

*Phe Scw*



# Federal Emergency Management Agency

Washington, D.C. 20472

MAR 25 1993

MEMORANDUM FOR: Richard W. Krimm,  
Acting Associate Director  
State and Local Programs and Support

FROM: *Spence W. Perry*  
Spence W. Perry  
Acting General Counsel

SUBJECT: Authority to Donate Property to State and Local  
Governments For Civil Defense Purposes

Your memorandum of February 9, 1993 asks about the authority of the Director of the Federal Emergency Management Agency (FEMA) to cede property to state and local governments. In particular, you ask whether portions of section 401(d) of the Federal Civil Defense Act allow you to accept equipment and distribute it to State and local governments.

Your memorandum explains that you are interested in providing equipment, such as generators, communications gear, vehicles, ice machines, tenting, field kitchens, portable bathrooms, and water storage containers, which will help State and local governments save lives and protect property before, during, and immediately after disaster situations. You anticipate that FEMA would acquire this equipment from the Department of Defense (DoD), General Services Administration (GSA), or other Federal agencies and departments, or FEMA might use property purchased from Civil Defense appropriations but which is now excess to the agencies needs.

There is authority under the Robert T. Stafford Disaster Relief and Emergency Assistance (Stafford) Act, as amended, 42 U.S.C. §§ 5121-5201, to donate property during or immediately after a major disaster, but not before. Section 401(b) of the Federal Civil Defense Act of 1950 (Civil Defense Act), as amended (50 U.S.C. App. §§ 2251-2303) does not permit donations of surplus personal property to State and local governments, although other sections of that statute do permit matching grants for organizational equipment or leases for certain purposes.

*The FCDA of 1950  
Public Law 920 of the  
81st Congress was  
incorporated in part  
into the Robert T. Stafford Act*

**GCM** 93-3-25A

Richard W. Krimm  
Authority to Donate Property for  
Civil Defense Purposes, page 2

### I. Stafford Act Authorities

Section 403 of the Stafford Act confers authority to provide assistance in the event of a Presidentially declared major disaster:<sup>1</sup>

#### § 5170B. Essential Assistance

##### (a) In general

Federal agencies may on the direction of the President, provide assistance essential to meeting immediate threats to life and property resulting from a major disaster, as follows:

##### (1) Federal resources, generally

Utilizing, lending, or donating to State and local governments Federal equipment, supplies, facilities, personnel, and other resources, other than the extension of credit, for use or distribution by such governments in accordance with the purposes of this Act.

42 U.S.C § 5170B. Section 403 of the Stafford Act clearly authorizes donations of essential supplies and equipment during or immediately following a disaster.

The authority of section 502, "Federal emergency assistance," may be exercised before a disaster, in some limited circumstances (although that authority does not include donations). Under section 501(a), an emergency exists when the President makes a determination, at the request of a Governor, that "the situation is of such severity and magnitude that effective response is beyond the capabilities of the State and the affected local governments and that Federal assistance is necessary." 42 U.S.C. 5191(a).<sup>2</sup>

---

<sup>1</sup> Section 102 of the Stafford Act, "Definitions," distinguishes between an "emergency" and a "major disaster." 42 U.S.C. § 5122(1), (2).

<sup>2</sup> The President may also declare an emergency under section 501(b) of the Stafford Act without a request from a Governor and without regard to the capabilities of the State, whenever the United States exercises exclusive or preeminent responsibility and authority. Section 501(b) provides:

##### (b) Certain emergencies involving Federal primary responsibility

The President may exercise any authority vested in him by section 502 or section 503 [42 U.S.C. § 5192 or § 5193] with respect to an emergency when he determines that an emergency exists for which the primary responsibility for response rests with the United States

Richard W. Krimm  
Authority to Donate Property for  
Civil Defense Purposes, page 3

However, both the request and the declaration may be made before the potential catastrophe causes damage so long as there is a threat of damage. If this were not the case, the words "avert the threat" in the definition of "emergency" would be meaningless.<sup>3</sup>

Section 502 of the Stafford Act provides authority which is similar in some respects, but different in scope:

§ 5192. Federal emergency assistance

(a) Specified

In any emergency, the President may--

(1) direct any Federal agency, with or without reimbursement, to utilize its authorities and the resources granted to it under Federal law (including personnel, equipment, supplies, facilities, and managerial, technical and advisory services) in support of State and local emergency assistance efforts to save lives, protect property and public health and safety, and lessen or avert the threat of a catastrophe.

