Legal duties of emergency management directors and proactive use of contract law

William C. Nicholson, JD

INTRODUCTION

Local and state emergency management (EM) directors have many legal duties. These duties are based on specific EM law and other laws of general application, such as Occupational Safety and Health Administration (OSHA) law, contract law, personnel law, and government ethics law.

They also have the responsibility for purchasing systems and equipment that best meet the needs of their departments while staying within the confines of time and budget. This article will present guidelines for successfully negotiating EM contracts.

STATE EMERGENCY MANAGEMENT LAW

Every state has some form of EM law. Such laws typically relate to:

- setting up a state emergency or disaster management agency,
- specifying state and local organization roles in responding to disasters,
- assigning executive authority to declare a state of emergency,
- explaining special executive powers that result from such a declaration,
- allowing cooperation in the form of mutual aid with neighboring jurisdictions,
- drafting emergency plans and keeping them current,
- compiling and distributing a list of emergency duties for all officials, and
- documenting the chain of command for continuity of government purposes.

State EM statutes often address other aspects of disaster preparedness and response, assigning a broad and varying set of responsibilities to emergency managers. For example, in Indiana, emergency managers fulfill a variety of duties during all phases of EM and are also responsible for preparing and keeping emergency plans current, preparing and distributing a list of emergency duties for all officials, and documenting the chain of command for continuity of government purposes.

The definition of “emergency management” lays out the broad scope of the discipline’s responsibilities. In a general sense, it relates to the preparation for and coordination of all emergency functions other than those designated to military forces or other federal agencies to prevent, minimize, and repair injury and damage resulting from disasters. These functions include firefighting; police services; medical and
health services; rescue; engineering; warning services; communications; radiological, chemical, and other special weapons defense; evacuation; emergency welfare services; emergency transportation; infrastructure protection; and restoration of utility services. As is readily apparent, although the enumerated duties at the state level are limited, their scope is all-inclusive. Keeping EM plans current is another specific responsibility, and the failure to fulfill it may expose the emergency manager and his or her jurisdiction to liability.

**LOCAL EMERGENCY MANAGEMENT ORDINANCE**

The local emergency manager is obliged to understand and obey all relevant local ordinances related to his or her functions. Local EM ordinance serves a number of purposes:

- It “fills in the blanks” in EM state law.
- It creates a structure for governmental EM activities.
- It delineates the local line of succession.
- It specifies grants of emergency authority to the leaders of the unit of government.
- It provides a structure for EM activities.
- It acts as a teaching tool to help public employees understand their roles during a disaster.
- It provides legal support to the emergency operations plan.
- It ensures that proper steps are taken to save lives and protect property.

The local EM ordinance must also comply with the requirements of NFPA 1600 (March/April 2005) and National Incident Management System (NIMS) standards as well as other laws designed to prevent liability.

**CONTRACT LAW: PREVENTING LEGAL CLAIMS REGARDING PRODUCTS AND SERVICES**

Every emergency manager enters into contracts for purchase of goods and services. The basics of contract law are straightforward, consisting of three elements:

1. the offer; e.g., “I will sell you these goods or perform these services for this amount of money”;
2. acceptance; and
3. consideration (the fee paid for the services).

To facilitate mutual understanding, contracts are typically written rather than oral. A written agreement allows both parties to see clearly the subject matter of their bargain.

Difficulties arise when the parties do not have a mutual understanding of exactly what is offered or the nature and character of the consideration. One key thing to remember is that the party that initially drafts the contract will typically end up with a document reflecting his or her desires more than those of the other party. This is why emergency managers should, whenever possible and particularly with expensive purchases, see that their attorney drafts the contract. For some, this step is a given, as many units of government have standardized contracts for purchase of goods or services. Another tack is to take the contractor’s document and use pieces of it in crafting one’s own contract.

Frequently, though, contractors have standard contracts of their own that they will submit as the first draft. They may say that they always use this contract and threaten to walk if it is not used. In such cases, it is not a bad idea to let the contractor walk away from the deal. Remember, for the most part the purchaser has the upper hand in negotiations, because he or she has the money, and the contractor needs the work to prosper.

Sometimes, the contract officer will be tempted to use the contractor’s document as is, because it means
less work for that busy individual. One must be extremely careful in reviewing such texts and be ready to delete unacceptable language. These documents are often worded to contain indemnification requirements, waivers of inadequate performance, arbitration clauses, and other language that dilutes the obligations of the contractor. They may also include requirements that are contrary to state or local law. The emergency manager and his or her attorney or contract officer should carefully scrutinize the contents of standardized contracts, particularly when big-ticket items are involved. Modification of standard language is often in order in such situations.

Performance standards
One key part of drafting a contract for purchase of goods is performance standards. These are particularly important when the items purchased are being custom built. The emergency manager and the field expert need to get together to discuss in detail exactly what is desired and how it is expected to operate when installed. They then need to meet with the attorney or contracting officer to make sure the standards are written into the contract in complete form. If this preparatory step is properly taken, the emergency manager is much more likely to end up with the end product desired.

Sidestepping political pressure in awarding contracts
When purchasing a complex and expensive system, there may be political pressure to award different contracts to various people within the jurisdiction with the goal of “spreading the wealth.” Although this may sound like a good idea, in actuality it could be the cause of unending headaches. When a system such as a communications network is installed, all of its parts must work together properly for it to perform as advertised. If multiple contractors perform the work, they may all point fingers at one another if there is a problem and refuse to cooperate and address it. This can be expensive and politically embarrassing.

One good way to avoid this problem is to insist on a turnkey system with guarantees in the contract that it will perform as advertised prior to acceptance by the purchaser. To help ensure this, it is important to set up a schedule of partial payments that holds back a significant portion (typically 25 to 33 percent) until verification tests, possibly by a third party, have been performed to ensure the entire system functions properly.

When the actual product differs from the contents of a written contract, the party whose expectations are frustrated will have a number of legal options. First, there may be a cause of action for damages or specific performance. Second, the contract may be repudiated or cancelled. Third, if part of the contract has been complied with but some performance is contrary to the contract requirements, there may be payment for partial performance only.

Conclusion
State and local EM personnel have a broad range of duties, not the least of which is reducing their jurisdictions’ risk of liability. Following the contractual safeguards above helps ensure that EM support systems perform optimally and can protect EM departments and officials from potential legal action as well as professional embarrassment.

William C. Nicholson, JD, Adjunct Professor, Widener University of Law; Adjunct Professor, University of Delaware, Newark, Delaware (wcnicholson@widener.edu). Note: This article is for information only and does not constitute legal advice. For legal advice, consult your own attorney.