

Calendar No. 623

116TH CONGRESS }
2d Session }

SENATE

{ REPORT
116-320 }

TO REPEAL SECTION 692 OF THE
POST-KATRINA EMERGENCY MANAGEMENT
REFORM ACT OF 2020

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

S. 4165



DECEMBER 14, 2020.—Ordered to be printed

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

R E P O R T

[To accompany S. 4165]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 4165) to repeal section 692 of the Post-Katrina Emergency Management Reform Act of 2006, having considered the same, reports favorably thereon with an amendment and recommends that the bill, as amended, do pass.

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I. PURPOSE AND SUMMARY

S. 4165, a bill to repeal section 692 of the Post-Katrina Emergency Management Reform Act of 2006, repeals a unique Department of Homeland Security (DHS) contracting requirement that conflicts with subsequent legislation and Government-wide procurement regulations that place limits on excessive subcontracting.

II. BACKGROUND AND THE NEED FOR LEGISLATION

Following Hurricane Katrina in 2005, Congress enacted the Post-Katrina Emergency Management Reform Act (PKEMRA) of 2006 to address various shortcomings identified in preparation for and re-

sponse to Hurricane Katrina.¹ One of those reforms required DHS to limit tiered subcontracting. Section 692 of PKEMRA prohibits “the use of subcontracts for more than 65 percent of the cost of cost-reimbursement type contracts.”²

After Hurricane Katrina, Congress moved to reform the Federal Emergency Management Agency’s (FEMA) disaster contracting processes and practices. Two of those reforms stressed the importance of advance contracts that are entered into before a disaster occurs to reduce the need for FEMA to enter into non-competitive contracts, and to limit excessive use of subcontractors. Although FEMA outlined an advance contracting strategy in its report to Congress in 2007, they did not issue a final rule to address section 692 of PKEMRA.³

In 2010, DHS published a proposed rule prohibiting the use of excessive contracting, but did not immediately act to implement the final rule due to challenges identified by the small business community. The Government Accountability Office stated in a September 2015 report that, “DHS policy officials said they have delayed implementing this rule because of comments they received that indicate the limitation would have a negative impact on small businesses. Officials explained that FEMA uses type-contracts primarily for construction services that often bring an array of specialists together on one job, creating the need for subcontracting.”⁴

To satisfy the requirements in PKEMRA, FEMA created an advance contracting strategy, which was outlined in its report to Congress in 2007.⁵ According to their strategy, FEMA stated that the agency “[w]ill 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.” The DHS Office of Inspector General concurred with the agency, stating it, “[b]elieve[s] Section 692 of the Post-Katrina Act may adversely affect future disaster response and recovery contracting by reducing the funds available to small and local businesses while potentially impairing FEMA’s ability to respond quickly to catastrophic disasters.”⁶

Furthermore, the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (NDAA FY’09) resulted in the amendment of the Federal Acquisition Regulation (FAR) to impose a Government-wide limit on agencies’ use of tiered subcontractors for cost-type contracts or orders. Section 866 of NDAA FY’09 achieved this goal by “requiring prime contractors demonstrate the added value they provide to subcontract work that exceeds 70 percent of the total contract.”⁷

¹Post-Katrina Emergency Management Reform Act of 2006, Pub. L. No. 109–295, § 691, 120 Stat. 1355, 1457 (2006) (codified at 6 U.S.C. § 791).

²U.S. Gov’t Accountability Office, GAO–15–783, Disaster Contracting: FEMA Needs to Cohesively Manage Its Workforce and Fully Address Post-Katrina Reforms 39 (2015), <https://www.gao.gov/assets/680/672771.pdf>.

³U.S. Dep’t of Homeland Sec., Fed. Emergency Mgmt. Agency, Advance Contracting of Goods and Services Report to Congress (2007).

⁴U.S. Gov’t Accountability Office, *supra* note 2, at 39.

⁵U.S. Dep’t of Homeland Sec., *supra* note 3.

⁶U.S. Dep’t of Homeland Sec., Office of Inspector Gen., OIG–08–81, Hurricane Katrina Multitier Contracts (2008), https://www.oig.dhs.gov/sites/default/files/assets/Mgmt/OIG_08-81_Jul08.pdf.

⁷Letter from Christine Ciccone, Assistant Sec’y for Legislative Affairs, U.S. Dep’t of Homeland Sec., to Mitch McConnell, Majority Leader, U.S. Senate (May 16, 2019) (on file with author).

