization and Post-Katrina Rebuilding in New Orleans,” 635.

<sup>18</sup> Nathan E. Busch and Austen D. Givens, “Achieving Resilience in Disaster Management: The Role of Public-Private Partnerships,” *Journal of Strategic Security* 6, no. 2, art. 1 (Summer 2013): 5, accessed February 19, 2016, doi:10.5038/1944-0472.6.2.1.

<sup>19</sup> *Ibid.*, 6.

<sup>20</sup> David A. McEntire and Amy Myers, “Preparing Communities for Disasters: Issues and Processes for Government Readiness,” *Disaster Prevention and Management* 13, no. 2 (March 2004): 146, accessed January 28, 2016, doi:10.1108/09653560410534289.

emergency situations “decreases bargaining power” and that resultant “rapid procurement is particularly prone to inflated prices and expenditures.”<sup>21</sup>

## 2. Public-Private Collaborations at the Emergency Preparedness Stage

The research reviewed is largely in agreement that public-private collaborations for emergency management are beneficial. The academic discourse on this issue has focused more on the stage at which such collaborations would be most advantageous. Kiefer notes that the mitigation stage is the most advantageous as it is the economic stability of a community that will dictate its ability to recover, and that stability depends on overall risk reduction.<sup>22</sup> Bharania agrees, stating that “[t]he private sector has...a vested interest in seeing the timely recovery of disaster-affected communities.”<sup>23</sup> Klima and Jerolleman further cite the need for public and private-sector representatives from a variety of disciplines to contribute to the hazard mitigation effort in order to provide a more unified and coherent approach to risk reduction.<sup>24</sup> The NRF advocates for the integration of the private sector “before an incident occurs” in order to ensure that the necessary assistance and support services are available for the response and recovery phases.<sup>25</sup> Likewise, the NIMS’ National Preparedness System recognizes that while emergencies and preparedness efforts affect the whole community, preparedness plans must include the whole community, public and private-sector representatives alike.<sup>26</sup> On the other hand, Chen et al., suggest that the recovery phase is when this type of collaboration is most effective, as the local partners have the unique local knowledge and

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<sup>21</sup> Schultz and Søreide, “Corruption in Emergency Procurement,” 518.

<sup>22</sup> John J. Kiefer, “Recent Trends in Emergency Management,” in *The Private Sector’s Role in Disasters: Leveraging the Private Sector in Emergency Management*, ed. Alessandra Jerolleman and John J. Kiefer (Boca Raton: Taylor & Francis Group, LLC, 2016), 7.

<sup>23</sup> Rakesh Bharania, “Using Expert Networking Knowledge to Assist Communities in Crisis Resilience,” in *The Role of Business in Disaster Response: A Business Civic Leadership Center Report*, United States Chamber of Commerce (2012): 31, accessed January 28, 2016, <https://www.uschamberfoundation.org/sites/default/files/publication/ccc/Role%20of%20Business%20in%20Disaster%20Response.pdf>.

<sup>24</sup> Kelly Klima and Alessandra Jerolleman, “Bridging the Gap: Hazard Mitigation in the Global Context,” *Journal of Homeland Security and Emergency Management* 11, no. 2 (June 2014): 2, accessed January 29, 2016, doi:10.1515/jhsem-2013-0095.

<sup>25</sup> United States Department of Homeland Security, *National Response Framework*, 26.

<sup>26</sup> “Preparedness.”

resources that will be able to rebuild the community and most effectively respond to the residual effects befalling that community after a disaster, both social and economic.<sup>27</sup>

With regard to the locality aspect of this argument, Gerber and Robinson have criticized local governments for failing to be more proactive in their emergency preparedness efforts.<sup>28</sup> In fact, Schultz and Søreide note that “corruption occurs because procurement specialists are ignorant of the local market dynamics.”<sup>29</sup> Kapucu, Arslan and Collins also note that local jurisdictions are able to respond more quickly to disasters and should be prepared accordingly.<sup>30</sup> Perry and Lindell are in agreement regarding the ability of local governments to be more attuned to local circumstances, needs and capabilities.<sup>31</sup> In addition, MacManus and Caruson point out that “[l]ocal officials are well aware of the fact that they will be held the most accountable for responses to disaster-related incidents because constituents often have little knowledge of which level of government is primarily responsible for the delivery of specific services.”<sup>32</sup>

### **3. Advantages of Collaborating with the Private Sector: Business Continuity and Supply Chain Management Expertise**

As many scholars have noted, one of the prime advantages for the public sector in partnering with private-sector entities is the public sector’s ability to share in and reap the benefits of a private company’s business continuity plan. Busch and Givens specifically highlight the substantial assistance that Wal-Mart was able to provide post-Katrina in the

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<sup>27</sup> Justine Chen et al., “Public-Private Partnerships for the Development of Disaster Resilient Communities,” *Journal of Contingencies and Crisis Management* 21, no. 3 (September 2013): 132, accessed January 28, 2016, doi:10.1111/1468-5973.12021.

<sup>28</sup> Brian J. Gerber and Scott E. Robinson, “Local Government Performance and the Challenges of Regional Preparedness for Disasters,” *Public Performance and Management Review* 32, no. 3 (March 2009): 354, accessed February 19, 2016, doi:10.2753/Pmr1530-9576320301.

<sup>29</sup> Schultz and Søreide, “Corruption in Emergency Procurement,” 527.

<sup>30</sup> Kapucu, Arslan, and Collins, “Examining Intergovernmental and Interorganizational Response to Catastrophic Disaster,” 239.

<sup>31</sup> Ronald W. Perry and Michael K. Lindell, “Preparedness for Emergency Response: Guidelines for the Emergency Planning Process,” *Disasters* 27, no. 4 (December 2003): 339, accessed January 28, 2016, doi:10.1111/j.0361-3666.2003.00237.x.

<sup>32</sup> Susan A. MacManus and Kiki Caruson, “Financing Homeland Security and Emergency Preparedness: Use of Interlocal Cost-Sharing,” *Public Budgeting and Finance* 28, no. 2 (Summer 2008): 63, accessed January 28, 2016, doi:10.1111/j.1540-5850.2008.00905.x.

face of governmental resource gaps.<sup>33</sup> Wong discusses the assistance that Office Depot provides to businesses during disasters through its “in-house” disaster preparedness and recovery division.<sup>34</sup> Kapucu, Arslan and Demiroz suggest that given that supply chain management and business continuity are essentially the business of large national and international chains, the “private sector should have more opportunity and responsibility to provide resources for response and recovery operations.”<sup>35</sup> In fact, Stewart, Kolluru and Smith refer to supply chain management as a key component to the community resilience framework advocated in their article in that it highlights the interconnectedness of all agencies and entities in responding to and recovering from an emergency situation.<sup>36</sup>

Busch and Givens take this argument a step further and suggest that private firms should partner with the public sector from the policy-making stage to better assist in emergency preparedness efforts, such as in the creation of emergency plans.<sup>37</sup> They suggest that private businesses can advise the particular governmental agency of all of its own needs, which can then be built into a wider emergency planning framework.<sup>38</sup> Of course, this is not to say that public agencies do not have their own emergency planning committees, emergency managers and like officials to determine a government’s and its community’s respective needs and plan accordingly. Rather, this thesis allows for the reality that there is no guarantee that government emergency managers can plan and prepare for every possible need, every piece of equipment or service or all necessary personnel to sufficiently respond to and recover from the many possible disaster or emergency situations, and considers that a sound preparedness initiative involves all

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<sup>33</sup> Busch and Givens, “Public-Private Partnerships in Homeland Security,” 3, 6.

<sup>34</sup> Mary Wong, “Talking About Preparedness: Leave No Stone Unturned,” in *The Role of Business in Disaster Response: A Business Civic Leadership Center Report*, United States Chamber of Commerce (2012): 7, accessed January 28, 2016, <https://www.uschamberfoundation.org/sites/default/files/publication/cc/Role%20of%20Business%20in%20Disaster%20Response.pdf>.

<sup>35</sup> Kapucu, Arslan, and Demiroz, “Collaborative Emergency Management and National Emergency Management Network,” 455.

<sup>36</sup> Stewart, Kolluru, and Smith, “Leveraging Public-Private Partnerships to Improve Community Resilience in Times of Disaster,” 350.

<sup>37</sup> Busch and Givens, “Achieving Resilience in Disaster Management,” 12–13.

<sup>38</sup> *Ibid.*, 13.

stakeholders, both public and private, which reinforces the more effective “whole community” recovery effort.<sup>39</sup>

#### 4. Private Sector Disadvantages of Public-Private Collaborations

One concern cited by the research against public-private collaborations is the idea of transparency that is necessary for governmental agencies, but not the private sector. By agreeing to do business with the government, private entities are essentially agreeing to open their books and business practices, to a certain extent, for public viewing. Busch and Givens, as well as Schaffer and Loveridge, point out that such transparency may put that private business at a disadvantage in the competitive business market if certain information, like its price points, are publicly disclosed for all to see and for competitors to under-bid.<sup>40</sup> Busch and Givens also cite the financial disincentives for private firms in doing business with the government, given that it is based on a low-bid structure.<sup>41</sup> Pongsiri further cautions that private firms may be hesitant to enter into business relationships with governmental agencies if governmental regulation of private activities is not clearly defined and if the roles and responsibilities of each of the parties are not clearly defined, as private entities do not want to be micromanaged.<sup>42</sup>

Conversely, Waddock, Bodwell and Graves suggest that private firms may find that the positive “public relations” benefit of providing assistance to a community in times of disaster may supersede the concerns attendant the transparency issue as well as the potential negative financial effects of a low-bid pricing structure.<sup>43</sup> As referenced previously, VanWagner also offers the possibility that the low-bid requirement actually

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<sup>39</sup> Kapucu, Arslan, and Collins, “Examining Intergovernmental and Interorganizational Response to Catastrophic Disaster,” 229; McEntire and Myers, “Preparing Communities for Disasters,” 141, 146.

<sup>40</sup> Busch and Givens, “Public-Private Partnerships in Homeland Security,” 13; Peter V. Schaeffer and Scott Loveridge, “Toward an Understanding of Types of Public-Private Cooperation,” *Public Performance and Management Review* 26, no. 2 (December 2002): 172, 174, accessed January 28, 2016, <http://www.jstor.org/stable/3381276>.

<sup>41</sup> Busch and Givens, “Public-Private Partnerships in Homeland Security,” 13.

<sup>42</sup> Nutavoot Pongsiri, “Regulation and Public-Private Partnerships,” *International Journal of Public Sector Management* 15, no. 6 (2002): 491, accessed January 28, 2016, doi:10.1108/09513550210439634.

<sup>43</sup> Sandra A. Waddock, Charles Bodwell, and Samuel B. Graves, “Responsibility: The New Business Imperative,” *Academy of Management Executive* 16, no. 2 (May 2002): 136, accessed January 17, 2016, <http://www.jstor.org/stable/4165848>.

motivates private companies to develop cheaper, more efficient products, which serve to benefit not only the government and its citizens, but also the private company's bottom line.<sup>44</sup>

## 5. Formal Contracts between Public and Private Partners

Busch and Givens highlight the particular obstacles that will inevitably be involved in a public-private collaborative scheme, such as management oversight and accountability in what is essentially a horizontal organizational structure.<sup>45</sup> They acknowledge the competing arguments of whether the public sector must always be in charge of emergency management efforts, even with private contractors and resources, or whether the public would be better served by a managerial structure overseen by a private entity.<sup>46</sup>

Busch and Givens also point out the potential legal concerns that public-private collaborations incite, such as accountability, if the private-sector firm fails to provide the resources according to the contractual terms.<sup>47</sup> Does the government sue the private firm? Busch and Givens argue that clearly defining the roles and obligations of each of the parties will curtail the chances of either party violating the other party's expectations, which will, in turn, build trust.<sup>48</sup> Girth agrees, but states that there must be trust, in addition to tension, between the parties to ensure that the contractor does not neglect its duties, which must be memorialized in a contract.<sup>49</sup> Schaeffer and Loveridge espouse a similar viewpoint in their position that the success of a cooperative relationship is dependent upon "adherence to agreed-upon rules and norms."<sup>50</sup> Pongsiri is particularly clear in the statement that successful public-private collaborations depend on sound legal

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<sup>44</sup> VanWagner, "Privatization of Some Emergency Management Functions-Case Study," 29.

<sup>45</sup> Busch and Givens, "Public-Private Partnerships in Homeland Security," 10.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid., 11.

<sup>48</sup> Busch and Givens, "Achieving Resilience in Disaster Management," 7, 9, 15, 17, 18.

<sup>49</sup> Amanda M. Girth, "A Closer Look at Contract Accountability: Exploring the Determinants of Sanctions for Unsatisfactory Contract Performance," *Journal of Public Administration Research and Theory* 24 (October 2012): 325, accessed January 28, 2016, doi:10.1093/jopart/mus033.

<sup>50</sup> Schaeffer and Loveridge, "Toward an Understanding of Types of Public-Private Cooperation," 171.

agreements governing their relationship.<sup>51</sup> Without them, “disputes are likely to occur and projects can and will be delayed and terminated.”<sup>52</sup> Similarly, Koliba, Zia and Mills emphasize that confusion over partnership responsibilities and authority in the absence of contractual agreements may lead to a “sluggish” response to an emergency.<sup>53</sup> Nicholson, in fact, labels such contracts as “litigation mitigation,” which are necessary to limit liability as much as possible when the contractual duties are triggered.<sup>54</sup>

Still, as much as the argument can be made for the benefits of formal contractual relationships, Prager highlights a situation in which, contract or not, the government is left in a lurch. Specifically, he states that “[c]ontract cancellation provisions are critical but will be of no use when the contractor defaults on a vital service.”<sup>55</sup> Despite their criticism of the lack of contractual agreements post-disaster, Koliba, Zia and Mills also acknowledge that legally defined obligations and responsibilities may “get in the way of expediency, particularly in times of crisis.”<sup>56</sup> Kapucu, Arlsan and Demiroz further acknowledge this divergent view and emphasize the importance of remaining flexible in emergency situations in order to better respond to the chaotic and unexpected occurrences in such dynamic environments.<sup>57</sup> Perry and Lindell agree with these critiques of a formal contractual structure and argue that the incorporation of specific response details in a formal contract is unreasonable since the parties cannot possibly anticipate any and all

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<sup>51</sup> Pongsiri, “Regulation and Public-Private Partnerships,” 489.

<sup>52</sup> Ibid.

<sup>53</sup> Christopher J. Koliba, Asim Zia, and Russell M. Mills, “Accountability in Governance Networks: An Assessment of Public, Private, and Nonprofit Emergency Management Practices Following Hurricane Katrina,” *Public Administration Review* 71, no. 2 (March/April 2011): 216, accessed February 19, 2016, doi:10.1111/j.1540-6210.2011.02332.x.

<sup>54</sup> William Charles Nicholson, Esq., “Emergency Management and Law,” in *Disciplines, Disasters and Emergency Management: The Convergence and Divergence of Concepts, Issues and Trends from the Research Literature*, ed. David A. McEntire, Ph.D. (Springfield, IL: Charles C. Thomas Publisher, Ltd., 2007), 255–56.

<sup>55</sup> Prager, “Contracting Out Government Services,” 181.

<sup>56</sup> Koliba, Zia, and Mills, “Accountability in Governance Networks,” 216.

<sup>57</sup> Kapucu, Arslan, and Demiroz, “Collaborative Emergency Management and National Emergency Management Network,” 455.

contingencies that may occur.<sup>58</sup> Instead, parties must remain flexible to deal with unforeseen circumstances.<sup>59</sup>

Similar to the above scholars, Stewart, Kolluru and Smith recognize the benefits of an informal relationship between public and private partners, which allows the private partner to go “above and beyond” the contract requirements to augment response efforts; however, they further acknowledge that such informality requires “trust, commitment, reciprocity norms and exchange efficiency” between the partners, and that more formal contracts may be necessary in the absence of these elements.<sup>60</sup> Negron offers a solution to the “informal relationship” argument in the form of a “team-building” initiative in which the parties to an emergency-related contract engage in recurring brainstorming activities by which the parties can identify as many reasonably foreseeable emergency-related needs as possible and put together a contract responsive to the identified needs, or construct necessary contract amendments which meet the needs not previously identified in the original contract.<sup>61</sup>

## **6. The Private Sector as a True Emergency Management Partner**

Adler, Petty and Randall posit that the role of government is shifting from the “provider” of goods and services, to more of an “administrator” or “manager” of those private vendors who are actually contracted to provide goods and services.<sup>62</sup> With this new role, the authors note that procurement offices will also have to contract out to fill the gaps in their knowledge base to fulfill their new “strategic” role.<sup>63</sup> Klima and Jerolleman recognize this trend and advise that connecting a variety of disciplines from both the public and private sectors to contribute to the hazard mitigation effort will allow

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<sup>58</sup> Perry and Lindell, “Preparedness for Emergency Response,” 342–43.

