



OFFICE OF THE COUNTY ATTORNEY

Douglas M. Duncan
County Executive

Charles W. Thompson, Jr.
County Attorney

MEMORANDUM

TO: Gordon Aoyagi, Fire Administrator
Fire & Rescue Service

FROM: Richard H. Melnick *RHM*
Associate County Attorney

DATE: September 28, 2000

RE: Memoranda of Understanding - Federal Agencies

This is in response to your memorandum that I received on August 17, 2000, concerning Memoranda of Understanding ("MOUs") with federal agencies to provide assistance.

ISSUES

In your memorandum, you raise four issues:

1. Identification of the official with authority to execute an agreement;
2. The extent of liability of a federal agency with whom we would enter an MOU;
3. Whether a federal agency may limit its reimbursement obligation to amounts provided by FEMA; and
4. The definition of "emergency".

SHORT ANSWER

The County Executive has the authority to sign agreements for assistance with another jurisdiction, but must not bind the County to provide aid. And only the County Council may execute an agreement for the County to render aid during an emergency. In addition, a federal agency, or the County, may limit its liability to reimbursement of costs. A federal agency's exposure to the County should include all amounts available to the agency. An "emergency" is declared to protect the public welfare from a riot, natural or man-made disaster, or act of war.

FACTS AND ANALYSIS

Based on your correspondence, the MOUs entered by the Montgomery County Fire &

Rescue Service (“MCFRS”) are generally intended for routine mutual aid, to call upon the resources of different government agencies from time-to-time. But they may also be utilized during a declared emergency. For example, a federal agency may need direct assistance. Or the County may need reserve or “back-fill” units during a major incident, or first due response units for fire and rescue assistance when another jurisdiction can respond more quickly.

1. The County Executive has the authority to sign a mutual aid agreement, unless it binds the County to provide aid, or is for rendering aid during an emergency.

The County Executive has the authority to sign these MOUs, but must not bind the County to provide assistance. And only the County Council may execute an agreement for the County to provide assistance during a public emergency.

While the County Executive is authorized to enter into agreements “with any organizations and agencies . . . created for the purposes of establishing emergency plans and procedures, whereunder the county may request assistance from such other organizations and agencies during times of emergency; . . . any such agreement must not bind the county to provide reciprocal assistance to any organization or agency.”¹ Under County law, only the County Council “may enter into agreements with any municipality, county or state or federal agency, or private party, to **render** emergency and supplemental services or fire or police protection **during** a fire, disturbance, or other public emergency that requires extra assistance.”²

The above provisions of law indicate that only the County Council has the authority to enter into reciprocal, mutual aid agreements, if the agreement requires the County to provide supplemental services, **during** a public emergency or otherwise. Therefore, under the provisions of County law, the County Executive may enter into agreements whereby other jurisdictions or agencies provide the County aid, or in which the County agrees, but is not bound, to provide aid. But the County Council must execute any agreement that contemplates that the County is required to provide aid, or will provide aid to other jurisdictions during a public emergency.³

¹Montg. Co. Code, § 2-8 (1994, as amended). (Emphasis added). Note that Maryland law expressly grants the authority to local governments to enter into mutual aid, joint powers, or intergovernmental assistance agreements, in the event or anticipation of an emergency or disaster. These types of agreements should be designed to meet the County’s needs (equipment; supplies; information technology; personnel; etc.) when conditions, events, or occurrences are of such a magnitude or severity that the normal governmental services provided by the County would be insufficient, ill prepared, or inadequate to respond to such an emergency or disaster. See Md Code Ann., art. 16A, §8.

²Montg. Co. Code, § 2-17(d) (1994, as amended). (Emphasis added).

³See definition of “public emergency” at Montg. Co. Code, § 2-17(a)(1)(A)-(C), and in Section 4 below.

2. A federal agency, or the County, may limit liability to reimbursement of costs.

The liability of the federal agency, or the County, generally is governed by provisions of law, which should be included in the agreement itself.

The United States Code Annotated, at Article 42, Section 1856, *et seq.*, applies to reciprocal fire protection between the federal government and other jurisdictions. Section 1856a states in relevant part that “[e]ach such agreement shall include a waiver by each party of all claims against every other party for compensation for any loss, damage, personal injury, or death occurring in consequence of the performance of such agreement. Any such agreement may provide for the reimbursement of any party for all or any part of the cost incurred by such party in furnishing fire protection for or on behalf of any other party.”⁴

The Maryland Annotated Code, at Article 38A, Section 38, governs agreements for the provision of assistance between fire departments and the federal government. Similar to the federal law above, this statute prohibits a fire department from entering an agreement with the federal government for the provision of firefighting or rescue activities on property under the jurisdiction of the United States, unless the agreement includes:

(1) a waiver by each party of all claims against every other party for compensation for any loss, damage, personal injury, or death occurring in consequence of the performance of such agreement; (2) a provision to indemnify and save harmless the other parties to such agreement from all claims by third parties for property damage or personal injury within the limitations prevented by applicable federal law, that may arise out of the activities of the other parties to such agreement; and (3) . . . a provision that entitles the . . . fire department to obtain reimbursement from the appropriate federal authority for all or any part of the cost incurred in furnishing fire protection on property which is under the jurisdiction of the United States, pursuant to applicable federal law.⁵

Note also that a firefighter, who sustains an injury while engaged in an activity to provide aid to the federal government, has as his/her primary remedy any benefits under the Maryland Workers’ Compensation Act, for reimbursement of medical bills, loss of earnings, and disability expenses.⁶

In addition, State law handles these agreements for assistance between MCFRS and the

⁴42 U.S.C.A. §1856a.

