

FEDERAL ADVANCED CONTRACTS
ENHANCEMENT ACT

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

S. 979

TO AMEND THE POST-KATRINA EMERGENCY MANAGEMENT
REFORM ACT OF 2006 TO INCORPORATE THE RECOMMENDATIONS
MADE BY THE GOVERNMENT ACCOUNTABILITY OFFICE RELATING
TO ADVANCE CONTRACTS, AND FOR OTHER PURPOSES



SEPTEMBER 10, 2019.—Ordered to be printed

U.S. GOVERNMENT PUBLISHING OFFICE

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FEDERAL ADVANCED CONTRACTS ENHANCEMENT ACT

SEPTEMBER 10, 2019.—Ordered to be printed

Mr. JOHNSON, from the Committee on Homeland Security and
Governmental Affairs, submitted the following

R E P O R T

[To accompany S. 979]

[Including cost estimate of the Congressional Budget Office]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 979) to amend the Post-Katrina Emergency Management Reform Act of 2006 to incorporate the recommendations made by the Government Accountability Office relating to advance contracts, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill, as amended, do pass.

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I. PURPOSE AND SUMMARY

S. 979, the Federal Advance Contracts Enhancement Act of 2019, codifies nine recommendations made by the Government Accountability Office (GAO) related to the Federal Emergency Management Agency’s (FEMA) use of advance contracting in carrying out its mission responsibilities. GAO’s recommendations require FEMA to, among other things, update its strategy and guidance to clarify the use of advance contracts, improve the timeliness of its acquisition planning activities, and provide more consistent guidance, information, and coordination with states and localities to establish ad-

vance contracts. It also requires that FEMA report to Congress on its implementation efforts.

II. BACKGROUND AND THE NEED FOR LEGISLATION

Following Hurricane Katrina in 2005, the Congress enacted the Post-Katrina Emergency Management Reform Act of 2006 (PKEMRA) to address various shortcomings identified in preparation for and response to Hurricane Katrina.¹ One of those reforms required FEMA to establish advance contracts. Advance contracts are contracts that are established prior to disasters and that are typically needed to quickly provide life-sustaining goods and services in the immediate aftermath of disasters.² Other requirements in PKEMRA include that FEMA: coordinate advance contracts with state and local governments, encourage state and local governments to engage in similar pre-planning and contracting, and develop a contracting strategy.³

To satisfy the requirements in PKEMRA, FEMA created an advance contracting strategy, which was outlined in its report to the Congress in 2007.⁴ According to its strategy, FEMA “will maximize the use of advance contracts to the extent they are practical and cost-effective, which will help preclude the need to procure goods and services under unusual and compelling urgency.”⁵

Advance contracts are important because if contracts are not in place before a disaster strikes and a disaster is declared, FEMA could enter into contracts under “unusual and compelling urgency”, a position that exempts the agency from full and open competition requirements.⁶ In these instances, FEMA enters into non-competitive contracts to deliver life-sustaining resources to suffering communities.⁷ When resources are exhausted and contracts are entered into on a non-competitive manner, previous experience shows that the product typically ends up being produced at a higher cost to the Federal Government.⁸ In recognition of that, Congress required FEMA to leverage the use of advanced contracts and develop strategies to prioritize their use in PKEMRA.⁹

At the request of Congress, GAO reviewed the Federal Government’s contracting efforts for preparedness, response, and recovery efforts related to the 2017 hurricanes and California wildfires.¹⁰ In its review, GAO found that in response to Hurricanes Harvey, Irma, and Maria, as well as the 2017 California wildfires, FEMA and the U.S. Army Corps of Engineers (USACE) relied heavily on advance contracts, obligating approximately \$4.5 billion for goods and services as of May 31, 2018.¹¹ Despite FEMA and USACE’s extensive use of advance contracts, GAO identified several challenges, including, but not limited to, inconsistencies in Federal co-

¹ Pub. L. No. 109–295, § 691 (codified at 6 U.S.C. § 791).

² *Id.*

³ *Id.*

⁴ Department of Homeland Security, Federal Emergency Management Agency, Advance Contracting of Goods and Services Report to Congress (Dec. 2007).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ U.S. Gov’t Accountability Office, GAO–19–93, 2017 Disaster Contracting: Action Needed to Better Ensure More Effective Use and Management of Advance Contracts (2019), available at <https://www.gao.gov/assets/700/695829.pdf>.