<sup>59</sup> *Ibid.*, 343.

<sup>60</sup> Stewart, Kolluru, and Smith, “Leveraging Public-Private Partnerships to Improve Community Resilience in Times of Disaster,” 346–47.

<sup>61</sup> Martin Negron, “Use Team Building to Make the Most of Your Public-Private Partnerships,” in *Emergency Management and Disaster Response Utilizing Public-Private Partnerships*, ed. Marvine Paula Hamner et al. (Hershey: IGI Global, 2015), 132.

<sup>62</sup> Adler, Petty, and Randall, “Public Procurement: Past, Present and Future,” 449.

<sup>63</sup> *Ibid.*, 451–52.

for a more unified and coherent approach to disaster management.<sup>64</sup> The NRF also espouses the need for “creative thinking” in light of governmental resource shortfalls. Kapucu and Hu state that public-private collaborations, being horizontal management collaborations, allow for this creative thinking as well as greater flexibility in information and experience-sharing initiatives.<sup>65</sup> Izumi and Shaw, as well as Wild, cite the informal information and experience-sharing efforts that are being made by certain agencies to incorporate the expertise and experience of the private sector into the emergency management enterprise.<sup>66</sup> But, the NRF has stated that private partners should have a “direct link” to emergency managers during an incident, and has suggested that these partners “be involved in the decision making process.”<sup>67</sup> Barlte and Korosec have offered an additional more formal solution of advertising a “problem-oriented bid” pursuant to which private vendors would offer solutions to emergency-related problems.<sup>68</sup> Izumi and Shaw take this solution a step further and posit that private vendors should not only provide necessary products or solutions, but also participate in the management of the projects utilizing those products or solutions.<sup>69</sup>

Largely, the literature is in agreement that the public and private sectors must use their interconnectedness to provide greater emergency preparedness and management efforts and response services for citizens. But, the works reviewed are not all in agreement as to when or how best to accomplish these collaborations, as they recognize the private-sector concerns in entering into such collaborations, such as those related to

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<sup>64</sup> Klima and Jerolleman, “Bridging the Gap: Hazard Mitigation in the Global Context,” 2–4.

<sup>65</sup> Naim Kapucu and Qian Hu, “Understanding Multiplexity of Collaborative Emergency Management Networks,” *American Review of Public Administration* (October 2014): 5, accessed January 8, 2016, doi:10.1177/0275074014555645.

<sup>66</sup> Izumi and Shaw, “Overview and Introduction of the Private Sector’s Role in Disaster Management,” 6; Sarah Wild, “Continuity of Operations and Business Continuity,” in *The Private Sector’s Role in Disasters: Leveraging the Private Sector in Emergency Management*, ed. Alessandra Jerolleman and John J. Kiefer (Boca Raton: Taylor & Francis Group, LLC, 2016), 285.

<sup>67</sup> United States Department of Homeland Security, *National Response Framework*, 10.

<sup>68</sup> John R. Bartle and Ronnie LaCourse Korosec, “A Review of State Procurement and Contracting,” *Public Administration Faculty Publications Paper 8* (2003): 208, accessed January 29, 2016, <http://digitalcommons.unomaha.edu/pubadfacpub/8>.

<sup>69</sup> Izumi and Shaw, “Overview and Introduction of the Private Sector’s Role in Disaster Management,” 3.

transparency, accountability and the threat to the bottom line business model of private businesses. Much of the literature, however, focuses on the overarching motivators for public-private collaborations, such as fostering a “whole of community” relationship, building public trust in government and encouraging patronage for the private businesses that helped their communities to recover. Admittedly, the majority of the research seems to speak of public-private collaborations in a theoretical manner, without considering the practical implications of implementing the theory alongside the procurement and emergency management laws currently in effect. Accordingly, the literature, while reinforcing the call for increased public-private collaborations in the emergency preparedness and response context, also highlights the gaps in the current preparedness framework in terms of how to actually put into place the suggested increased collaborative structure. The statutory and academic works reviewed confirm that the applicable legal framework must be in place, or augmented, as applicable, to allow for the most effective resources to be assembled and “at the ready” before that emergency occurs.

## **C. RESEARCH DESIGN**

### **1. Objectives**

This thesis has three essential objectives: 1) a study of the argument for increased public-private collaborations for more effective emergency preparedness and response efforts; 2) a critical review and assessment of the various states’ procurement and emergency management laws for the provision of emergency goods, supplies and services by private vendors, and whether those laws support increased public-private collaborations; and 3) the construction of a “best practices” policy that can be implemented as a whole or in a piecemeal fashion that supports the aforesaid increased collaborative practices, to the extent agencies are not currently collaborating with private entities to their greatest advantage and have the desire and the feasibility to do so.

### **2. Selection**

To accomplish the second and third objectives stated above, the research considered state law requirements regarding the competitive selection process governing

the procurement of emergency-related goods and services, including emergency exceptions to the procurement code, as well as state law provisions governing emergency management. The research also considered certain federal guidelines regarding emergency preparedness and management initiatives, including NIMS and the Congressionally-established EMAC. This review reveals that the relevant federal guidelines actually encourage and support increased collaborations with the private sector. Moreover, a review of the states' procurement and emergency management laws reveals that, in general, the currently existing statutory frameworks allow for the recommended collaborations. But, some states do a better job of specifically expressing that allowance than others. As such, this thesis will offer certain statutory or policy language, which features more explicit statements of encouragement and permissibility for public-private collaborations, for agencies to consider to augment their currently existing framework to enhance their emergency preparedness efforts.

### **3. Limits**

This thesis focused on public-private collaborations that are allowable pursuant to state statutory law, whether by an Invitation to Bid (goods and non-professional services) or a Request for Proposals (professional services). The proposed goal was to determine whether an overarching policy was possible from which states can enhance their emergency procurement and/or management initiatives based on increased public-private collaborations, or whether certain states already have a preferred framework in place from which other states can draw guidance for individual statutory reform. To the extent local municipalities within each of the states have in place policies that augment state law, those policies would have to agree with the state standard proposed. But, local laws were not considered or addressed in this thesis, as such an analysis would be untenable for the scope of this project, given the sheer volume of such municipalities in existence. That being said, the limited research conducted in that regard reveals that certain municipalities have ordinances or similar provisions that actually prohibit or limit emergency preparedness and management initiatives that their respective state's laws otherwise allow. While further study and resolution of this issue is beyond the scope of

this thesis, this finding reveals a matter that requires additional research and potential policy recommendations.

#### **4. Data Sources**

The sources of the statutory data reviewed and analyzed were obtained through online databases that provided the full text and annotations for the states' procurement and emergency management laws, such as Westlaw. In addition to the statutory text, the research considered interpretations of the relevant procurement and emergency management laws as well as law reviews and other scholarly or academic journals that have investigated and discussed the above-stated laws and applicable federal standards. The research also reviewed publicly available information by FEMA and DHS in connection with emergency preparedness and management directives and initiatives. In addition, the research utilized publicly available databases to identify and investigate the scholarly and academic research conducted on the logistics, advantages, disadvantages, and other considerations comprising the concept of public-private collaborations between government agencies and the private sector in connection with emergency preparedness, management and response efforts.

#### **5. Type and Mode of Analysis**

This thesis utilized the Best Practice Research methodology to identify “what works” in the context of private-sector integration in public sector emergency management, and to extrapolate a “best practices” model based on a review of what is currently in place.<sup>70</sup> Veselý states that the primary goal of this particular methodology is to improve “the working of a social institution” by “adopting certain principles of the working of another institution that appears more successful.”<sup>71</sup> To accomplish this goal, one must first consider the “target site” (i.e., the institution one desires to improve and assess how and why such institution is lacking).<sup>72</sup> Then, one must look for “exemplars of

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<sup>70</sup> Arnošt Veselý, “Theory and Methodology of Best Practice Research: A Critical Review of the Current State,” *Central European Journal of Public Policy* 5, no. 2 (December 2011): 99, accessed February 9, 2016, <http://www.cejpp.eu/index.php/ojs/article/view/99/81>.

<sup>71</sup> *Ibid.*, 103.

<sup>72</sup> *Ibid.*

working practices that appear superior” and explain how and why a certain practice “works” in that context.<sup>73</sup> Ultimately, one must “extrapolate” what is found from the “exemplar” research and apply it to the “target site.”<sup>74</sup>

In this case, the “target site” is that hypothetical governmental institution that does not collaborate with the private sector for emergency management purposes in such a way so as to obtain the greatest benefit for its citizens from the available private-sector resources. In considering the adverse effect, if any, of the failure to use public-private collaborations to the maximum extent allowable, the research critically assessed 1) the existing literature regarding such collaborations and how those collaborations contribute to or detract from effective emergency preparedness and management, and 2) the current state procurement and emergency management laws and how they support or prohibit public-private collaborations in the emergency preparedness and management context. In doing so, the research meets the preferred “completeness” aspect of this methodology by including all states in the analysis.<sup>75</sup>

What is not known is the full scope of the potential political and/or feasibility constraints with regard to the proposed policy recommendations that may prohibit their whole or piecemeal implementation. The author attempted to identify as many of these constraints or obstacles as possible, but unless such constraints were discoverable through publicly available research and literature, the author could not account for that which was not publicly disclosed. Consequently, the policy recommendations proposed herein may make sense academically, but when assessed through the lens of the particular political/legal landscape, may simply be academic and too idealistic for implementation. Of course, some states may deem the proposed policy unnecessary in light their current emergency management practices. Thus, those states which desire to do so may wish to consider that which is proposed in a piecemeal fashion, consistent with that particular state’s political and feasibility realities. Accordingly, what is a “best” practice, as extrapolated from the academic literature and statutory review, may or may not be a

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<sup>73</sup> Veselý, “Theory and Methodology of Best Practice Research,” 103.

<sup>74</sup> Ibid.

<sup>75</sup> Ibid., 104.

“smart” practice based on “context” (i.e., the above-referenced political and/or legal feasibility of a particular jurisdiction).<sup>76</sup>

According to Veselý, this particular methodology is properly applied by “clearly defin[ing] the purpose” or “what is to be achieved.”<sup>77</sup> Thus, in addition to the identification of weaknesses or gaps in the academic literature on this topic, as well as the identification of weaknesses or gaps in the current procurement and emergency management laws, this thesis also recommends a policy to guide future emergency preparedness and management efforts by suggesting reformatory statutory language to employ on a state-by-state basis to enhance such efforts. The purpose of this thesis is to enhance the overall emergency preparedness and response effort, to the extent states are not currently collaborating with private entities in such a way so as to make the best use of private resources and expertise for the greater benefit of the public. As such, the policy proposed intends to meaningfully contribute to that effort by whatever method is most feasible for the jurisdiction considering it.

## **6. Output**

The research has revealed the states have statutory frameworks in place that “work” (i.e., that generally allow for increased public-private collaborations for the provision of necessary emergency goods and supplies in a dynamic emergency environment in an effective manner). But, some states have enacted laws that expressly call for increased public-private collaborations and have laws that better enable agencies to act accordingly. Consequently, this thesis proposes a model framework that should be used as a guide pursuant to which state-by-state reform can be accomplished, either on a whole or piecemeal basis, based upon the content of the respective statutory language currently in force and the states’ desire to engage in such reform. This output will guide emergency managers, procurement officials, attorneys for state and local governments, legislators and policymakers in preparing their respective jurisdictions and communities

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<sup>76</sup> Veselý, “Theory and Methodology of Best Practice Research,” 106, 111.

<sup>77</sup> *Ibid.*, 114.

for disaster by making use of all available resources to the greatest degree possible well before the disaster occurs.

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## II. INTRODUCTION

Preparedness is one of the key foundations of emergency management.<sup>78</sup> States and municipalities have historically built and, in fact, continue to build their respective preparedness models through the execution of various mutual aid agreements, both intrastate and interstate, to increase otherwise limited governmental resources and/or to provide for outside support when a particular jurisdiction is totally devastated.<sup>79</sup> But, such mutual aid agreements are not enough as they only allow for the sharing of governmental resources by and among public agencies. The research reveals a continued call for greater collaborative preparedness efforts between public agencies and the private sector prior to the occurrence of an emergency or disaster for more effective response and recovery. These collaborations should not come simply by way of contracts for emergency-related goods, services and other resources. Rather, for these collaborations to be most effective, the private sector should be a true partner with governmental agencies, beginning in the initial emergency management planning stages.

In general, the states have procurement and emergency management statutory frameworks in place to make greater public-private collaborations a reality. But, some states and many of their respective municipalities are either not using these laws to achieve maximum collaboration, or the municipalities have enacted stricter requirements in their respective Home Rule Charters or Municipal Codes that make such collaborations unduly burdensome. While a review of the emergency management laws governing individual municipalities and counties/parishes is beyond the scope of this thesis, it is sufficient to mention here that the limited research conducted in that regard demonstrates that the failure to take full advantage of what is available from the private sector is limiting those jurisdictions' abilities to form beneficial partnerships to ensure that necessary resources are obtained before a disaster occurs and are provided to citizens as soon after a disaster as possible. Moreover, the failure to account for the time that is

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<sup>78</sup> "Preparedness."

<sup>79</sup> "Preparedness"; Lynn, "Mutual Aid: Multijurisdictional Partnerships for Meeting Regional Threats," vii.

needed to competitively bid for contracts for those reasonably foreseeable and anticipated emergency services and resources prior to a disaster event leaves the emergency “no-bid” exception to procurement the only viable option. Reliance on this option renders jurisdictions vulnerable to exploitation and fraud, which can financially devastate the recovery process, and totally undermine public trust.<sup>80</sup> As will be discussed more fully, states have attempted to mitigate against these vulnerabilities statutorily; however, these pronouncements do not absolutely negate the reality that agencies may ultimately be constrained to rely on the emergency exception as a result of poor planning.

This thesis will review the advantages of partnering with the private sector from the public agency perspective, both at the planning stage and at the procurement/contract stage, and will also consider the concerns that may arise in connection with forming such partnerships. Arguing that the advantages of public-private collaborations, both for the public and private sectors, outweigh any perceived concerns, the thesis will further consider the most effective means by which to memorialize these collaborations, noting the importance of formal contracts, while also acknowledging that greater contract flexibility is needed to effectively respond to the dynamic nature of disasters, whether natural or man-made. This thesis will provide a reference to the most representative of the states’ laws currently in effect with regard to emergency procurement as well as emergency management in order to demonstrate that the requisite statutory authority generally exists to support increased public-private collaborations at all phases of emergency management. Some states have more expressly and explicitly supported private-sector collaboration than others, arguably making such collaborations more feasible in certain jurisdictions than others. Accordingly, this thesis will ultimately offer a model policy framework for consideration and integration, in whole or in part, into each state’s respective statutory framework to enhance the legal support for increased collaboration with the private sector on a nationwide basis, to the extent such reform is necessary, desired and politically feasible. This policy is based on the author’s review of the various relevant statutory provisions governing emergency procurement and emergency management services.

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<sup>80</sup> Schultz and Søreide, “Corruption in Emergency Procurement,” 516.