42 U.S.C. § 5192. Note that section 501(a) authorizes Federal agencies to "utilize" resources, a term which also appears in section 403, but it does not authorize "lending or donating." The clear implication is that, when exercising section 501(a) authority, the assisting agencies will retain title and control over equipment, facilities, and non-consumable supplies.

---

because the emergency involves a subject area for which, under the Constitution or laws of the United States, the United States exercises exclusive or preeminent responsibility and authority. In determining whether or not such an emergency exists, the President shall consult the Governor of any affected State, if practicable. The President's determination may be made without regard to subsection (a).

42 U.S.C § 5191(b).

<sup>3</sup> 42 U.S.C. § 5122(2). Please note that FEMA's disaster assistance regulations contradict this interpretation in one respect. They provide that, "When an incident occurs or threatens to occur in a State, **which would not qualify under the definition of a major disaster**, the Governor ... may request that the President declare an emergency." 44 C.F.R. § 206.35(a) (emphasis added). However, the Stafford Act does not require this result and you might consider changing the regulation.

Richard W. Krimm  
Authority to Donate Property for  
Civil Defense Purposes, page 4

## II. Federal Civil Defense Act Authorities

### A. Acquisitions Through FEMA Appropriations or Interagency Transfers

The Federal Civil Defense Act (Civil Defense Act) authorizes the Director to accept gifts and to donate them to States for civil defense purposes. Section 401(d) of the Civil Defense Act provides:

Sec. 401. For the purpose of carrying out his powers and duties under this Act, the [Director] is authorized to --

....  
....

(d) notwithstanding any other provisions of law, accept gifts of supplies, equipment, and facilities; and utilize or distribute same for civil defense purposes in accordance with the provisions of this Act.

50 U.S.C. App. § 2253(d).<sup>4</sup>

The distribution authority is specifically tied to that which was received as a gift. This section does not apply to property purchased by FEMA with disaster assistance money or civil defense money because the Director has not received a gift in such cases.

Excess personal property<sup>5</sup> which other Federal agencies might

---

<sup>4</sup> The term "Civil Defense" is defined as:

[A]ll those activities and measures designed or undertaken (1) to minimize the effects upon the civilian population caused or which would be caused by an attack upon the United States or by a natural disaster, (2) to deal with the immediate emergency conditions which would be created by any such attack or natural disaster, and (3) to effectuate emergency repairs to, or the emergency restoration of, vital utilities and facilities destroyed or damaged by any such attack or natural disaster....

50 U.S.C. App. § 2252(c).

<sup>5</sup> The regulations implementing the Federal Property and Administrative Services Act distinguish between "excess personal property" and "surplus personal property." "Excess personal property" is defined as "any personal property under the control of any Federal agency which is not required for its needs and the discharge of its responsibilities, as determined by the head thereof." 41 C.F.R. § 101-43.001-6. "Surplus personal property" is "any excess personal property not required for the needs and the discharge of the responsibilities of all Federal agencies, as determined by the Administrator of General Services." 41 C.F.R.

Richard W. Krimm  
Authority to Donate Property for  
Civil Defense Purposes, page 5

transfer to FEMA is controlled by the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. §§ 471-514 and 41 C.F.R., Part 101. Unless there is specific statutory authority for a direct transfer, the disposition of the surplus property is under the control of the Administrator of General Services. Federal agencies are prohibited from obtaining excess personal property for purposes of furnishing such property to grantees, except under regulations issued by the General Services Administration (GSA). 40 U.S.C. § 483(d).<sup>6</sup> GSA regulations provide for donations by FEMA under the Stafford Act (41 C.F.R. § 101-44.105), but there is no provision in the Federal Property Management Regulations (41 C.F.R., Ch. 101) for equivalent donations under the Civil Defense Act. You might want to explore additional regulatory authority with the Administrator of General Services. However, as things stand now, section 401(d) of the Civil Defense Act does not authorize transfers of property to FEMA from other Federal agencies for the purposes of donations under that act.

## B. Other Civil Defense Authorities

### 1. Matching Grants

Other sections of the Civil Defense Act allow donation of certain types of property, but a matching requirement exists.<sup>7</sup> Section 201 enumerates the Director's powers and duties. Subsection (i) contains authority to make financial contributions to the States, but specifically prohibits contributions for personal equipment. Any contribution under this section must be equally matched by the State and it must be for organizational equipment only. 50 U.S.C. App. § 2281(i).

Organizational equipment is defined as:

[E]quipment (1) necessary to a civil defense organization, as distinguished from personal equipment, and (2) of such a type or nature as to require it be financed in whole or in part by the Federal Government. It shall not be construed to include those items which

---

§ 101-43.001-31.