⁵Md. Ann. Code art. 38A, §38(c).

⁶Md. Ann. Code, Art. 38A, § 38(d).

federal government, separately from “mutual aid agreements” entered between MCFRS and neighboring jurisdictions.⁷ Under the State statute, a “mutual aid agreement” means “an agreement to establish and carry into effect a plan to assist in extinguishing fires and preserving life and property within this State, the District of Columbia, Virginia, West Virginia, Delaware, or Pennsylvania by providing firefighting, rescue or emergency medical agreement, personnel, and services.”⁸

3. Agreements should not limit the federal government’s exposure to amounts from FEMA

Federal law provides that “[f]unds available to any agency head for fire protection on installations or in connection with activities under the jurisdiction of such agency may be used to carry out the [need for aid] purposes of this subchapter. All sums received by any agency head for fire protection rendered pursuant to this subchapter shall be covered into the Treasury as miscellaneous receipts.”⁹ As noted above, State law requires a provision in the agreement “that entitles the . . . fire department to obtain reimbursement from the appropriate federal authority for all or any part of the cost incurred in furnishing fire protection on property which is under the jurisdiction of the United States, pursuant to applicable federal law.”¹⁰ Therefore, a provision entitling reimbursement from “the appropriate federal agency or authority” is appropriate. As a practical matter, FEMA may be the appropriate federal agency providing the funds; however, our agreements should not limit reimbursement to funds from that agency, since other funds may be available to the agency with whom we are entering the agreement.

⁷See Md. Ann. Code, Art. 38A, § 37.

⁸Md. Ann. Code art. 38A, § 37(a)(3). (The term also includes “a reciprocal agreement” entered into in accordance with § 37 of this article prior to July 1, 1989). Also, under Article 38A, § 37(c), the mutual aid agreement may provide that a party requesting assistance under the agreement indemnifies and saves harmless a party providing assistance from all claims by third parties for property damage or personal injury arising out of mutual aid activities, including travel, of the party providing assistance that occur outside the jurisdiction of the party providing assistance, except that the party requesting assistance need not indemnify the party providing assistance if: (1) the party providing assistance does not cooperate in defending against claims made by third parties; or (2) the claims by third parties arise out of malicious acts of the party providing assistance. The law governing those agreements also has language that a fire, rescue, or emergency medical services entity may not enter into a mutual aid agreement unless the agreement provides that each subscribing party shall waive any and all claims against all other parties to the agreement that may arise out their activities outside their respective jurisdictions under the agreement. Md. Ann Code art. 38A, § 37(d)

⁹42 U.S.C.A. § 1856d. (In addition, 44 CFR Part 151 deals with reimbursement for cost of firefighting on federal property).

¹⁰Md. Ann. Code art. 38A, §38(c)(3).

4. An "emergency" is declared to protect the public welfare during a disaster.

The term "emergency" is defined under State law as: "the threat or occurrence of an enemy attack or any hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, earthquake, landslide, mudslide, snow storm, drought, fire, explosion, act of terrorism, or other catastrophe in any part of the State which requires State emergency assistance to supplement local efforts in order to save lives and protect public health and safety."¹¹ Similarly, the County Code defines "public emergency" as "a riot, a natural or man-made disaster, or an attack or series of attacks by an enemy of the United States."¹² The County Executive has the authority to declare an emergency in Montgomery County, "to protect the public safety and welfare," pursuant to which he/she may "[i]ssue any other order immediately necessary to protect life and property during the declared emergency."¹³ Only the County Executive may proclaim and terminate a public emergency. However, the proclamation of a public emergency may expire by operation of law after a three-day period unless the County Council approves its extension.¹⁴

CONCLUSION

The County Executive may sign an agreement with the federal government, unless it binds the County to provide aid, or contemplates rendering aid during a public emergency. Then, the County Council must execute the agreement. Moreover, the federal government should be required in the agreement to reimburse the County's expenses for providing assistance. This obligation should be for the full amount that the appropriate federal agency has available to pay for the assistance, not just the amount FEMA may pay in an emergency. An "emergency" is defined by County and State law, and is declared to protect the public welfare.

✓ cc: Marc P. Hansen, Chief, General Counsel Division

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¹¹Md. Ann. Code, art. 16A, § 3 (Emphasis added).

¹²Mont. Co. Code, § 2-17(a)(1)(A)-(C)(1994, as amended).

¹³Montg. Co. Code, §§ 2-17(b)(2)(A)-(H); 2-13 (1994, as amended); *see e.g.*, Md. Code Ann., art. 16A, §§ 2, 6 & 10 (conferring emergency powers upon the Governor and executive heads of government bodies of political subdivisions). At the federal level, the President is authorized to declare a national emergency, or an emergency relating to federal property, and the Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1988, authorizes the President to provide federal aid to those stricken by an emergency or disaster.

¹⁴Montg. Co. Code, §2-17 (1994, as amended) (State law allows for a period up to 7 days, but the County law limits the period to 3 days).