### III. EMERGENCY MANAGEMENT IN THE UNITED STATES: A HISTORICAL PERSPECTIVE

The touchstone of emergency preparedness and management in the United States is NIMS. DHS issued NIMS on March 1, 2004, in response to Congress' expressed need for a "common incident management system" in the Homeland Security Act of 2002.<sup>81</sup> NIMS is the operational arm of the NRP.<sup>82</sup> In that regard, NIMS provides the framework and sets the required national industry emergency planning standard under which emergency management and response personnel and their affiliated organizations work together to implement preparedness initiatives.<sup>83</sup> NIMS' emergency response standard provides for a well-researched and planned nationwide preparedness template for all states, which allows for coordinated and effective emergency management and incident response actions.<sup>84</sup> To that end, NIMS espouses a "continuous cycle of planning, organizing, training, equipping, exercising, evaluating, and taking corrective action" and stresses a response plan that optimizes "the combined efforts of all participants," both public and private.<sup>85</sup> In fact, the NRF is clear that "[g]overnment resources alone cannot meet all the needs of those affected by major disasters" and further states that the NIMS framework calls for both public and private stakeholders to be "activated, engaged, and integrated to respond to a major or catastrophic incident."<sup>86</sup> In fact, in the context of a federally-declared emergency, adoption of NIMS is a pre-condition for federal assistance in the emergency preparedness context, at the risk of agencies losing federal grant

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<sup>81</sup> Lydia R. Wilson, J.D., MA, CPP and Robert McCreight, Ph.D., "Public Emergency Laws and Regulations: Understanding Constraints and Opportunities," *Journal of Homeland Security and Emergency Management* 9, no. 2, art. 7 (October 2012): 9, accessed February 22, 2016, doi:10.1515/1547-7355.2034.

<sup>82</sup> *Ibid.*; Nicholson, "Emergency Management and Law," 253-54, 257.

<sup>83</sup> "Preparedness"; Wilson and McCreight, "Public Emergency Laws and Regulations," 9.

<sup>84</sup> Lynn, "Mutual Aid: Multijurisdictional Partnerships for Meeting Regional Threats," vii; "Preparedness"; "National Incident Management System," FEMA, accessed January 28, 2016, <https://www.fema.gov/national-incident-management-system#>; United States Department of Homeland Security, *National Response Framework*, 3.

<sup>85</sup> "Preparedness"; United States Department of Homeland Security, *National Response Framework*, 4.

<sup>86</sup> United States Department of Homeland Security, *National Response Framework*, 4.

funding.<sup>87</sup> Under such pre-condition, state and local organizations must develop an Emergency Operations Plan or Incident Action Plan to prepare for and, eventually, manage the eventual emergency or disaster event.<sup>88</sup>

Depending on the severity of the emergency or disaster, the necessary resources and services required to effectively respond to natural or man-made disasters in accordance with the NIMS standard may simply be beyond the abilities of individual jurisdictions; as such, mutual aid and assistance agreements become indispensable for agencies, organizations and jurisdictions to share resources and services, establish responsibilities for disaster response and arrange for emergency assistance.<sup>89</sup> Accordingly, an essential part of the NIMS “common incident management system” framework is EMAC.<sup>90</sup> Congress established EMAC pursuant to its enactment of Public Law 104-321 on October 19, 1996.<sup>91</sup> EMAC provides:

[M]utual assistance between the states...in managing any emergency disaster that is duly declared by the Governor of the affected state, whether arising from natural disaster, technological hazard, man-made disaster, civil emergency aspects of resources shortages, community disorders, insurgency, or enemy attack.<sup>92</sup>

Through its interstate compact mechanism, EMAC essentially augments the federal disaster response system. EMAC has been adopted by all fifty states, the District of Columbia, Puerto Rico, Guam and the United States Virgin Islands.<sup>93</sup>

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<sup>87</sup> “Emergency Preparedness for State Procurement Officials Guide,” National Association of State Procurement Officials (March 2013): 4, accessed January 28, 2016, [www.naspo.org/dnn/portals/16/documents/EmergencyPreparednessforStateProcurementOfficials.pdf](http://www.naspo.org/dnn/portals/16/documents/EmergencyPreparednessforStateProcurementOfficials.pdf); Nicholson, “Emergency Management and Law,” 254, 256-57.

<sup>88</sup> “Emergency Preparedness for State Procurement Officials Guide,” 4.

<sup>89</sup> “Preparedness.”

<sup>90</sup> Ibid.

<sup>91</sup> *Emergency Management Assistance Compact*, Pub. L. No. 104–321, 110 Stat. 3883 (October 19, 1996).

<sup>92</sup> Ibid.; Wilfredo Lopez, Stacie P. Kershner, and Matthew S. Penn, “EMAC Volunteers: Liability and Workers’ Compensation,” *Biosecurity and Bioterrorism: Biodefense Strategy, Practice, and Science* 11, no. 3 (2013): 217–18, accessed January 28, 2016, doi:10.1089/bsp.2013.0040.

<sup>93</sup> Lopez, Kershner, and Penn, “EMAC Volunteers: Liability and Workers’ Compensation,” 217.

EMAC anticipates the execution of various other supplemental aid agreements, which agreements can restrict or expand the existing EMAC provisions, address legal issues not considered by EMAC and provide for cooperation when circumstances “do not rise to the level of [g]overnor-declared emergencies.”<sup>94</sup> This is particularly important because while EMAC provides interstate mechanisms for providing assistance and sharing resources during disasters, it does not provide mechanisms for collaborative “pre-disaster” preparedness initiatives, either interstate, intrastate or with private entities.<sup>95</sup> Instead, states must create and implement preparedness initiatives, both through preparedness plans and formalized contracts for emergency goods and services, to not only brace themselves as best as possible for whatever emergency or disaster may occur, but to also engage in risk reduction or mitigation initiatives to prevent total devastation when that disaster event does occur.

Given that this concept of “mitigation” has become an increasingly more focused directive issued to the states in assembling their emergency management plans, scholars, such as Kiefer, have decided that mitigation is the pivotal point to bring “the private sector into the emergency management system” as the economic stability of a community depends on risk reduction and, consequently, preparedness initiatives to enhance such risk reduction.<sup>96</sup> Others, though, have suggested that the recovery phase is when this collaboration is most effective, as the local partners have the unique knowledge to rebuild the community and most effectively respond to the adverse effects befalling that community after a disaster.<sup>97</sup> While collaborations are important in the recovery stage, the planning stage is necessarily the most critical for the suggested collaborative practices in that this is where risk assessment data is collected, reviewed and analyzed, and plans, procedures, agreements and strategies are developed and integrated into a cohesive protocol that outlines roles, responsibilities and action items to enable an effective

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<sup>94</sup> Lopez, Kershner, and Penn, “EMAC Volunteers: Liability and Workers’ Compensation,” 218.

<sup>95</sup> Gerber and Robinson, “Local Government Performance and the Challenges of Regional Preparedness for Disasters,” 355.

<sup>96</sup> Kiefer, “Recent Trends in Emergency Management,” 7.

<sup>97</sup> Chen et al., “Public-Private Partnerships for the Development of Disaster Resilient Communities,” 132.

response and recovery effort.<sup>98</sup> Accordingly, this “pre-disaster” stage is where states can best utilize private-sector resources to not only identify the necessary resources that must be “at the ready” to respond to whatever disaster may occur, but to also augment their emergency preparedness and management plans.

NIMS, in fact, has recognized the vital role the private sector plays in all phases of emergency management and has encouraged that the private sector be incorporated in the “manage[ment] [of] incidents involving all threats and hazards.”<sup>99</sup> The NRF specifically advocates for the inclusion of private-sector entities by “collaborating with emergency management personnel before an incident occurs to determine what assistance may be necessary and how they can support local emergency management during response operations.”<sup>100</sup> According to the NIMS National Preparedness System, “preparedness efforts involve and affect the whole community” and, as such, preparedness plans must be coordinated with “all parts of the whole community: individuals, businesses, nonprofits, community and faith-based groups, and all levels of government.”<sup>101</sup> The private sector is, thus, well-positioned to fill the emergency management gaps left by relying solely on governmental resources.

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<sup>98</sup> United States Department of Homeland Security, *National Response Framework*, 24.

<sup>99</sup> “National Incident Management System.”

<sup>100</sup> United States Department of Homeland Security, *National Response Framework*, 26.

<sup>101</sup> “Preparedness.”

#### **IV. INCREASED “PRE-DISASTER” PUBLIC-PRIVATE COLLABORATIONS FOR BETTER EMERGENCY MANAGEMENT**

Simply stated, it is impossible for federal, state and local governments to plan and prepare for every possible need, every piece of equipment or service or all necessary personnel to sufficiently respond to and recover from the many possible disaster or emergency situations. States do have certain statutory measures in place to attempt to mitigate against being unprepared, such as required annual updates of emergency response plans and annual inventories of emergency services, goods, personnel and related resources. But, intrastate, and even interstate, planning alone is not sufficient to meet the potential devastation of an event like a 500-year hurricane. Rather, the private sector has to be involved.

##### **A. THE PRIVATE SECTOR AS A SOLUTION TO THE GOVERNMENTAL RESOURCE GAP**

According to Copenhaver in his article, “Integrating the Private Sector in Homeland Security Preparation and Response,” “no state or local government can ignore the private sector, either in its emergency response planning or its response activities.”<sup>102</sup> In fact, the argument in favor of this position provides that “government cannot protect our communities and our homeland either from terrorist threats or natural disasters, without also mobilizing the full support and involvement of the private sector.”<sup>103</sup> Jones confirms that it is inevitable that the government will lack the necessary resources, technology, personnel, experience, expertise and, simply, time to construct and implement all of its emergency preparedness and management protocols.<sup>104</sup> The private sector is the best option to fill this need.<sup>105</sup> It is, after all, the response and recovery of the private business sector of a community that will drive that community’s overall recovery

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<sup>102</sup> Copenhaver, “Integrating the Private Sector in Homeland Security Preparation and Response,” 250.

<sup>103</sup> Ibid.

<sup>104</sup> Jones, “Privatization of Disaster Preparedness,” 99.

<sup>105</sup> Ibid.

following an emergency or disaster.<sup>106</sup> Research has shown the economic damage caused as a result of disasters has increased steadily over the last few years.<sup>107</sup> Moreover, given the increased globalized economy, businesses damaged domestically can have adverse economic effects in other countries and, conversely, domestic businesses housed in “safe” states can be negatively affected by disasters or emergencies that occur in other parts of the world.<sup>108</sup> Thus, private entities have an even greater interest in developing emergency preparedness efforts to support their own “business continuity in the face of natural or man-made disasters.”<sup>109</sup>

The prime advantage for the public sector in partnering with private-sector entities is the public sector’s ability to share in and reap the benefits of a private company’s business continuity plan.<sup>110</sup> Izumi and Shaw confirm that “[t]he greatest strength of the private sector is its abundant resources, expertise and technology.”<sup>111</sup> Stewart, Kolluru and Smith also agree that “[t]he public-private interface offers opportunities for decision makers at all levels of government to build resilience by proactively coordinating and positioning the capabilities of stakeholders to collaboratively manage disaster consequences.”<sup>112</sup> This collaboration allows for the blending of the public accountability of government with the “market-driven” strategies of the private sector to create relationships to better prepare for catastrophes.<sup>113</sup> As disasters affect the whole community, public and private alike, so must the whole

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<sup>106</sup> Copenhaver, “Integrating the Private Sector in Homeland Security Preparation and Response,” 250.

<sup>107</sup> Izumi and Shaw, “Overview and Introduction of the Private Sector’s Role in Disaster Management,” 2.

<sup>108</sup> Ibid.

<sup>109</sup> Stewart, Kolluru, and Smith, “Leveraging Public-Private Partnerships to Improve Community Resilience in Times of Disaster,” 355.

<sup>110</sup> Busch and Givens, “Public-Private Partnerships in Homeland Security,” 5.

<sup>111</sup> Izumi and Shaw, “Overview and Introduction of the Private Sector’s Role in Disaster Management,” 3.

<sup>112</sup> Stewart, Kolluru, and Smith, “Leveraging Public-Private Partnerships to Improve Community Resilience in Times of Disaster,” 344.

<sup>113</sup> Kapucu, Arslan, and Collins, “Examining Intergovernmental and Interorganizational Response to Catastrophic Disaster,” 228.

community be willing to assist in the recovery effort.<sup>114</sup> Indeed, “[d]isasters create an atmosphere wherein organizations from different sectors feel the shared risk and willingly coordinate their shared responsibilities.”<sup>115</sup> This must start in the planning stages to ensure business continuity in the face of a disaster, both for the government and the private sector.

## **B. THE INTEGRATION OF PRIVATE SECTOR BUSINESS CONTINUITY EXPERTISE INTO GOVERNMENTAL EMERGENCY PLANNING**

Business continuity is “[a]n ongoing process to ensure that the necessary steps are taken to identify the impacts of potential losses and maintain viable recovery strategies, recovery plans and continuity of services.”<sup>116</sup> According to Copenhaver, the government’s continuity of operations plan and a private entity’s business continuity plan have the same end goal: “maintaining or quickly restoring functions that are mission-critical to the entities covered by the plans.”<sup>117</sup> Thus, the private sector’s experience in business continuity planning can be integrated with government planning to arrive at a “best practices” continuity response and recovery plan that will benefit all sectors of a community.<sup>118</sup>

Office Depot, for example, has an “in-house” division in place that provides tutorials and tips for small businesses in building their own disaster preparedness and recovery plans, and further sponsors the Business Civic Leadership Center’s National Disaster Help Desk for Business to provide assistance for businesses during disasters.<sup>119</sup> This is exemplary of the NRF’s recognition that “[i]n many cases, private sector organizations have immediate access to commodities and services that can support

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<sup>114</sup> Kapucu, Arslan, and Collins, “Examining Intergovernmental and Interorganizational Response to Catastrophic Disaster,” 229.

<sup>115</sup> Ibid.

<sup>116</sup> National Fire Protection Association 1600, *Standard on Disaster/Emergency Management and Business Continuity/Continuity of Operations Programs* (2016 Edition) (December 2015), 8.

<sup>117</sup> Copenhaver, “Integrating the Private Sector in Homeland Security Preparation and Response,” 253.

<sup>118</sup> Ibid.

<sup>119</sup> Wong, “Talking About Preparedness: Leave No Stone Unturned,” 7.

incident response, making them key potential contributors of resources.”<sup>120</sup> But, imagine if companies like Office Depot were able to offer their expertise on a formalized, statutorily-recognized basis to governmental agencies nationwide so that governments had access to what private-sector resources routinely provide and were able to integrate that expertise into their own emergency-related operations.

The NRF contemplates the foregoing possibility and highlights the following key ways that the private sector can contribute prior to, during and/or after an emergency:

- Addressing the response needs of employees, infrastructure, and facilities
- Protecting information and maintaining the continuity of business operations
- Planning for, responding to, and recovering from incidents that impact their own infrastructure and facilities
- Collaborating with emergency management personnel to determine what assistance may be required and how they can provide needed support
- Contributing to communication and information sharing efforts during incidents
- Planning, training, and exercising their response capabilities
- Providing assistance specified under mutual aid and assistance agreements
- Contributing resources, personnel, and expertise; helping to shape objectives; and receiving information about the status of the community.<sup>121</sup>

The NRF’s projections are reflective of Wal-Mart’s and Home Depot’s application of their respective supply chain management structures to deliver necessary post-Katrina resources to the devastated communities in the Gulf South.<sup>122</sup> The Wal-Mart disaster response model, in particular, highlights the advantages for a public agency in integrating private-sector expertise into its emergency operations plan.

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<sup>120</sup> United States Department of Homeland Security, *National Response Framework*, 11.

<sup>121</sup> Ibid.

<sup>122</sup> Kapucu, Arslan, and Demiroz, “Collaborative Emergency Management and National Emergency Management Network,” 455.

According to its Senior Director of Global Emergency Management, Mark Cooper,<sup>123</sup> Wal-Mart has a corporate EOC in Bentonville, Arkansas as well as division-based EOCs and additional distribution centers that are located in jurisdictions that are considered to be “at high risk.”<sup>124</sup> Wal-Mart further has an “in-house meteorologist who interprets weather data provided by government agencies, like the National Weather Service or the National Oceanic and Atmospheric Administration,” to provide to Wal-Mart decision makers during a disaster event.<sup>125</sup> Moreover, to ensure a consistent supply chain, Wal-Mart requires its suppliers to adhere to certain minimum standards to ensure that necessary goods will be supplied and available for distribution during times of disaster.<sup>126</sup> Wal-Mart also maintains a close working relationship with power companies in order for it to determine the best way to employ alternate power sources to continue its business operations.<sup>127</sup> Most importantly, Wal-Mart has established and maintains relationships with federal, state and local government representatives that allow it to work directly with those governments when disasters occur and resolve many supply and demand issues that arise in such situations.<sup>128</sup> All of the foregoing demonstrates the advantage of increased collaborations between the government and the private sector, and the way in which such collaborations are essential to enhancing community resilience. But, large-scale national corporations cannot solely drive the emergency management effort with government entities. Smaller businesses, equipped with valuable knowledge of the unique needs of their locality, have an important role to play and must be included in the competitive procurement of private-sector resources.