<sup>6</sup> For reference, I have attached copies of 40 U.S.C. §§ 483(d), 484(j), and 41 C.F.R. §§ 101-44.001-11, 101-44.105, 101-44.201, and 101-44.202.

<sup>7</sup> Our office has answered similar questions in regards to generators and vehicles. See the attached memorandums dated August 31, 1990, March 30, 1992, and June 18, 1992.

Richard W. Krimm  
Authority to Donate Property for  
Civil Defense Purposes, page 6

the local community normally utilizes in combating local disasters except when required in unusual quantities plans dictated by the requirements of civil defense plans.

50 U.S.C. App. §2252(d). Generators, vehicles, ice machines, tents, field kitchens, portable bathrooms, and water storage containers fit in the category of "items which the local community normally utilizes in combating local disasters" and, therefore, may not be considered organizational equipment for the purposes of this Act. Neither are they of a type or nature which require federal financing. The general gift language of section 2253(d) cannot be construed to conflict with the more specific prohibitions in this section (§2252(d)).

Subsection (h) does not authorize outright donation either; the language may not be construed in such a way as to ignore Subsection (i) and the equal match requirement. This issue was addressed in the attached memorandum of August 31, 1990 from George W. Watson, Acting General Counsel, to Grant C. Peterson, Associate Director, State and Local Programs and Support.

Subsection (j) allows for the disposal of materials found to be unnecessary or unsuitable for civil defense purposes in the same manner as provided for excess property in the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. § 471-514. See the discussion above, beginning at page 4.

## 2. Leases

The Office of General Counsel has previously approved the lease of civil defense equipment for "civil defense communications and for dissemination of warnings to the civilian population of an attack or natural disaster."<sup>8</sup> FEMA has the authority under section 201 to:

(a) prepare national plans and programs for the civil defense of the United States...;

....

(c) make appropriate provision for necessary civil defense communications and for dissemination of

---

<sup>8</sup> Memorandum of August 31, 1990 from George W. Watson, Acting General Counsel, to Grant C. Peterson, Associate Director, State and Local Programs and Support, p. 2, citing section 201(c) of the Civil Defense Act, 50 U.S.C. App. § 2281(c).

Richard W. Krimm  
Authority to Donate Property for  
Civil Defense Purposes, page 7

warnings of enemy attacks to the civilian population of  
an attack or natural disaster; or

....  
....

(f) publicly disseminate appropriate civil defense  
information by all appropriate means.

50 U.S.C. App. § 2281. Mr. Watson's memorandum of August 31, 1990 advised that, use of the property in question [generators] had to be restricted to those activities authorized in section 201 of the Civil Defense Act and clearly further a civil defense purpose. In a memorandum of April 30, 1992, Mrs. Patricia Gormley, General Counsel, advised Mr. José Bravo, Director of the Caribbean Area Office, that FEMA could lend cargo vans to the Government of the Virgin Islands Territory under section 201 of the Civil Defense Act. In a memorandum of June 18, 1992, Mrs. Gormley explained to Mr. Peterson that, while section 201 authorized loans of equipment, section 401 of the Civil Defense Act could not be construed in a way that ignored the equal match requirement of subsection (i). Copies of these three memorandums are attached.

I understand that equipment loan agreements are administratively cumbersome, but there is no authority in the Civil Defense Act which allows for outright donation of this type of property in these circumstances. If you do decide to pursue the lease route, there are other issues such as liability and hold harmless agreements. We would be happy to work with you further on this issue.

If I can be of further help, please do not hesitate to contact me or Stephanie Ryan of our office.

Attachments:

1. 40 U.S.C. § 483(d)
2. 40 U.S.C. § 484(j)
3. 41 C.F.R. § 101-44.001-11
4. 41 C.F.R. § 101-44.105
5. 41 C.F.R. § 101-44.201
6. 41 C.F.R. § 101-44.202
7. Memorandum of August 31, 1990 from George W. Watson, Acting General Counsel, to Grant C. Peterson, Associate Director, State and Local Programs and Support

Richard W. Krimm  
Authority to Donate Property for  
Civil Defense Purposes, page 8

8. Memorandum of March 30, 1992 from Patricia M. Gormley,  
General Counsel to José Bravo, Director, Caribbean Area  
Office
9. Memorandum of June 18, 1992 from Patricia M. Gormley,  
General Counsel, to Grant C. Peterson, Associate  
Director, State and Local Programs and Support

cc: John McKay  
Dennis Kwiatkowski