¹¹ *Id.*

ordination with states and localities on their use—a requirement from PKEMRA. As GAO stated, “without consistent information and coordination with FEMA, states and localities may not have the tools needed to establish their own advance contracts for critical goods and services and quickly respond to future disasters.”¹²

Concluding their review, GAO made nine recommendations to FEMA. Among others, those recommendations would require FEMA to:

Update its strategy and guidance to clarify the use of advance contracts, improve the timelines of its acquisition planning activities, revise its methodology for reporting disaster contracting actions to congressional committees, and provide more consistent guidance and information to contracting officers to coordinate with and encourage states and localities to establish advance contracts.¹³

After reviewing GAO’s report and the accompanying recommendations, FEMA concurred with all nine recommendations.¹⁴ S. 979 codifies those recommendations to ensure that FEMA is more effectively using and managing its advance contracts process while also coordinating with states and localities to ensure they are well-prepared and equipped for future disasters.¹⁵

III. LEGISLATIVE HISTORY

Senator Marco Rubio (R–FL) introduced S. 979, the Federal Advance Contracts Enhancement Act, on April 2, 2019, with Committee Chairman Ron Johnson (R–WI) and Ranking Member Gary Peters (D–MI). The bill was referred to the Committee on the Homeland Security and Governmental Affairs.

The Committee considered S. 979 at a business meeting on June 19, 2019. Senator Peters offered an amendment that requires FEMA to report within 180 days how the agency can maximize the award of advance contracts to small businesses. The Committee ordered the bill, as amended by the Peters Amendment, reported favorably by voice vote *en bloc*. Senators present for the vote were: Johnson, Portman, Paul, Lankford, Romney, Scott, Enzi, Hawley, Peters, Carper, Hassan, Sinema, and Rosen.

IV. SECTION-BY-SECTION ANALYSIS OF THE BILL, AS REPORTED

Section 1. Short title

This section established that the Bill may be cited as the “Federal Advance Contracts Enhancement Act” or the “FACE Act.”

Section 2. Findings

This section makes a number of findings. First it clarifies that, according to PKEMRA, FEMA is required to establish advance contracts. It defines advance contracts as contracts that are established prior to disasters and are typically needed to provide life-sustaining goods and services in the immediate aftermath of a dis-

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Press Release, Senator Marco Rubio, The Federal Advance Contracts Enhancement (FACE) Act (2019), available at <https://www.rubio.senate.gov/public/cache/files/3c25affe-baa4-43bb-9b3d-21f7c7aef40a/949D2085980D52AF552926AEDA958DBF.rubio---the-face-act-one-pager.pdf>.

aster. It also finds that the hurricanes and wildfires in 2017 highlighted the importance of advance contracts, cites GAO's report that identified advance contract challenges in the review of the 2017 disaster season, and states the intent of Congress to amend PKEMRA to implement GAO's recommendations.

Section 3. Federal emergency management agency advance contracts

Subsection (a) amends Section 691 of PKEMRA to add a new section (e), which requires that the Administrator of FEMA report to the appropriate committees of Congress on FEMA's reporting methodology, disaster contract spending, a strategy that defines the objective of advance contracts, how advance contracts contribute to disaster response operations, how to maximize the award of advanced contracts to small businesses, and whether and how advance contracts should be prioritized in relation to post-disaster contracts.

It also adds a new section (f), which requires the Administrator of FEMA within 270 days to ensure the head of contracting activity updates the Disaster Contracting Desk Guide to provide guidance on instances where contracting officers should use advance contracts over post-disaster contracts, for contract officers to work with state and local governments to ensure sound advance contracts are in place at their respective levels, to adhere to hard copy contract file management requirements, that contracting officers be notified of the three-day time frame requirements for entering completed award documentation, to revise the reporting methodology to ensure all disaster contracts are entered into quarterly reports, to identify a single centralized resource that all advance contracts be entered into, and communicates complete and up-to-date information that is available to state and local governments to inform their advance contracting efforts.

The Administrator of FEMA is also required within 180 days to update and implement guidance to identify acquisition planning time frames, to clearly communicate the purpose and use of a master acquisition planning schedule, and to report regularly to the appropriate committees of Congress on their efforts to implement the GAO recommendations.

V. EVALUATION OF REGULATORY IMPACT

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of this bill and determined that the bill will have no regulatory impact within the meaning of the rules. The Committee agrees with the Congressional Budget Office's statement that the bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

VI. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

U.S. CONGRESS,
 CONGRESSIONAL BUDGET OFFICE,
 Washington, DC, July 18, 2019.

Hon. RON JOHNSON,
 Chairman, Committee on Homeland Security and Governmental Affairs,
 U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 979, the Federal Advance Contracts Enhancement Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Jon Sperl.

Sincerely,

PHILLIP L. SWAGEL,
 Director.

Enclosure.