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<sup>123</sup> Jim McKay, “Mark Cooper and Wal-Mart Help Foster Resilient Communities,” *Emergency Management*, February 21, 2012, accessed January 28, 2016, <http://www.emergencymgmt.com/disaster/Mark-Cooper-Wal-Mart-Help-Foster-Resilient-Communities.html>.

<sup>124</sup> “Walmart Takes Collaborative Approach to Disaster Recovery,” *PwC Rebuilding for Resilience*, September 2013, accessed February 19, 2016, <https://www.pwc.com/gx/en/capital-projects-infrastructure/disaster-resilience/assets/pdf/interview-mark-cooper.pdf>.

<sup>125</sup> Ibid.

<sup>126</sup> Ibid.

<sup>127</sup> Ibid.

<sup>128</sup> Ibid.

## 1. The Benefits of Competitive Procurement for the Private Sector

As is evident based on the foregoing, it is much more feasible for large financially successful international companies, like Wal-Mart or Home Depot, to render needed aid or provide assistance to a community in connection with an emergency or disaster. But, smaller and/or local businesses may be more affected by a disaster and, thus, may have greater incentive to participate in and reap the benefits from public-private collaborations if jurisdictions heed the call to enter into contractual emergency preparedness agreements in anticipation of an emergency or disaster. It is then that an agency is best able to afford small and/or locally owned businesses the opportunity to compete for specific contracts through the competitive selection process. At the very least, smaller businesses can be retained by the larger national chains through disadvantaged business enterprise initiatives, which require a certain percentage of the contract work to be performed by “disadvantaged” businesses (i.e., smaller businesses and/or those owned by minorities and/or women).<sup>129</sup>

Egan and Anderson have recognized the importance of each of these business types.<sup>130</sup> Specifically, they posit that while national chains have greater resources, market power and supply chain expertise, smaller businesses “have ties to local neighborhoods, regular customers and a strong interest in getting the doors open.”<sup>131</sup> Of course, the value of the small business is wholly dependent upon the level of devastation wrought upon its community and its ability to reopen its doors and have customers able to buy its goods.<sup>132</sup> But, this is why robust disaster planning, response and recovery efforts that identify community-specific emergency-related goods and services, and allow for the timely competitive procurement of those goods and services are so important.<sup>133</sup>

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<sup>129</sup> City of New Orleans, Chief Administrative Office, *Policy Memorandum No. 46(R) – Policies and Procedures for Disadvantaged Business Enterprise (DBE) Program* (April 26, 2004), accessed January 28, 2016, [http://www.nola.gov/chief-administrative-office/policies/policies/no-46-\(r\)-policies-and-procedures-for-disadvantage/](http://www.nola.gov/chief-administrative-office/policies/policies/no-46-(r)-policies-and-procedures-for-disadvantage/).

<sup>130</sup> Egan and Anderson, “Considerations for a Model of Public-Private Sector Collaboration in the Provision of Disaster Relief,” 6.

<sup>131</sup> *Ibid.*

<sup>132</sup> *Ibid.*, 6–7.

<sup>133</sup> *Ibid.*, 8.

At least statutorily, states generally require their procurement agencies to use the competitive procurement method to ensure that the necessary emergency-related goods and services are in place by the properly procured vendors in enough time to effectively respond to the emergency. For example, Louisiana’s Administrative Code expressly states that “[t]he source selection method used shall be selected with a view to the end of assuring that the required supplies, services, or major repair items are procured in time to meet the emergency.”<sup>134</sup> Its statutory code further states that one of the primary functions of the Governor’s Office of Homeland Security and Emergency Preparedness is to “[s]tudy the feasibility of pre-bidding of contracts to provide for disaster response services...and enter into such contracts deemed to be in the best interest of the state.”<sup>135</sup>

Ideally, a sound preparedness initiative allows a governmental agency to identify its emergency resources beforehand, and then to identify the supplies and equipment that it needs to acquire.<sup>136</sup> As those needed resources are identified, a government emergency manager can begin preparations of public invitations to bid for those resources and engage all interested private-sector participants, both large and small, to compete for public contracts through the competitive selection process. Allowing sufficient time to consider needs and advertise for bids will further benefit the government agency in terms of what the private sector is positioned to offer. In order to “win” the public contract, a private vendor has to submit the best price. According to VanWagner, it is this need to reduce costs that results in private-sector innovations which are then provided for the benefit of the public sector.<sup>137</sup> She reasons that “[t]his need to reduce costs drives the private sector toward innovation—creating new products to increase efficiency, effectiveness, and affordability of their services.”<sup>138</sup>

Indeed, private-sector expertise can be most beneficial in identifying the latest innovations that can best assist in emergency management initiatives and in further

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<sup>134</sup> La. Admin. Code tit. 34, pt. V, §1109.

<sup>135</sup> La. Rev. Stat. Ann. §29:726 (West, Westlaw through the 2015 Regular Session).

<sup>136</sup> McEntire and Myers, “Preparing Communities for Disasters,” 141, 146.

<sup>137</sup> VanWagner, “Privatization of Some Emergency Management Functions—Case Study,” 29.

<sup>138</sup> *Ibid.*

determining which supplies, services and goods would be necessary to meet a disaster or emergency. In fact, Nebraska law permits, as part of its emergency operations plan, “[a]n analysis of past and potential disasters [and] emergencies, including an identification of the functions and resources required to cope with such occurrences,” and encourages expert professional and technical input from the private sector in that regard.<sup>139</sup>

Wilkins presents a valid counterargument to this position in her view that the private sector’s involvement must necessarily be limited by its lack of jurisdiction to address certain administrative duties of public agencies in the context of emergency management, such as law enforcement and public emergency medical issues that may arise during a disaster.<sup>140</sup> But, the private sector’s legal or jurisdictional inability to address every emergency-related need of a particular region does not detract from the value that its expertise can lend to enhance preparedness and mitigation efforts “pre-disaster,” as well as the efficient provision of needed supplies “post-disaster” to aid in response and recovery.<sup>141</sup> As such, collaborations with the private sector must be formulated before a disaster occurs in order to 1) put in place well-researched “whole of community” preparedness plans that are based on both public and private sector “best practices,” and 2) be ready to provide what the government alone cannot during and after a disaster event. As set forth in the next section, state law provides the general framework to support these collaborations and enhance states’ emergency preparedness initiatives.

## **2. The Emergency Management Legal Framework Governing the Integration of Private Sector Resources**

From a statutory perspective, the states have adopted this “collaborative” viewpoint into their emergency management framework. Alabama law is representative of the most general way in which states have provided for the inclusion of the private sector in emergency management. It contains a general statement that allows its local

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<sup>139</sup> Neb. Rev. Stat. Ann. §81-829.41(2)(b) (West, Westlaw through the end of the 1st Regular Session of the 104th Legislature (2015)); Neb. Rev. Stat. Ann. §81-829.41(3)-(4).

<sup>140</sup> Melissa Wilkins, “Case Study—Benefits of Privatization of Emergency Medical Services,” in *The Private Sector’s Role in Disasters: Leveraging the Private Sector in Emergency Management*, ed. Alessandra Jerolleman and John J. Kiefer (Boca Raton: Taylor & Francis Group, LLC, 2016), 43.

<sup>141</sup> *Ibid.*

emergency management directors to enter into mutual aid agreements with other public and private agencies to provide assistance in case of an overwhelming disaster.<sup>142</sup> Similarly, but in a somewhat more precise fashion, Arkansas charges its Department of Emergency Management to “procure and “pre-position supplies, medicines, materials, and equipment[,]” and make surveys of available private resources and enter into appropriate contracts to secure those resources “under terms and conditions agreed upon.”<sup>143</sup> Likewise, other states feature permissive language similar to Alabama and Arkansas, such as Colorado, Delaware, Iowa and Tennessee, whose respective procurement, homeland security and emergency management departments are directed to contract with private entities to carry out the duties of those divisions.<sup>144</sup>

Georgia’s Emergency Management Law, however, contains arguably the most comprehensive representation of the states’ respective stated “purpose” of their emergency management agencies. It provides:

It is further declared...that all emergency management functions of this state be coordinated to the maximum extent with the comparable functions of the federal government, including its various departments and agencies; of other states and localities; and of private agencies of every type, to the end that the most effective preparation and use may be made of the nation’s manpower, resources, and facilities for dealing with any emergency or disaster that may occur.<sup>145</sup>

Ga. Code Ann. § 38-3-6 expands the reach of this purpose in its pronouncement that the statutes under the Georgia Emergency Management title be “liberally construed” in order to “effectuate their purposes.”<sup>146</sup> Hawaii’s Emergency Management Law more

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<sup>142</sup> Ala. Code §31-9-9(a) (West, Westlaw through Act 2015–559 of the 2015 Regular, First Special and Second Special Sessions).

<sup>143</sup> Ark. Code. Ann. §12-75-111(a)(2),(7),(8) (West, Westlaw through 2015 Reg. Sess. and 2015 1st Ex. Sess. of the 90th Arkansas General Assembly, including changes made by the Ark. Code Rev. Comm. received through November 1, 2015).

<sup>144</sup> Colo. Rev. Stat. Ann. §24-33.5-1604(1)(c)(II), (5)(a) (West, Westlaw through the First Regular Session of the 70th General Assembly (2015)); Del. Code Ann. tit. 20, §3107 (West, Westlaw through 80 Laws 2015, ch. 194); Iowa Admin. Code r.11-117.5(8A) (West, Westlaw through January 5, 2016); Tenn. Code Ann. §58-2-102(b) (West, Westlaw through end of the 2015 First Reg. Sess.).

<sup>145</sup> Ga. Code Ann. §38-3-2(b) (West, Westlaw through the Regular Session of the 2015 Legislative Session). (Emphasis supplied).

<sup>146</sup> *Ibid.*

specifically integrates the federal directive to partner with the private sector with its addition of the phrase “and with private-sector and nonprofit organizations” to the above-stated list of coordinating agencies.<sup>147</sup> Moreover, it arguably expands the liberal construction intent evidenced in the majority of the states’ laws by stating that “in construing this chapter, due consideration shall be given to the circumstances as they exist from time to time.”<sup>148</sup> It, thus, stands to reason that, in Hawaii, certain circumstances could ostensibly broaden the involvement of the private sector for emergency management purposes. Indeed, the generality of the language leads the practitioner to reasonably rely on this language to justify the privatization of a myriad of governmental emergency-related functions, depending on the needs and desires of the agency. In fact, the accompanying language found later in the same statute confirms the breadth of the statute’s reach to encompass initiatives to:

Sponsor and develop mutual aid plans and agreements for emergency management between the State, one or more counties, and other governmental, private-sector, and nonprofit organizations, for the furnishing or exchange of food, clothing, medicine, and other materials; engineering services; emergency housing; police services; health, medical, and related services; firefighting, rescue, transportation, and construction services and facilities; personnel necessary to provide or conduct these services; and such other materials, facilities, personnel, and services as may be needed.<sup>149</sup>

Florida, which also encourages private-sector involvement more specifically than other states, expressly directs its emergency management agency to:

[A]scertain the requirements of the state and its political subdivisions for equipment and supplies of all kinds in the event of an emergency; plan for and either procure supplies, medicines, materials, and equipment or enter into memoranda of agreement or open purchase orders that will ensure their availability.<sup>150</sup>

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<sup>147</sup> Haw. Rev. Stat. §127A-1(b) (West, Westlaw through Act 243 [End] of the 2015 Regular Session).

<sup>148</sup> Haw. Rev. Stat. §127A-1(c) (West, Westlaw through Act 243 [End] of the 2015 Regular Session).

<sup>149</sup> Haw. Rev. Stat. §127A-12(b)(4) (West, Westlaw through Act 243 [End] of the 2015 Regular Session).

<sup>150</sup> Fla. Stat. Ann. §252.35(g) (West, Westlaw through the 2015 1st Reg. Sess. and Special A Session of the Twenty-Fourth Legislature).

The California legislature, though, seems to have made the most precise and express support of collaboration with the private sector for emergency management purposes. Specifically, it has made the express acknowledgment that “this state can only truly be prepared for the next disaster if the public and private sector collaborate.”<sup>151</sup> California’s emergency management laws specifically encourage the inclusion of private businesses in the state’s preparedness initiatives, and support the integration of “private sector emergency preparedness measures into governmental disaster planning programs.”<sup>152</sup> The law further enables the California Emergency Management Agency to “[d]evelop programs so that businesses and government can work cooperatively to advance technology that will protect the public during disasters.”<sup>153</sup> Based on a review of this representative statutory language, there seems to be an overwhelming recognition of the need and desire for the private sector’s involvement in emergency preparedness and management initiatives. This review of the enabling statutory language further reveals that the legislation necessary to support the integration of this assistance is already largely in place. So, for those agencies that have not fully embraced the private-sector collaboration concept, what is holding them back?

### **3. Privatization: Its Advantages and Pitfalls**

Considering the foregoing discussion, it may seem that public-private collaborations have only positive implications; however, the research reveals a resistance with regard to overzealous governmental integration with the private sector. Indeed, while Adler, Petty and Randall point to governmental budget concerns as a justification for increased privatization of traditional governmental services, such as emergency preparedness and management, other scholars have countered that such expanded privatization “represents an assault on traditional relays of democratic accountability.”<sup>154</sup> Gotham specifically argues:

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<sup>151</sup> Cal. Gov’t. Code §8588.1 (West, Westlaw through all 2015 Reg. Sess. laws, and Ch. 1 of 2015–2016 2nd Ex. Sess.).

<sup>152</sup> Ibid.

<sup>153</sup> Ibid.

<sup>154</sup> Adler, Petty, and Randall, “Public Procurement: Past, Present and Future,” 449; Gotham, “Disaster, Inc.: Privatization and Post-Katrina Rebuilding in New Orleans,” 634.

Privatization especially in the realm of emergency management policy and disaster recovery services raises several issues fundamental to notions of civil society, community, and citizenship. By providing assistance to communities affected by disasters, the state aids its citizens, asserts its power, and reproduces its sovereignty. In shifting emergency management responsibilities from government to market, privatization addresses disaster victims not as citizens and members of an aggrieved community but as atomized customers, clients, and consumers. In doing so, privatization obscures liability and accountability for problematic post-disaster outcomes, and disarticulates public purposes from post-disaster recovery and rebuilding activities.

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In addition, privatization prioritizes the goals and interests of private companies and allows such groups to use public resources and power to achieve what are essentially private aims.<sup>155</sup>

It is important to put Gotham's view in context, though. His analysis was conducted in connection with the post-Katrina out-of-control spending by multinational corporations that did not have scoped statements of work included in the contractual terms, nor negotiated terms and conditions that appropriately regulated the parties' relationship or oversight responsibilities.<sup>156</sup> As will be discussed further, Gotham's argument, while contrary to the view of the need for increased public-private collaborations, actually provides the precise reasoning for why formalized contracts between the parties are necessary and why emergency "no-bid" procurements can become dangerous.

Moreover, contrary to Gotham's view, the categorization of "disaster victim" as a "citizen," "customer," "client," or "consumer" should not be mutually exclusive. In fact, perhaps victims would be better served if they were treated as customers or clients, as opposed to citizens. Urby and McEntire reference the "new public management" form of government that applies market-based operations to provide the community with the best products for the best prices, and includes performance-driven benchmarks in its contractual agreements with private vendors.<sup>157</sup> Especially in the emergency context, this

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<sup>155</sup> Gotham, "Disaster, Inc.: Privatization and Post-Katrina Rebuilding in New Orleans," 635.

<sup>156</sup> *Ibid.*, 637–38.

<sup>157</sup> Urby and McEntire, "Applying Public Administration in Emergency Management," 54.

form of government would most realistically be the most effective in that the response to a disaster or emergency will be judged based on the results of the emergency management strategy. As such, the emergency-related contracts should be constructed in a way that ensures those results to the maximum extent possible. On the other hand, like Gotham, Urby and McEntire also laud the advantages of the “new public service” model of government in which the goal is to serve “citizens” and not “customers” through building relationships of trust and creating a collaborative environment between the government and citizens as well as among citizens themselves.<sup>158</sup> In support of their position, Urby and McEntire specifically state that this model is in line with FEMA’s “Whole Community” approach which fosters a collaborative approach in order to understand the capabilities of and resources available across the community.<sup>159</sup>

While the latter approach would be most advantageous in the preparedness/planning stages when the experts are meeting around the emergency management table, engaging in theoretical management discussions, and crafting the overarching emergency management strategy, this thesis stands for the proposition that the actual contractual agreements with private vendors must be bid and negotiated with an eye toward serving the “customer” (i.e., “citizen”) with the best emergency response goods and services possible at the best prices. Accordingly, it stands to reason that the public service model works best at the preparedness/planning stage while the public management model should apply to the contracting/negotiation stage. In fact, disregarding the concept of treating the citizen as a valued customer arguably provides the foundation for a public agency to devalue the importance of competitive procurement, which ensures its “customers” get the “best product” for the “best price” and, instead, rely on the “no-bid” exception in the emergency context. But, as is demonstrated below, overuse or overreliance on this exception could subject a public agency to a host of dangers, including the total loss of the public’s (i.e., its “customer’s”) trust.

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<sup>158</sup> Ibid., 56.

<sup>159</sup> Ibid., 56–57.

### C. THE EMERGENCY “NO BID” EXCEPTION TO COMPETITIVE PROCUREMENT AND THE DANGER IT POSES

Competitive procurement methods require private firms to compete to provide the best quality products at the best prices in the most efficient and effective way to a community.<sup>160</sup> Conversely, in “no-bid” emergency procurements, governmental agencies essentially have to purchase whatever is available at whatever price is available. Negotiating a deal at this point is wholly untenable given the rapid response needed in an emergency. Accordingly, “no-bid” emergency contracts leave a governmental entity and its citizens vulnerable to high prices, low quality, exploitation and fraud.<sup>161</sup> In fact, Gotham cautions that increased privatization will only provide a vehicle for private entities to capitalize on the rapid need for resources and to treat disasters as “money making opportunities.”<sup>162</sup> Schultz and Søreide agree, stating that “as the urgency of an emergency decreases bargaining power anyway, rapid procurement is particularly prone to inflated prices and expenditures.”<sup>163</sup> In addition, “no-bid” arrangements entered into pursuant to emergency exceptions allow the potential for bribery and kickback opportunities for public officials.<sup>164</sup> States’ laws recognize this exception and encourage as much competition as is practicable in an emergency; however, the laws’ various discretionary catchall language arguably invites opportunities for abuse that should be acknowledged and guarded against.

It is a well-accepted tenet of law that adherence to mandatory competitive procurement rules is waived for the purchase of goods and services required in an emergency situation when prompt purchase action becomes necessary for health and safety reasons.<sup>165</sup> What qualifies as an emergency so as to justify a waiver of statutory law varies somewhat from state to state, but all states are consistent that an emergency is

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<sup>160</sup> Gotham, “Disaster, Inc.: Privatization and Post-Katrina Rebuilding in New Orleans,” 640.

<sup>161</sup> *Ibid.*

<sup>162</sup> *Ibid.*

<sup>163</sup> Schultz and Søreide, “Corruption in Emergency Procurement,” 518 (differentiating between those “pre-disaster” competitively bid contracts with private companies and unanticipated requirements that require “rapid acquisitions” like “transportation, fuel and specialized supplies such as winterized tents.”).

<sup>164</sup> *Ibid.*, 519.

<sup>165</sup> Oakes, “Competitive Bidding.”

not an “oops, we forgot to purchase X or Y.” As succinctly stated by the Rhode Island legislature, “[i]nadequate anticipation of need shall not be considered justification for ‘emergency’ purchases.”<sup>166</sup> Simply, “poor planning is not an emergency.”<sup>167</sup>

Based on a review of all states’ emergency procurement laws, the dispositive quality of a qualifying event is that which is a threat to public health, welfare, and safety. Certain states, such as Ohio and Kentucky, include “an interruption in utility services” in their consideration of qualifying events.<sup>168</sup> Georgia allows even more flexibility, defining “emergencies” to include those “arising from any unforeseen causes, including delay by contractors, delay in transportation, breakdown in machinery, unanticipated volume of work, or upon the declaration of a state of emergency.”<sup>169</sup> Other states, like Connecticut and Delaware, include a qualifier that emergencies must be “those extraordinary conditions or contingencies that cannot reasonably be foreseen and guarded against.”<sup>170</sup> Certain courts that have considered this qualifier have ruled that “an occurrence or condition is unforeseen when it is not anticipated, when it creates a situation which cannot be remedied by exercise of reasonable care, or when it is fortuitous.”<sup>171</sup> Kentucky law arguably provides the most comprehensive description of circumstances that qualify as an “emergency:”

An emergency condition is a situation which creates a threat or impending threat to public health, welfare, or safety such as may arise by reason of fires, floods, tornadoes, other natural or man-caused disasters, epidemics, riots, enemy attack, sabotage, explosion, power failure, energy shortages,

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<sup>166</sup> R.I. Admin. Code §2-7-1.9.6.3 (West, Westlaw through amendments received through December 31, 2015).

<sup>167</sup> Ricardo G. Martinez and Brad Shepley, California Department of General Services, *Emergency Acquisitions Guide 2015* (February 2015), 12, accessed January 28, 2016, <http://www.documents.dgs.ca.gov/pd/eProcurement/DGSEmergencyAcquisitionsGuide.pdf>.

<sup>168</sup> Ohio Department of Administrative Services General Services Division, “Emergency Purchases,” *State of Ohio Procurement Handbook for Supplies and Services* (July 2014): 72, accessed January 28, 2016, [https://procure.ohio.gov/pdf/PUR\\_ProcManual.pdf](https://procure.ohio.gov/pdf/PUR_ProcManual.pdf).

<sup>169</sup> Ga. Code Ann. §50-5-71 (West, Westlaw through amendments received through December 31, 2015).

<sup>170</sup> Conn. Agencies Regs. §4a-52-20 (West, Westlaw through material published in Conn.L.J. through January 26, 2016); Del. Code Ann. tit. 29, §6907 (West, Westlaw through 80 Laws 2015, ch. 194).

<sup>171</sup> *Civil Service Employees Ass’n, Inc. v. O’Rourke*, 660 N.Y.S.2d 929, affirmed in part 659 N.Y.S.2d 794, leave to appeal denied 90 N.Y.2d 808, 664 N.Y.S.2d 270, 686 N.E.2d 1365 (1997).

transportation emergencies, equipment failures, state or federal legislative mandates, or similar events. The existence of the emergency condition creates an immediate and serious need for services, construction, or items of tangible personal property that cannot be met through normal procurement methods and the lack of which would seriously threaten the functioning of government, the preservation or protection of property, or the health or safety of any person.<sup>172</sup>

Regardless of the type of emergency, though, an “[e]mergency procurement shall be limited to only those supplies, services, or major repair items necessary to meet the emergency.”<sup>173</sup> Also, no matter the type of emergency, the general statutory law mandates as much competition as possible “to the extent practicable under the circumstances.”<sup>174</sup> North Carolina “encourages” negotiation with emergency vendors for the “best price possible” even when purchasing agencies are acting under the exception to competitive procurement.<sup>175</sup> Likewise, under its emergency exception to competitive procurement, Pennsylvania mandates the solicitation of “at least two bids” if “practical.”<sup>176</sup> Nevada’s law attempts to prevent price-gouging common in “no-bid” procurements in the context of emergency personal safety equipment, and provides:

3. The purchase of personal safety equipment for use by a response agency or any other local governmental agency is not subject to the requirements of this chapter for competitive bidding, as determined by the governing body or its authorized representative, if:

(a) The personal safety equipment will be used by personnel of the response agency or other local governmental agency in preventing, responding to or providing services of recovery or relief in connection with emergencies, acts of terrorism or other natural or man-made disasters

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<sup>172</sup> Ky. Rev. Stat. Ann. §45A.095(3) (West, Westlaw through the end of the 2015 regular session).

<sup>173</sup> La. Admin Code. tit. 34, pt. V, §1105 (West, Westlaw through rules published in the Louisiana Register dated November 20, 2015) (generally, similar, if not identical, is included in states’ statutory law).

<sup>174</sup> Alaska Stat. §36.30.310 (West, Westlaw through the 2015 First Regular Session through Third Special Session of the 29th Legislature) (which contains the representative general language viewed in states’ laws).

<sup>175</sup> North Carolina Department of Administration, Division of Purchase and Contract, *North Carolina Procurement Manual* Version 3 (May 2013), 35, accessed January 28, 2016, [http://www.pandc.nc.gov/documents/Procurement\\_Manual\\_5\\_8\\_2013\\_interactive.pdf](http://www.pandc.nc.gov/documents/Procurement_Manual_5_8_2013_interactive.pdf).

<sup>176</sup> 62 Pa. Cons. Stat. Ann. §516 (West, Westlaw through 2015 Regular Session Acts 1 to 66, 68 to 70).

in which the health, safety or welfare of those personnel may be compromised, impaired or otherwise threatened; and

(b) The cost of the personal safety equipment is comparable to the cost of similar personal safety equipment that is available for purchase by the public.<sup>177</sup>

In a further attempt to ameliorate the possibility for abuse, Illinois law includes a clear temporal restriction to its emergency exception to competitive procurement. Specifically, it provides that “the term of the emergency purchase shall be limited to the time reasonably needed for a competitive procurement, not to exceed 90 calendar days.”<sup>178</sup> It allows for that contract to exceed the 90-day limit “if the chief procurement officer determines additional time is necessary” and the “contract scope and duration are limited to the emergency.”<sup>179</sup> Rhode Island uses the term “immediate response to the dysfunctional emergency” in its limitation of the emergency “no bid” procurement, and expressly prohibits any contract beyond that “immediate response,” specifically stating that any commitments beyond the “immediate restoration of function” must be competitively procured.<sup>180</sup> Mississippi law limits the term of an emergency contract to no longer than one year.<sup>181</sup>

Even with this language, though, procurement officials have much discretion in utilizing exceptions to competitive procurement. For example, Kansas law allows for an exception to competition when “in the judgment of the director of purchases and the head of the acquiring state agency, not seeking competitive bids is in the best interest of the state.”<sup>182</sup> Also, Mississippi includes in its definition of “emergency” the very general set

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<sup>177</sup> Nev. Rev. Stat. Ann. §332.115(3)(a)-(b) (West, Westlaw through the end of the 78th Regular Session (2015) and 29th Special Session (2015) of the Nevada Legislature and subject to revision and classification by the Legislative Counsel Bureau). Emphasis supplied.

<sup>178</sup> 30 Ill. Comp. Stat. Ann. 500/20-30(a) (West, Westlaw through P.A. 99–495 of the 2015 Reg. Sess.).

<sup>179</sup> Ibid.

<sup>180</sup> R.I. Admin. Code §2-7-1.9.6.4 (West, Westlaw through amendments received through December 31, 2015).

<sup>181</sup> Miss. Code Ann. §31-7-13(k) (West, Westlaw through the End of the 2015 Regular Session).

<sup>182</sup> Kan. Stat. Ann. §75-3739 (West, Westlaw through laws enacted during the 2015 Regular Session of the Kansas Legislature). Emphasis supplied.

of circumstances “when the delay incident to obtaining competitive bids could cause adverse impact upon the governing authority or agency, its employees or citizens.”<sup>183</sup> It is, thus, obvious how the application of such catchall statutory language triggers transparency concerns as it allows for an arguably arbitrary justification of what is in the best interest of the state based solely on that which is presented by the head procurement official(s). Florida law lays bare the “on the books” commitment to transparency, but the concomitant opportunity for abuse when in a real-time emergency situation. It provides the protocol for utilizing the emergency exception and sets forth the following, in pertinent part:

(a) The agency head determines in writing that an immediate danger to the public health, safety, or welfare or other substantial loss to the state requires emergency action. After the agency head signs such a written determination, the agency may proceed with the procurement of commodities or contractual services necessitated by the immediate danger, without receiving competitive sealed bids, competitive sealed proposals, or competitive sealed replies. However, the emergency procurement shall be made by obtaining pricing information from at least two prospective vendors, which must be retained in the contract file, unless the agency determines in writing that the time required to obtain pricing information will increase the immediate danger to the public health, safety, or welfare or other substantial loss to the state. The agency shall furnish copies of all written determinations and any other documents relating to the emergency action to the department. A copy of the written statement shall be furnished to the Chief Financial Officer with the voucher authorizing payment.<sup>184</sup> **However, the Governor’s order, under its emergency management powers may waive even the obligation to comply with emergency procurement procedures.**<sup>185</sup>

It becomes clear by these discretionary exceptions that it is in these “no-bid” rapid emergency procurement situations that the aforesaid price-inflation, corruption, bribery and fraud vulnerabilities can occur, especially when these residual provisions provide for catchall deviations from competitive procurement, which permits any “best interest of the

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<sup>183</sup> Miss. Admin. Code §27-1:3-206.02(f) (West, Westlaw through the Mississippi Administrative Rules Listing of Filings, December 2015). Emphasis supplied.

<sup>184</sup> Fla. Stat. Ann. §287.057(5)(a) (West, Westlaw through the 2015 1st Reg. Sess. and Special A Session of the Twenty-Fourth Legislature).

<sup>185</sup> Fla. Stat. Ann. §252.36 (West, Westlaw through the 2015 1st Reg. Sess. and Special A Session of the Twenty-Fourth Legislature). Emphasis supplied.

state” reason that “could have” an adverse impact on the state as an acceptable justification. Other residual provisions provide for even further opportunities for deviance when they allow for additional exceptions from competitive procurement law based upon “contrary language contained by local home rule charter” or as “approved by county ordinance.”<sup>186</sup>

Resorting to these exceptions could not only lead to contracts with either an official’s “preferred” vendor or whoever is available in an emergency, it can also result in the creation of Gotham’s “vendor opportunism” situation.<sup>187</sup> Girth agrees, describing such a situation as that in which “contractors take advantage of their position as a preferred provider, recognizing the government is compromised in its ability to replace that contractor.”<sup>188</sup> In the face of a contractor’s failure to perform, “the government can be held hostage, unable to sanction (and therefore harm their only provider) and unable to maintain contract accountability.”<sup>189</sup> As an additional matter, it warrants mentioning here that in a federally-declared emergency situation, FEMA reimbursement rules require that contracts with private vendors must be cost-controlled, cost-effective and competitively procured, which supports the agency’s commitment to public transparency.<sup>190</sup> As such, rampant overuse of the “no-bid” emergency exception as a substitute for “pre-disaster” procurement planning can prohibit a jurisdiction’s ability to qualify for reimbursement from FEMA in the context of a federally-declared disaster. Preparation, planning and competitive bidding reduces the need for “no-bid” emergency purchases, thereby reducing the possibility for fraud and corruption.<sup>191</sup>

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<sup>186</sup> Schultz and Søreide, “Corruption in Emergency Procurement,” 521; N. M. Stat. Ann. §13-1-98, 13-1-98.2 (West, Westlaw through the end of the First Special Session of the 52nd Legislature (2015)).

<sup>187</sup> Gotham, “Disaster, Inc.: Privatization and Post-Katrina Rebuilding in New Orleans,” 640.

<sup>188</sup> Girth, “A Closer Look at Contract Accountability,” 327.

<sup>189</sup> Ibid.

<sup>190</sup> Gotham, “Disaster, Inc.: Privatization and Post-Katrina Rebuilding in New Orleans,” 640.

<sup>191</sup> Ernest A. Abbott, “Representing Local Governments in Catastrophic Events: DHS/FEMA Response and Recovery Issues,” in *A Legal guide to Homeland Security and Emergency Management for State and Local Governments*, ed. Ernest B. Abbott and Otto J. Hetzel (Chicago: ABA Publishing, 2005), 227–28; Gotham, “Disaster, Inc.: Privatization and Post-Katrina Rebuilding in New Orleans,” 640.

The concerns cited regarding privatization and “vendor opportunism” that could result from overuse of the “no-bid” emergency exception to competitive procurement can be ameliorated by a greater commitment to the competitive procurement procedure with the assistance of private-sector expertise. This expertise will not only allow for a more robust preparedness initiative, but a more thoughtful procurement process through which all reasonably foreseeable goods and services are timely procured and positioned prior to a disaster event. There must be accountability and oversight assurances governing this collaborative process, though, which can be confirmed through the execution of formal contractual agreements between the parties.