S. 979, Federal Advance Contracts Enhancement Act			
As ordered reported by the Senate Committee on Homeland Security and Governmental Affairs on June 19, 2019			
By Fiscal Year, Millions of Dollars	2019	2019-2024	2019-2029
Direct Spending (Outlays)	0	0	0
Revenues	0	0	0
Deficit Effect	0	0	0
Spending Subject to Appropriation (Outlays)	0	2	n.e.
Statutory pay-as-you-go procedures apply?	No	Mandate Effects	
Increases on-budget deficits in any of the four consecutive 10-year periods beginning in 2030?	No	Contains intergovernmental mandate?	No
		Contains private-sector mandate?	No
n.e. = not estimated.			

Under the Post-Katrina Emergency Management Reform Act of 2006, the Federal Emergency Management Agency (FEMA) was required to provide a report to the Congress identifying goods and services that the agency is capable of contracting for in advance of disasters, as well as a strategy outlining how the agency could use advance contracts in a practical and cost-effective manner.

S. 979 would require FEMA, within 6 months of enactment, to provide an updated report and strategy to the Congress that includes new information about how advance contracts can be better employed by the agency. The bill also would require FEMA to undertake a variety of actions with respect to contracts including communicating complete and up-to-date information on available advance contracts to state and local governments.

FEMA's Office of Chief Procurement Officer employs 54 staff focused on implementing advance contracts and is currently performing all of the activities required by S. 979, with the exception of communicating with state and local governments.

Using information from FEMA, CBO estimates that the agency would need about \$150,000 to develop a strategy for communicating information to state and local governments and would complete the strategy in 2020. After that, CBO expects the agency would start conducting two briefings each year with state and local officials. CBO estimates the agency would require the equivalent of 3 full-time employees for those briefings, at an annual cost of about \$400,000. In total, CBO estimates that the briefings would cost \$2 million over the 2020–2024 period; any spending would be subject to the availability of appropriated funds.

The CBO staff contact for this estimate is Jon Sperl. The estimate was reviewed by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

VII. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows: (existing law proposed to be omitted is enclosed in brackets, new matter is printed in *italics*, and existing law in which no change is proposed is shown in roman:

UNITED STATES CODE

* * * * *

TITLE 6—DOMESTIC SECURITY

* * * * *

CHAPTER 2—NATIONAL EMERGENCY MANAGEMENT

* * * * *

Subchapter II—Comprehensive Preparedness System

* * * * *

PART D—PREVENTION OF FRAUD, WASTE, AND ABUSE

* * * * *

SEC. 791. ADVANCE CONTRACTING

* * * * *

(e) UPDATED REPORT.—Not later than 180 days after the date of enactment of this subsection, the Administrator shall submit to the appropriate committee of Congress an undated report that contains—

(1) the information required in the initial report under subparagraphs (A) and (B) of subsection (a)(1); and

(2) an updated strategy described in subsection (a)(1)(C) that clearly defines—

(A) the objectives of advance contracts;

(B) how advance contracts contribute to disaster response operations of the Agency;

(C) how to maximize the award of advance contracts to small business concerns, as defined in section 3 of the Small Business Act (15 U.S.C. 632); and

(D) whether and how advance contracts should be prioritized in relation to new post-disaster contract awards.

(f) ADDITIONAL DUTIES OF THE ADMINISTRATOR.—

(1) HEAD OF CONTRACTING.—The Administrator shall ensure that the head of contracting activity of the agency—

(A) not later than 270 days after the date of enactment of this subsection, updates the Disaster Contracting Desk Guide of the Agency to provide specific guidance—

(i) on whether and under what circumstances contracting officers should consider using existing advance contracts entered into in accordance with this section prior to making new post disaster contract awards, and include this guidance in existing semi-annual training given to contracting officers; and

(ii) for contracting officers to perform outreach and to State and local government on the potential benefits of establishing their own pre-negotiated advance contracts;

(B) adheres to hard copy contract file management requirements in effect to ensure that the files relating to advance contracts entered into in accordance with this section are complete and up to date, whether the files will be transferred into the Electronic Contracting Filing System of the Agency or remain in hard copy format;

(C) notifies contracting officers of the 3-day time frame requirement for entering completed award documentation into the contract writing system of the Agency when executing notice to proceed documentation;

(D) not later than 180 days after the date of enactment of this subsection, revises the reporting methodology of the Agency to ensure that all disaster contracts are included in each quarterly report submitted to the appropriate congressional committees under this section on disaster contract actions;

(E) identifies a single centralized resource listing advance contracts entered into under this section and ensures that

source is current and up to date and includes all available advance contracts; and

(F) communicates compete and up-to-date information on available advance contracts to State and local government to inform their advance contracting efforts.

(2) MASTER ACQUISITION PLANNING SCHEDULE.—Not later than 180 days after the date of enactment of this subsection, the Administrator shall update and implement guidance for program office and acquisition personal of the Agency to—

(A) identify acquisition planning time frames and considerations across the entire acquisition planning process of the Agency; and

(B) clearly communicate the purpose and use of a master acquisition planning schedule.