#### **D. FORMAL CONTRACTING AS AN ARGUABLE CURE TO PRIVATIZATION AND THE “NO-BID” EMERGENCY EXCEPTION CONCERNS**

Aside from the stated benefits that the private sector brings to bear in the emergency preparedness and management context, the research shows that it is the strength of the relationship between the public and private sectors that will dictate the effectiveness of their collaborative disaster preparedness and the success of their coordinated response and recovery efforts.<sup>192</sup> But, the relationship cannot be built on trust alone; rather, “government contracting entails some level of tension between the contractor and the purchasing organization.”<sup>193</sup> In fact, “absence of this tension and overreliance on trust can foster a situation in which the public manager reduces or neglects oversight duties, allowing the contractor to take advantage of the purchasing organization.”<sup>194</sup>

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<sup>192</sup> Frazier Wilson, “A Strategic Approach to Response and Recovery,” in *The Role of Business in Disaster Response: A Business Civic Leadership Center Report*, United States Chamber of Commerce (2012): 11, accessed January 28, 2016, <https://www.uschamberfoundation.org/sites/default/files/publication/ccc/Role%20of%20Business%20in%20Disaster%20Response.pdf>; Kathy Snyder et al., “Maryland Businesses Get Their Stake in Emergency Response,” *The Role of Business in Disaster Response: A Business Civic Leadership Center Report*, United States Chamber of Commerce (2012): 14, accessed January 28, 2016, <https://www.uschamberfoundation.org/sites/default/files/publication/ccc/Role%20of%20Business%20in%20Disaster%20Response.pdf>.

<sup>193</sup> Girth, “A Closer Look at Contract Accountability,” 325.

<sup>194</sup> *Ibid.*

## 1. Formal Contracts as Mechanisms for Accountability

Formalized negotiated contracts, executed prior to the crisis occurring, between governmental agencies and their private vendors that set forth performance objectives and responsibilities, as well as management and oversight responsibilities, ensure the balance of trust and tension between the parties. They further support the argument in favor of the increased role of the private sector in governmental functions, and undercut stated criticisms, as they ideally delineate “who is responsible for what” and they “ensure the accountability of public programs and the expenditure of public funds.”<sup>195</sup>

Indeed, as reviewed in the context of a post-Katrina study of “what went wrong” published by the *Public Administration Review*, the authors determined that the lack of coordination in the Katrina response efforts was partly due to the lack of formal contracts with private vendors for the provision of necessary goods and services, which led to confusion as to with whom to work and who had the authority over such relationships during and after the hurricane.<sup>196</sup> This ultimately led to the failure of those private partners to provide necessary supplies and services timely, if at all.<sup>197</sup> Moreover, as confirmed by NASPO, establishing a contract with private vendors prior to a disaster “will help to ensure that the quality and level of support that will be required is clear and [will] help to establish pricing agreements in order to prevent price gouging during disasters.”<sup>198</sup> This contractual relationship further strengthens the interdependency between the public and private sector.<sup>199</sup> To be sure, “[i]f one partner does not perform its objectives in an interdependent relationship, the other is bound to fail as well.”<sup>200</sup> Therefore, to confirm that the necessary resources will be available in the event of a

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<sup>195</sup> Kettl, “The Job of Government,” 220.

<sup>196</sup> Koliba, Zia, and Mills, “Accountability in Governance Networks,” 216.

<sup>197</sup> Ibid.

<sup>198</sup> “Emergency Preparedness for State Procurement Officials Guide,” 11.

<sup>199</sup> Kapucu, Arslan, and Collins, “Examining Intergovernmental and Interorganizational Response to Catastrophic Disaster,” 230.

<sup>200</sup> Ibid.

disaster, it is preferable that those resources be secured by “agreed-upon rules and norms” (i.e., formal, written and, thus, enforceable, contractual agreements).<sup>201</sup>

Some argue that informal agreements are more advantageous in order to foster flexible public-private collaborations in the face of a disaster, especially when rapid decisions need to be made.<sup>202</sup> In fact, those same scholars argue that such informal agreements augment community resilience by allowing private partners to provide resources as the need occurs, rather than having a strict contractual “checklist” of terms and conditions.<sup>203</sup> In fact, despite its criticism of the lack of “pre-disaster” contracts, the *Public Administration Review’s* post-Katrina study suggests that having stringent contractual requirements can actually hinder a response effort as such requirements can impede a response to unforeseen events.<sup>204</sup> For example, if a jurisdiction’s emergency medical services department contracts with a private vendor for certain emergency medical supplies and then, during the disaster, it is discovered that additional supplies are needed that were not included in the original contract, its terms need to be flexible enough to allow for the addition of those supplies.

Consider also the situation in which there is no written contract, only an informal agreement, and the private contractor simply pulls out of its “obligation” to provide certain emergency services during a disaster response effort. A government is left with even further decreased resources to fill ever-increasing citizen needs. Prager describes this exact situation in his article “Contracting Out Government Services: Lessons from the Private Sector,” in which he puts forth the example of contracting out emergency hospital services: “[i]f the staff pulls out, the community is left in the lurch.”<sup>205</sup> Prager actually recommends parceling out the contract in favor of a number of private providers,

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<sup>201</sup> Schaeffer and Loveridge, “Toward an Understanding of Types of Public-Private Cooperation,” 171; Stewart, Kolluru, and Smith, “Leveraging Public-Private Partnerships to Improve Community Resilience in Times of Disaster,” 347.

<sup>202</sup> Stewart, Kolluru, and Smith, “Leveraging Public-Private Partnerships to Improve Community Resilience in Times of Disaster,” 347.

<sup>203</sup> Ibid.; Kapucu, Arslan, and Demiroz, “Collaborative Emergency Management and National Emergency Management Network,” 455.

<sup>204</sup> Koliba, Zia, and Mills, “Accountability in Governance Networks,” 216.

<sup>205</sup> Prager, “Contracting Out Government Services,” 181.

thus providing alternatives in case of a failure.<sup>206</sup> Prager's recommendation supports the case for multi-award as well as cooperative purchasing contracts. While many states have legislated that such contracts should only be awarded to the minimum number of contractors as necessary to meet the need,<sup>207</sup> the possible danger(s) that could occur should a party pull out of an interdependent relationship without a contract for the other party to legally enforce highlights their advantages.

This argument is valid and identifies an actual problem in the event unanticipated goods and services become necessary that were not a part of the bid or included in the contractual agreement's scope of work. But, such flexibility does not have to come at the expense of a formalized written contract. The contract can be structured in such a way so as to provide a mechanism for the provision of certain additional emergency response supplies upon mutual agreement of the parties and set forth a protocol for the acquisition of same, in accordance with the applicable competitive procurement law and the contractual terms governing the protocol for amending the document. The District of Columbia has actually codified a potential gap-filling solution to this exact issue, which states that "[a] contract procured on an emergency basis shall not be modified to expand the scope or extend the time of the procurement unless a limited number of additional goods or services are needed to fill an on-going emergency requirement until regular procurement action procedures can be completed."<sup>208</sup>

Additionally, acknowledging that "disasters create dynamic changing environments,"<sup>209</sup> as emergency managers identify potential needs for emergency response efforts, those managers can create bids or requests for proposals beforehand to secure contracts with vendors to essentially have them "on standby" in the event their goods and/or services are needed during or after a disaster. Prior disaster experience plays

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<sup>206</sup> Prager, "Contracting Out Government Services," 181.

<sup>207</sup> Ark. Code Ann. §19-11-262 (West, Westlaw through 2015 Reg. Sess. and 2015 1st Ex. Sess. of the 90th Arkansas General Assembly, including changes made by the Ark. Code Rev. Comm. received through November 1, 2015).

<sup>208</sup> D.C. Mun. Regs. tit. 27, §1702 (West, Westlaw through District of Columbia Register, Volume 63, Number 3, dated January 15, 2016). Emphasis supplied.

<sup>209</sup> Perry and Lindell, "Preparedness for Emergency Response," 342.

a part here and emphasizes the importance of a preparedness planning initiative in which emergency managers identify needed resources based on previous disaster experiences and draw up “still need” lists based on those experiences.<sup>210</sup> As referenced previously, Nebraska law has specifically contemplated such forecasting and statutorily encourages “[a]n analysis of past and potential disasters [and] emergencies” in order to identify “the functions and resources required to cope with such occurrences.”<sup>211</sup> Such preparedness initiatives allow emergency contracts to include the purchase of as many reasonably foreseeable resources as possible, and have certain vendors “on standby,” thereby reducing the need to secure a contractor or amend a contract “mid-disaster.” Essentially, what may be lost in flexibility is gained in safeguarding against scandal, exploitation and fraud.<sup>212</sup>

Some state agencies, like in California, utilize the shorter, more easily readable pre-formatted MOUs to engage emergency-related services from private vendors. In fact, Brubaker lists the many states that utilize the vendor-friendly MOU framework for disaster-specific goods and services, and specifically recognizes that California was one of the first to contract with a private vendor, namely, the California Grocers Association, which provided for a representative of that group to be present at the state EOC during a disaster to expedite the provision of food and water to citizens.<sup>213</sup> It is important to note that while a MOU may be the most convenient option, and certainly preferable to no contract at all, it is still more of a general template and may not apply to every collaborative relationship with a government’s private partners. Thus, agencies must remain cognizant of their emergency needs and enter into properly negotiated contracts that meet those needs and are responsive to the unique or particular circumstances of each collaborative relationship.

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<sup>210</sup> McEntire and Myers, “Preparing Communities for Disasters,” 146.

<sup>211</sup> Neb. Rev. Stat. §81-829.41(2)(b).

<sup>212</sup> Adler, Petty, and Randall, “Public Procurement: Past, Present and Future,” 453.

<sup>213</sup> Jacqueline Brubaker, “Private Sector’s Role in Emergency Response,” in *The Private Sector’s Role in Disasters: Leveraging the Private Sector in Emergency Management*, ed. Alessandra Jerolleman and John J. Kiefer (Boca Raton: Taylor & Francis Group, LLC, 2016), 122.

Another possible solution is borrowed from the public sector's on-going "team building" initiative.<sup>214</sup> This initiative allows the parties to the collaboration to engage in recurring brainstorming, checklists, diagrams and other techniques by which the parties can account for the expected, as well as the unexpected, emergency-related needs, and put together a contractual framework that sets forth protocols to govern as much as is reasonably foreseeable.<sup>215</sup> This initiative could also prove useful in anticipating and planning for contractual amendments that become necessary as a result of these activities that would prove beneficial when the actual emergency or disaster occurs. But, these contracts should not only be responsive to the reasonably foreseeable needs attendant an emergency situation, they should also account for the responsibilities of each of the parties in an effort to mitigate liability to the greatest extent possible.

## **2. Formal Contracts as "Litigation Mitigation"**

To be sure, formal contracts are necessary to clearly outline each party's responsibilities as to the coordinated disaster response effort contemplated by the agreement and, also, to ensure accountability in the provision of goods and equipment in accordance with the terms and conditions of the contract.<sup>216</sup> As noted by Wilson and McCreight in their review of public emergency laws and regulations, "[e]mergency managers have enough to worry about without becoming legal experts on top of other tasks."<sup>217</sup> Moreover, according to Nicholson, "in spite of the fact that the law creates emergency management, in general the understanding of emergency managers and lawyers may be described as mutual ignorance. Some are not even aware that their activities are governed by both federal and state law."<sup>218</sup> Often times in the emergency management context, lawyers get called in after the business relationship has begun, to

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<sup>214</sup> Negron, "Use Team Building to Make the Most of Your Public-Private Partnerships," 132.

<sup>215</sup> *Ibid.*

<sup>216</sup> Busch and Givens, "Achieving Resilience in Disaster Management," 7-8; Pongsiri, "Regulation and Public-Private Partnerships," 489.

<sup>217</sup> Wilson and McCreight, "Public Emergency Laws and Regulations," 1.

<sup>218</sup> Nicholson, "Emergency Management and Law," 254.

“put out the fire.”<sup>219</sup> But, if lawyers get called in at the beginning, to craft the contract to head off the “fire” as much as possible, all parties would be best served and, most importantly, the public would benefit from as seamless a contractual performance as possible, given the previously negotiated terms and conditions outlining the expectations.<sup>220</sup> These “pre-disaster” contracts are, as Nicholson calls them, “litigation mitigation.”<sup>221</sup>

Arguably, attorney involvement at the beginning of this process, and the resultant negotiations process that will inevitably follow, could delay the ultimate execution of the contract and the pre-positioning of the goods and/or services. But this possibility is all the more reason for emergency managers to use all available resources, from both the public and private sectors, to identify those reasonably foreseeable goods and services that may become necessary during an emergency event in enough time to allow for the contract negotiations process. Planning is the key here, as in all emergency management tasks. Indeed, just as emergency management professionals engage in planning activities to mitigate against the adverse effects of disasters as much as possible, so too must they engage in mitigation activities to limit liability in the face of those same disasters.<sup>222</sup>

Formal contracts also allow the parties to expressly identify the management and oversight responsibilities of the various parties to the relationship. Essentially, private employees will be working for their private employer but to the ultimate benefit of the public agency with which that employer is contracting. As such, it is imperative to identify and contractually establish a mutually agreeable chain of command and management structure to guide the efficient provision of goods and services contemplated by the contract.<sup>223</sup> Moreover, while a private partner may have the responsibility to provide certain goods or services, the public perception is that the government is ultimately responsible for emergency response and recovery; thus, the government must

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<sup>219</sup> Nicholson, “Emergency Management and Law,” 255–56.

<sup>220</sup> Ibid.

<sup>221</sup> Ibid., 255.

<sup>222</sup> Ibid., 255–56.

<sup>223</sup> Busch and Givens, “Achieving Resilience in Disaster Management,” 15; Pongsiri, “Regulation and Public-Private Partnerships,” 491.

have a legally enforceable means by which to confirm the accountability of its partners and be accountable to its constituents.<sup>224</sup> As articulated by Busch and Givens in their review of public-private partnerships in disaster management, “when government understands that it can count on firms to provide government with goods or services during disasters, this enables government to focus on other strategic planning priorities, as it reduces the number of resource procurement decisions that the government must make in the midst of a crisis.”<sup>225</sup> Additionally, clearly delineating the obligations of each of the parties obviates the possibility that government representatives will “micromanage” the private partner with which they are doing business, thereby increasing the private sector’s willingness to enter into contractual relationships with governmental entities.<sup>226</sup> But, is contractual “confirmation” of responsibilities enough to ensure contractor performance in accordance with the terms and conditions of the contract? As set forth below, the research suggests that contractual measures alone will not assure such accountability.

### **3. The Argument for the Most Effective Confirmation of Contractor Performance**

Commentators have suggested that the accountability benefits of a formalized contract may be overstated, arguing that the threat of contractually-imposed sanctions for failure to adhere to the agreed-upon protocols will not deter a contractor’s substandard performance or failure to perform.<sup>227</sup> Moreover, they posit that it may be more costly for a governmental agency to enforce such contractual sanctions and, as a result, will simply opt to forego enforcing such provisions.<sup>228</sup> Instead, they offer the counterargument that the known reliance of the public on a contractor’s promised services serves as a more effective guarantee of contract performance, as opposed to a contract and its negative

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<sup>224</sup> Pongsiri, “Regulation and Public-Private Partnerships,” 491.

<sup>225</sup> Busch and Givens, “Achieving Resilience in Disaster Management,” 5.

<sup>226</sup> Pongsiri, “Regulation and Public-Private Partnerships,” 491.

<sup>227</sup> Girth, “A Closer Look at Contract Accountability,” 318.

<sup>228</sup> *Ibid.*, 322–24.

threat of sanctions.<sup>229</sup> According to that logic, a contractor’s successful completion of its performance under a contract can lead to a favorable public relations “campaign” for the private vendor who provides effective emergency response supplies and services to the community (i.e., its “customers”) in an emergency situation.<sup>230</sup> While a governmental agency will arguably bear the brunt of a poorly handled emergency response effort,<sup>231</sup> in the opposite instance, the credit for a successful response effort will be publicly known and proper credit given, both to the public and private agencies responsible.<sup>232</sup> Ideally, citizens will feel loyalty to and will patronize those private businesses who helped to revitalize their community, thus increasing the businesses’ sales. As Rakesh Bharania, Network Consulting Engineer for Cisco Systems, has stated, “[t]he private sector has...a vested interest in seeing the timely recovery of disaster-affected communities.”<sup>233</sup> Izumi and Shaw agree, stating that a business’ contributions to a public agency’s emergency preparedness and response efforts “can be an important part of a business’ community investment initiatives.”<sup>234</sup> Ideally, successful collaborative efforts will allow the private company to:

- Protect its own business, value chain, customers, and staff
- Build reputation and demonstrate good citizenship
- Enhance government relationships
- Influence stakeholder perceptions
- Improve staff motivation and retention
- Provide new business opportunities that create shared value<sup>235</sup>

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<sup>229</sup> Girth, “A Closer Look at Contract Accountability,” 324.

<sup>230</sup> Kapucu, Arslan, and Collins, “Examining Intergovernmental and Interorganizational Response to Catastrophic Disaster,” 240; Koliba, Zia, and Mills, “Accountability in Governance Networks,” 213.

<sup>231</sup> MacManus and Caruson, “Financing Homeland Security and Emergency Preparedness,” 63.

<sup>232</sup> Kapucu, Arslan, and Collins, “Examining Intergovernmental and Interorganizational Response to Catastrophic Disaster,” 229.

<sup>233</sup> Bharania, “Using Expert Networking Knowledge to Assist Communities in Crisis Resilience,” 31.

<sup>234</sup> Izumi and Shaw, “Overview and Introduction of the Private Sector’s Role in Disaster Management,” 5.

<sup>235</sup> Ibid.

But, there are disincentives for a private company to even choose to do business with the government in any context. One concern cited by the research against public-private collaborations is the idea of transparency that is necessary for governmental agencies in their business operations. By agreeing to do business with the government, the private entities are essentially agreeing to open their books and business practices, to a certain extent, for public viewing. Busch and Givens, as well as Schaffer and Loveridge, point out that such transparency may put that private business at a disadvantage in the competitive business market if certain information, like its price points, is publicly disclosed for all to see and for competitors to under-bid.<sup>236</sup> Busch and Givens also cite the financial disincentives for private firms in doing business with the government, given that it is based on a low-bid structure.<sup>237</sup> Pongsiri further cautions that private firms may be hesitant to enter into business relationships with governmental agencies if governmental regulation of private activities are not clearly defined and if the roles and responsibilities of each of the parties are not clearly defined, as private entities do not want to be micromanaged.<sup>238</sup> On the other hand, Waddock, Bodwell and Graves, like Girth, Bharania, Kapucu, Arslan and Collins cited above, suggest that private firms may find that the positive public relations benefit of providing assistance to a community in times of disaster may supersede the concerns of the transparency issue as well as any negative financial effects of a low-bid pricing structure that are not offset by the production of more efficient products to meet governmental needs.<sup>239</sup>

Arguments for or against increased privatization in the context of emergency management aside, the research is overwhelmingly clear that in the event such collaborations are implemented, they should be memorialized in a formal contract, so as to ensure the accountability of each of the parties to the greatest extent possible. Trust cannot solely be relied upon to confirm that the parties will do as they “promise.” The dynamic nature of an emergency event must be considered, to be sure. But, that should

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<sup>236</sup> Busch and Givens, “Public-Private Partnerships in Homeland Security,” 13; Schaeffer and Loveridge, “Toward an Understanding of Types of Public-Private Cooperation,” 172, 174.

<sup>237</sup> Busch and Givens, “Public-Private Partnerships in Homeland Security,” 13.

<sup>238</sup> Pongsiri, “Regulation and Public-Private Partnerships,” 491.

<sup>239</sup> Waddock, Bodwell, and Graves, “Responsibility: The New Business Imperative,” 136.

not detract from the necessity of a legally binding document that protects both parties in a dynamic environment that requires performance in the event one fails to adhere to the agreed-upon terms and conditions of that contract. In fact, the dynamic nature of an emergency event is all the more reason for the private sector to fill a more important role, beyond that of a collaborator, in the overall emergency management enterprise. As set forth in the next section, the private sector should be a true partner with the government in all phases of its emergency management initiatives to create and implement more robust preparedness and management protocols.

## **V. THE PRIVATE SECTOR AS MORE THAN A COLLABORATOR; RATHER, AS A TRUE EMERGENCY MANAGEMENT PARTNER**

Emergency management is not just informal planning and then drawing up documents evidencing those plans; rather, it is the coordination of the overall strategy to manage identifiable risk and to oversee of the implementation of that strategy.<sup>240</sup> At a time when governmental agencies continue to experience budgetary shortfalls while at the same time face the ever-increasing need and pressure to “successfully” protect their citizens from emergency events or “successfully” help their communities to recover from such events, a “whole of community” collaborative approach must be implemented for emergency management.<sup>241</sup> Adler, Petty and Randall note the trend that the role of government is shifting from a “provider” of goods and services to one of an “administrator” or “manager” of contracts with private sources who provide those goods and services.<sup>242</sup>

### **A. THE CROSS-DISCIPLINE CROSS-SECTOR APPROACH TO EMERGENCY MANAGEMENT**

Given the shifting trend of the government’s role in the provision of goods and services, especially in the context of emergency management, the question that necessarily arises is whether this managerial or administrative position should be with a government’s emergency management department, the procurement department or an emergency procurement consultant retained specifically for emergency/disaster contracting purposes. Adler, Petty and Randall advocate for an enhanced procurement office, stating that “procurement offices are ideally suited to lead strategic efforts related to state business transactions and supplier relationships.”<sup>243</sup> They explain:

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<sup>240</sup> Urby and McEntire, “Applying Public Administration in Emergency Management,” 44.

<sup>241</sup> Adler, Petty, and Randall, “Public Procurement: Past, Present and Future,” 449; Urby and McEntire, “Applying Public Administration in Emergency,” 56–57; Kapucu and Hu, “Understanding Multiplexity of Collaborative Emergency Management Networks,” 4.

<sup>242</sup> Adler, Petty, and Randall, “Public Procurement: Past, Present and Future,” 451.

<sup>243</sup> *Ibid.*, 452.

At times this may require procurement offices to contract...to augment knowledge gaps in existing staff. The role of internal procurement staff will broaden and become more valuable as they manage and tailor deliverables into a public contracting vehicle that optimizes outcomes for the state agency and complies with public procurement statutes.<sup>244</sup>

Indeed, “[p]rocurement organizations that fulfill this role will transition from a reactive status using traditional transactional approaches to a more proactive strategy seeking system-oriented results that are designed to reduce costs in government operations, streamline processes and optimize contract outcomes.”<sup>245</sup>

Klima and Jerolleman discuss an “all hands on deck” approach similar to that proposed above in the context of risk reduction, hazard mitigation and climate adaptation, but their recommendation is equally applicable here to support private-sector integration at the “pre-disaster” planning stage. Specifically, Klima and Jerolleman make the argument that, to be effective, natural hazard mitigation needs a more unified and coherent approach that involves a variety of disciplines, from both the public and private sectors, to ensure a “best practice” approach, as opposed to silo partnerships that often occur (i.e., architects working with city planners on building code issues and civil engineers working with local public officials to design drainage systems).<sup>246</sup> They posit that the approaches of various disciplines to hazard mitigation allows for the recognition of all foreseeable risks as well as investment in “long-term community well-being.”<sup>247</sup> Indeed, “[s]uccessful hazard mitigation breaks the cycle of destruction, rebuilding, and destruction again.”<sup>248</sup> Thus, by connecting the silo disciplines of emergency management, hazard mitigation and climate adaptation, real risk reduction can become actualized and resilience a reality.<sup>249</sup> Likewise, connecting the private and public sector approaches to emergency preparedness and management can provide similar benefits.

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<sup>244</sup> Adler, Petty, and Randall, “Public Procurement: Past, Present and Future,” 451.

<sup>245</sup> *Ibid.*, 452.

<sup>246</sup> Klima and Jerolleman, “Bridging the Gap: Hazard Mitigation in the Global Context,” 2.

<sup>247</sup> *Ibid.*, 3.

<sup>248</sup> *Ibid.*, 5.

<sup>249</sup> *Ibid.*, 5–6.

In the planning stages of emergency preparedness, the NRF identifies as “critical” the development of “operational plans at the Federal level and in the states and territories that adequately identify critical objectives based on the planning requirements.”<sup>250</sup> These plans include a “complete and integrated picture of the sequence and scope of the tasks to achieve the objectives,” which “are implementable within the time frame contemplated in the plan using available resources.”<sup>251</sup> This calls for “creative thinking about resource shortfalls.”<sup>252</sup> Kapucu and Hu state that horizontal emergency management collaborations, such as the public-private collaborations discussed here, allow for this creativity as well as greater flexibility in sharing ideas and resources.<sup>253</sup>

Izumi and Shaw discuss a possible solution in the form of an informal “forum,” such as a chamber of commerce meeting or similar platform, pursuant to which private-sector stakeholders can share experiences and knowledge with government and non-government entities.<sup>254</sup> Wild cites several examples of these collaborative forum-type initiatives, trainings and workshops that are being implemented in various states with positive results.<sup>255</sup> She specifically cites an annual symposium in Tulsa, Oklahoma that features collaborative information sessions and workshops between local government and the business community, which provides a foundation for public-private collaborations to enhance emergency preparedness efforts.<sup>256</sup> Kachgal also lauds Rhode Island’s 2014 initiative in which the Providence Emergency Management Agency, the Rhode Island Emergency Management Agency and the Northeast Disaster Recovery Information X-

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<sup>250</sup> United States Department of Homeland Security, *National Response Framework*, 20.

<sup>251</sup> *Ibid.*

<sup>252</sup> Nicholson, “Emergency Management and Law,” 255.

<sup>253</sup> Kapucu and Hu, “Understanding Multiplexity of Collaborative Emergency Management Networks,” 5.

<sup>254</sup> Izumi and Shaw, “Overview and Introduction of the Private Sector’s Role in Disaster Management,” 6.

<sup>255</sup> Wild, “Continuity of Operations and Business Continuity,” 285.

<sup>256</sup> *Ibid.*

Change formed the Rhode Island Business Alliance as a form of public-private commitment to enhance emergency response initiatives.<sup>257</sup>

While these may be valuable moves forward toward better emergency preparedness and risk mitigation initiatives, this thesis suggests that more can be done, both on a nationwide and on a more formal basis. Specifically, this need can be filled by allowing the private sector to occupy a specific place and have a decisive voice on agencies' emergency management committees and in the creation of agencies' emergency preparedness and management plans. The NRF has specifically promulgated that “[d]uring an incident, key private sector partners should have a direct link to emergency managers and, in some cases, be involved in the decision making process.”<sup>258</sup> It follows, though, that private vendors must have knowledge of the region or locality that they are advising. Indeed, Schultz and Søreide make the additional argument that emergency corruption can be reduced through strengthening the internal procurement expertise of a particular procurement unit in the planning phase of emergency preparedness.<sup>259</sup> This expertise is gained by knowing the relevant landscape and the beneficiaries of the goods and services.

Private sector stakeholders can provide procurement units with this specialized knowledge because it is their business operations that are “out there” in the community. Their businesses depend on knowing their customers and anticipating their needs. Thus, as stated, depending on the level of the relevant agency, private stakeholders should be representative of the national, regional, statewide and local communities. Not only will governments benefit from the private sector's supply chain expertise, as previously demonstrated, but also their local knowledge.<sup>260</sup> Local companies know their region's

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<sup>257</sup> Julie Kachgal, “Maximize Existing Resources with Your Public-Private Partnerships,” in *Emergency Management and Disaster Response Utilizing Public-Private Partnerships*, ed. Marvine Paula Hamner et al. (Hershey: IGI Global, 2015), 272.

<sup>258</sup> United States Department of Homeland Security, *National Response Framework*, 10.

<sup>259</sup> Schultz and Søreide, “Corruption in Emergency Procurement,” 526.

<sup>260</sup> *Ibid.*, 526–27.

unique risks and unique needs.<sup>261</sup> Schultz and Søreide confirm, “corruption occurs because procurement specialists are ignorant of the local market dynamics, as well as cultural norms. Local staff should to the extent possible mirror the diversity of society at large.”<sup>262</sup> This will translate into well-researched, competitively procured emergency-related contracts that will truly make the “no-bid” emergency exception a procurement method of last resort.

As another example of a way to more formally collaborate with the private sector, Bartle and Korosec support a concept posited by NASPO (i.e., that of the “problem-oriented bid”), which essentially puts forth an emergency preparedness or management-related problem or issue to private vendors, and then allows the bid responses to encompass the vendors’ respective suggested solutions.<sup>263</sup> While Bartle and Korosec discuss this concept in the specific context of information technology services, and acknowledge that certain states do allow for this process as a cost-saving measure, this concept could potentially prove advantageous in the emergency preparedness context. Specifically, state agencies would advertise an emergency-oriented bid to solicit a solution to a specific emergency-related issue. The “best” (i.e., the most cost-efficient) solution would then be implemented by emergency managers and, ultimately, by procurement officials in the solicitation and execution of emergency-related contracts. Izumi and Shaw specifically endorse the private sector’s potential as a “solution provider” by not only “developing innovative new products” that contribute to disaster risk reduction, but also by participating in the management of the projects utilizing those products.<sup>264</sup>

While this thesis stands for the proposition that any private-sector solicitation should be competitively procured to ensure transparency and “best value” to the government, it is interesting to note that certain states, such as Alabama, do not require

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<sup>261</sup> Izumi and Shaw, “Overview and Introduction of the Private Sector’s Role in Disaster Management,” 7.

<sup>262</sup> Schultz and Søreide, “Corruption in Emergency Procurement,” 527.

<sup>263</sup> Bartle and Korosec, “A Review of State Procurement and Contracting,” 208.

<sup>264</sup> Izumi and Shaw, “Overview and Introduction of the Private Sector’s Role in Disaster Management,” 3.

competitive bidding for “[c]ontractual services and purchases of products related to, or having an impact upon, security plans, procedures, assessments, measures, or systems, or the security or safety of persons, structures, facilities, or infrastructures.”<sup>265</sup> Public officials should be wary of overutilizing such provisions to accomplish the above-stated goals as such would trigger the exact transparency concerns this thesis has highlighted as an inevitable pitfall to the “no-bid” emergency procurement exception. Notwithstanding the method of retaining private partners, though, this discussion lends credence for the stated position that state governments, and their legislatures, as discussed more fully in the next section, recognize the advantageous benefits of private-sector collaborations in the context of emergency management.

## **B. THE EMERGENCY MANAGEMENT LEGAL FRAMEWORK AND THE EMERGENCY MANAGEMENT PARTNER CONCEPT**

A review of the states’ emergency management laws reveals statutory support for the realization of private sector-assisted emergency preparedness and management plans. Among the most representative of these laws is Idaho’s State Disaster Preparedness Act, which authorizes its emergency management bureau to “participate in the development and revision of local and intergovernmental disaster plans.”<sup>266</sup> Idaho law specifically provides that “[i]n preparing and maintaining the state disaster plan, the bureau shall seek the advice and assistance of local government, business, labor, industry, agriculture, civic, and volunteer organizations and community leaders.”<sup>267</sup> Idaho further allows its bureau to “employ or otherwise secure the services of professional and technical personnel to provide expert assistance to political subdivisions, their disaster agencies, and intergovernmental planning and disaster agencies.”<sup>268</sup>

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<sup>265</sup> Ala. Code §41-16-51(a)(15)(1975) (West, Westlaw through Act 2015–559 of the 2015 Regular, First Special and Second Special Sessions).

<sup>266</sup> Idaho Code Ann. §46-1006 (West, Westlaw through end of the 2015 First Regular and First Extraordinary Sessions of the 63rd Legislature).

<sup>267</sup> *Ibid.* (Texas law contains an almost identical mandate. Tex. Gov’t Code Ann. §418.042(b) (West, Westlaw through the end of the 2015 Regular Session of the 84th Legislature)).

<sup>268</sup> *Ibid.*

Arkansas' Emergency Management Law specifically contemplates integrating the private sector to achieve its stated purpose, mandating that the Emergency Management Department "shall employ or otherwise secure the services of professional and technical personnel capable of providing expert assistance to political subdivisions, their local offices of emergency management, interjurisdictional planning, and interjurisdictional offices of emergency management."<sup>269</sup> Likewise, the Illinois Emergency Management Agency encourages the formation of an emergency management advisory committee, which includes both public and private-sector representatives with expertise in all phases of emergency management.<sup>270</sup> Delaware's Emergency Management Agency is legislatively "authorized and directed" to "procure by contract or agency such consulting, research, technical and other services as are necessary for it to carry out its responsibilities under the plan."<sup>271</sup> Kentucky similarly mandates "coordination of all disaster and emergency response by and between [public agencies and]...private organizations or private-sector companies dealing with disaster and emergency response."<sup>272</sup> Likewise, Nebraska law requires its Emergency Management Agency to seek the advice of the private sector in the preparation of its emergency operations plans.<sup>273</sup> Also, Nevada law proscribes the development of comprehensive emergency preparedness and management plans "using the partnership of governmental entities, business and industry, volunteer organizations and other interested persons, for the mitigation of, preparation for, response to and recovery from emergencies or disasters."<sup>274</sup>

In a slightly different, but possibly more forward-thinking context, Mississippi's Emergency Management Agency is charged with "[a]nticipat[ing] trends and promot[ing]

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<sup>269</sup> Ark. Code Ann. §12-75-111(b)(2)(A) (West, Westlaw through 2015 Reg. Sess. and 2015 1st Ex. Sess. of the 90th Arkansas General Assembly., including changes made by the Ark. Code Rev. Comm. received through November 1, 2015).

<sup>270</sup> 20 Ill. Comp. Stat. Ann. 3305/5(e) (West, Westlaw through P.A. 99-495 of the 2015 Reg. Sess.).

<sup>271</sup> Del. Code. Ann. tit. 20 §3107(5).

<sup>272</sup> Ky. Rev. Stat. Ann. §39A.050 (West, Westlaw through the end of the 2015 regular session).

<sup>273</sup> Neb. Rev. Stat. §81-829.41(4).

<sup>274</sup> 2015 Nevada Laws Ch. 69 (A.B. 90) (West, Westlaw approved by the Governor May 14, 2015).

innovations that will enhance the emergency management system.”<sup>275</sup> California supports this trend as well, allowing its emergency management office to:

Conduct outreach programs to encourage business to work with governments and community associations to better prepare the community and their employees to survive and recover from disasters[,]and]

Develop programs so that businesses and government can work cooperatively to advance technology that will protect the public during disasters.<sup>276</sup>

Relevant Montana law features language which declares that it is necessary to “reduce vulnerability of people and communities of this state to damage, injury, and loss of life and property resulting from natural or human-caused disasters” and to “provide a setting conducive to the rapid and orderly start of restoration and rehabilitation of persons and property affected by disasters.”<sup>277</sup> That language coupled with Mississippi’s and California’s anticipatory language realistically supports the argument that there is a national appetite for private-sector preparedness collaborations to the fullest extent possible, especially in the context of cutting-edge innovation and innovative technologies.

This representative review of the existing statutory language provides support for the argument that the states generally allow for the possibility of the private sector to be more involved in emergency management from the initial planning stages. As demonstrated, the private sector has access to resources and cutting-edge technology that are not otherwise available to governmental agencies, and can integrate its resource-based knowledge in that regard to enhance public emergency management plans.<sup>278</sup>

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<sup>275</sup> Miss. Code Ann. §33-15-14(2)(g) (West, Westlaw through the End of the 2015 Regular Session).

<sup>276</sup> Cal. Gov’t. Code §8588.1(c)(2), (4).

<sup>277</sup> Mont. Code Ann. §10-3-101(2)-(3) (West, Westlaw through the 2015 session).

<sup>278</sup> Izumi and Shaw, “Overview and Introduction of the Private Sector’s Role in Disaster Management,” 4 (stating that the private sector can contribute to disaster risk reduction through displaying an “increased focus on innovations that respond to new demands and societal needs.”).

## **VI. POLICY RECOMMENDATIONS**

Based on the research conducted in connection with this thesis project, three distinct policy recommendations have been developed which are designed to guide emergency managers, procurement officials, attorneys for state and local governments, legislators and policymakers in the consideration of whether and how to enhance their respective jurisdictions' emergency management statutory or policy framework. These recommendations are based on the totality of the academic literature reviewed in addition to the various state procurement and emergency management laws currently in effect. The following recommendations may be integrated in whole, or in a piecemeal fashion, depending on the desire of the considering jurisdiction to enhance its public-private collaborative practices, to the extent it is not already doing so to its greatest advantage, as well as on the political and legal feasibility of such integration.

### **A. THE PRIVATE SECTOR AS A TRUE PARTNER IN EMERGENCY MANAGEMENT**

The research reviewed and cited in this thesis is overwhelmingly clear in its message that emergency management is more than just a group of public officials sitting down at a table and hammering out a planning document. Rather, a successful emergency response effort is based on a “solid, vibrant, and holistic emergency management program” that coordinates an overarching strategy on identifying, assessing and managing risk, and that utilizes the input of the “whole community,” public and private partners alike.<sup>279</sup> Accordingly, there must be a seat, if not a collection of seats, at the emergency management committee “table” for private-sector representatives, who will then have a decisive voice in the creation and implementation of that agency’s emergency management plans. This thesis has focused on state law and state agencies; however, these “tables” should be integrated at all levels of government to achieve maximum collaboration for the greatest benefit to the general public. Involving local businesses with local knowledge in the local emergency planning context would better inform the

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<sup>279</sup> Urby and McEntire, “Applying Public Administration in Emergency Management,” 39–40, 42, 44.

local procurement process in terms of identifying the unique needs of a particular community during an emergency and entering into contracts for those unique needs. At the state level, private-sector representatives would ideally possess not only the knowledge regarding a particular state's needs, but also the large-scale business continuity and supply chain expertise that would inform a statewide emergency management and response initiative.

To ensure the utmost transparency in the process of securing the services of these private representatives, and to enhance the public's trust in the process, it is most reasonable that this general policy be implemented through the competitive procurement process (i.e., through a request for professional services). Unlike a straight bid process, where price is the determinative factor, this thesis suggests that a combination of factors should be considered when selecting the private-sector committee members, such as those listed for South Carolina's "Competitive Best Value Bidding" law:

- The cost proposed by the private vendor
- Quality of the service proposed and/or the vendor's technical competency
- Consistency and/or preferred direction of the proposed solution when considered with the state's currently existing emergency management planning documents and/or the state's currently existing strategic plan
- Quality and effectiveness of the business solution and proposed approach
- Industry and program experience
- Prior record of vendor performance
- Vendor expertise with projects of similar scope and complexity
- Proven development methodologies and tools
- Innovative use of current technologies and quality results<sup>280</sup>

An issue arises with regard to the disciplines from which such representatives should be sought. As stated previously, while the majority of states allow for multi-award

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<sup>280</sup> S.C. Code Ann. §11-35-1528 (West, Westlaw through End of 2015 Reg. Sess.).

contracts, some local jurisdictions do not.<sup>281</sup> Accordingly, to the extent that local governments choose not to amend their governing procurement rules to allow for these multi-award contracts, or it is not feasible to do so, it is recommended that sector-specific requests be written and solicited in order to avoid violations of the law. While certain agencies may have certain needs for particular sectors to be included on the emergency management committee, this thesis suggests that some of the more notable for consideration and inclusion are those representatives from the industries of information technology, innovation and/or innovative technologies, emergency management, grocers' associations, business continuity and supply chain management.

## **B. THE EMERGENCY “NO-BID” EXCEPTION AS A TRUE PROCUREMENT METHOD OF LAST RESORT**

While this thesis has criticized the use of the “no-bid” emergency exception present in the competitive procurement rules governing state procurement bodies, it is also cognizant of its value, but only as a procurement method of last resort. The reasoning underlying this statement is based on the hypothesis generated by the research reviewed and cited, which suggests that by implementing a more robust emergency preparedness and management initiative through public-private collaborations, governmental agencies will be able to forecast with a great deal of precision the goods and services that will become necessary during and after a disaster or emergency event. They will then be able to put into place, through the proper competitive procurement mechanisms, the necessary (and negotiated) contracts with selected vendors to provide those services when they are needed. By working with private-sector representatives to develop a proactive overarching emergency management plan, emergency management committees will be able to engage in the competitive procurement process early enough to allow for the necessary time delays for advertisement, response, negotiation and finalization of all contract documents, which will ultimately limit the need for resorting to the emergency exception.

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<sup>281</sup> City of New Orleans, Chief Administrative Office, *Policy Memorandum No. 24(R) – Services and Movable Property Procurements and Purchases* (April 26, 2004): 5–6, accessed January 29, 2016, [http://www.nola.gov/chief-administrative-office/policies/policies/no-24-\(r\)-services-and-movable-property-procurement/](http://www.nola.gov/chief-administrative-office/policies/policies/no-24-(r)-services-and-movable-property-procurement/).

Admittedly, the process of putting together the emergency management committee, creating the proactive plan referenced above, implementing its objectives with regard to competitive procurement, and advertising for and entering into contracts with vendors for the identified goods and services is not an initiative that is able to be solidified and implemented in the short-term. Disasters and emergencies will inevitably occur that will fall under the previous methods of governmental operations. But, beginning the implementation of the proposed structure now, prior to an incident or crisis, will allow for better preparedness and response for future disasters and emergencies, both natural and man-made. Utilizing all resources available to investigate what is needed to effectively respond to an emergency event, and then to act on the results of that investigation will obviate an overreliance on the “no-bid” emergency exception, reduce the potential for economic waste, fraud and exploitation, and truly make the “no-bid” emergency exception a procurement method of last resort.

### **C. AN EMERGENCY MANAGEMENT POLICY THAT EXPLICITLY INTEGRATES THE PRIVATE SECTOR**

In order to encourage the implementation of the policy recommendations contained in this chapter, the states’ respective emergency management policies and/or governing laws should be reviewed and potentially revised to more explicitly encourage collaboration with the private sector and recognize the benefits such collaborations would bring to the general public. Below are the recommended provisions for consideration, which are based on an amalgamation of the states’ emergency management laws reviewed and identified as the most advantageous for such public-private collaborations. This policy may be adopted in whole or in part, either legislatively or as a policy statement by an agency. This policy is by no means intended to be exhaustive, but is rather solely based on the research conducted in connection with this work. The goal is simply to enable an agency to enhance its emergency preparedness and management initiatives, to the extent such enhancement is needed, by that method which is desired and feasible.

- *General Statement:* This state/city/political subdivision/agency can only be truly prepared for the next disaster or emergency if the public and the

private sector collaborate.<sup>282</sup> As such, it is expressly encouraged that all governmental agencies include representatives of private businesses in their emergency preparedness and management initiatives and also integrate private-sector emergency preparedness and management measures into their disaster or emergency planning programs, workshops, training and exercises to the maximum extent possible in accordance with applicable law.<sup>283</sup>

- *Private-Sector Representation on the Emergency Management Committee:* In addition to the governmental representatives on this state/city/political subdivision/agency's emergency management committee, the corresponding procurement unit shall be charged with the procurement of the services of private-sector professional and technical personnel to provide expert advice, assistance, consulting and/or research services to the emergency management committee(s) for the agency requesting such services for the anticipation and identification of necessary emergency-related goods and services as well as trends, innovations and innovative technologies that will enhance the emergency preparedness and management plans and risk assessments of the requesting agency.<sup>284</sup> Such private-sector representatives shall also be selected for the express purpose of providing expert advice, assistance and related consulting services in connection with the preparation, maintenance and implementation of the requesting agency's comprehensive disaster or emergency preparedness and/or management plan(s), which address the emergency management phases of mitigation, preparedness, response and recovery.<sup>285</sup>
- *Information Technology/Innovation Representative:* The requesting agency is expressly encouraged to solicit the professional services of a private-sector expert in information technology and/or technological innovation to be a part of its emergency management committee. Alternatively, the requesting agency is expressly encouraged to form an information technology/technological innovation sub-committee for its emergency management committee. The express purpose of this provision is to allow for the identification and application of those innovative technologies that the private sector has developed or is developing that can 1) be reasonably and feasibly integrated into the agency's emergency preparedness and management framework, and 2) be reasonably and feasibly integrated into developing programs, goods and/or services that will better prepare the general public for disasters and emergencies,

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<sup>282</sup> Cal. Gov't. Code §8588.1.

<sup>283</sup> Ibid.

<sup>284</sup> Miss. Code Ann. §33-15-14(2)(g).

<sup>285</sup> Idaho Code Ann. §46-1006; Ark. Code Ann. §12-75-111(b)(2)(A); 20 Ill. Comp. Stat. Ann. 3305/5(e); Del. Code Ann. tit. 20, §3107(5); Nevada Laws Ch. 69 (A.B. 90).

whether natural or man-made, and that will better protect the general public during and after such disasters or emergencies.<sup>286</sup>

- *Inventory Sub-Committee*: This state/city/political subdivision/agency shall form an emergency inventory sub-committee as part of its emergency management committee for the express purpose of keeping a real-time updated inventory of all emergency preparedness and management-related supplies, medicines, services, materials and equipment, as well as the contracts that provide for same, and be able to provide this information to the relevant procurement unit upon request to allow for the most effective pre-positioning of such supplies, medicines, services, materials and equipment in accordance with the applicable competitive procurement laws and guidelines.<sup>287</sup>
- *Plan to Allow for Competitive Procurement*: The state/city/political subdivision/agency shall, in cooperation with the corresponding emergency management committee(s) and/or sub-committee(s) as well as the corresponding procurement unit, competitively procure the required emergency-related supplies, services, or major repair items in time to meet the disaster or emergency event.<sup>288</sup> The emergency exception to competitive procurement shall only be used as a procurement method of last resort, and only after proper showing to the appropriate governmental representative that the failure to procure the necessary goods or services was not the result of the failure to adequately plan for such need.<sup>289</sup>
- *Testing Emergency Preparedness and/or Management Plans*: The emergency management committee of this state/city/political subdivision/agency shall test periodically, through training exercises, tabletop exercises or otherwise, in accordance with what is reasonable and feasible for the state/city/political subdivision/agency, the plans for emergency-related operations to ensure that the listed tasks and action items of agency employees and representatives are implementable and coordinated, and to allow for revisions to the emergency operations protocol, if necessary.<sup>290</sup>

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<sup>286</sup> Cal. Gov't. Code §8588.1.

<sup>287</sup> Ark. Code Ann. §12-75-111(a)(2),(7),(8).

<sup>288</sup> La. Admin. Code tit. 34, pt. V, §1109.

<sup>289</sup> Haw. Rev. Stat. §127A-12(b)(4); Fla. Stat. Ann. §252.35(g); La. Admin. Code tit. 34, pt. V, §1109.

<sup>290</sup> 2015 Nevada Laws Ch. 69 (A.B. 90).

## VII. CONCLUSION

Increased public-private collaborations are necessary to ensure that as many necessary resources as possible are in place before a disaster to provide during and post-disaster. To be the most effective, these collaborations must take place at the emergency preparedness stage to allow private-sector representatives to share their expertise, resources and innovative technologies with government representatives to allow for the creation of a more effective emergency management plan. Private-sector representatives will also be able to assist procurement agencies in the identification of all reasonably foreseeable emergency-related goods and services far enough in advance to allow for proper competitive procurement, and to avoid overuse of the “no-bid” emergency exception, which could render a jurisdiction vulnerable to inflated prices, exploitation and fraud. To ensure effective and beneficial collaborations, though, it is advisable that such partnerships be memorialized through formal written agreements instead of informal agreements. While flexibility is important, the need for accountability, especially in the face of potentially devastating disasters, outweighs the benefits that informal flexibility may provide.

While state statutory laws governing procurement and emergency management generally support greater collaborations with the private sector in the emergency management context, they can also be enhanced to provide greater legislative support for these collaborations, to the extent there are no political or legal obstacles preventing such enhancement. Implementing the proposed policy, whether in whole or in part, will allow an agency to achieve maximum collaboration and to use all available resources to the greatest degree possible before the disaster occurs. Indeed, by focusing preparedness efforts on partnerships with the private sector, governmental agencies can provide effective emergency resources to their citizens and, in turn, foster community resilience.

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