The unique requirement imposed on DHS by section 692 of PKEMRA conflicts with the requirement in the FAR. It is the intent of Congress, as required by section 866 of the NDAA FY'09, that subcontracting should still be limited, but that under unique and unusual circumstances, may be necessary if the prime contractor can demonstrate their value is necessary despite making up a minority of the contract's share. This legislation would repeal section 692 of PKEMRA and put DHS on par with every other Federal agency in so far as they are bound by section 866 of the NDAA FY'09 and resulting FAR regulations.

As amended in Committee, the bill also provides DHS' oversight committees with more transparency into the order of succession at DHS. In addition to the Federal Vacancies Reform Act of 1998 (FVRA)⁸ and an executive order that outline the order of succession at DHS,⁹ the Homeland Security Act of 2002 authorized the Secretary of DHS to designate a "further" line of succession for an individual to act as Acting Secretary in the event that the Secretary, Deputy Secretary, and Under Secretary for Management cannot serve.¹⁰ The same subsection requires the Secretary to notify this Committee and the Committee on Homeland Security of the House of Representatives of any vacancies that require notification under the FVRA.¹¹ S. 4165 as amended would maintain the authorities provided in the Homeland Security Act and the requirement to inform the committees of applicable vacancies, but add a new requirement that the Secretary also notify the committees within three days if he or she changes the "further" order of succession. Finally, it would add the same three-day notification requirement for any changes the Secretary makes to the order of succession for the Deputy Secretary.¹² These modifications will ensure that Congress is kept abreast of the order of succession of DHS' senior leadership.

III. LEGISLATIVE HISTORY

Senator Ron Johnson (R-WI) introduced S. 4165, to repeal section 692 of the Post-Katrina Emergency Management Reform Act of 2006, on July 2, 2020. The bill was referred to the Committee on Homeland Security and Governmental Affairs of the Senate.

The Committee considered S. 4165 at a business meeting on July 22, 2020. Senator Carper (D-DE) offered an amendment, as modified, requiring the Secretary of Homeland Security to submit written notification to Congress when modifications are made to the order of succession of the Acting Secretary or Deputy Secretary of DHS. The Committee adopted the amendment, as modified, by voice vote *en bloc* with Senators Johnson, Portman, Paul, Lankford, Romney, Scott, Enzi, Hawley, Peters, Carper, Hassan, Harris, and Rosen present. Senator Scott asked to be recorded as having voted "No" for the record.

⁸ 5 U.S.C. §§ 3345 et seq.

⁹ The White House, Office of the Press Secretary, *Amending the Order of Succession in the Department of Homeland Security* Executive Order (Dec. 9, 2016), available at <https://obamawhitehouse.archives.gov/the-press-office/2016/12/09/executive-order-amending-order-succession-department-homeland-security>.

¹⁰ Codified at 6 U.S.C. § 113(g)(1), (2).

¹¹ *Id.* at § 113(g)(3).

¹² This includes the *DHS Delegation No. 0106, DHS Orders of Succession and Delegations of Authority for Named Positions*, or any successor document.

The Committee ordered the bill, as amended, reported favorably by voice vote *en bloc* with Senators Johnson, Portman, Paul, Lankford, Romney, Scott, Enzi, Hawley, Peters, Carper, Hassan, Harris, and Rosen present.

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

Section 1. Repeal

This section repeals section 692 of the Post-Katrina Emergency Management Reform Act of 2006.

Section 2. Notification requirements related to modifications to the Order of Succession in the Department of Homeland Security or Delegations of the Deputy Secretary

This section amends the Homeland Security Act of 2002 to require the Secretary of DHS to notify the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Homeland Security of the House of Representatives of any vacancies that require notification under the Federal Vacancies Reform Act of 1998.

It also requires the Secretary of DHS to notify the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Homeland Security of the House of Representatives within three days of any modifications made by the Secretary to the order of succession for the Acting Secretary of DHS under the Homeland Security Act, as well as any modification made by the Secretary to the order of succession outlined for the Deputy Secretary in Delegation No. 0106, *DHS Orders of Succession and Delegations of Authority for Named Positions*, or any successor document.

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

CBO failed to provide the Committee with a cost estimate in time for the final reporting deadline of the 116th Congress.

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 italic, 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. 692. LIMITATIONS ON TIERING OF SUBCONTRACTORS.

(a) REGULATIONS.—The Secretary shall promulgate regulations applicable to contracts described in subsection (c) to minimize the excessive use by contractors of subcontractors or tiers of subcontractors to perform the principal work of the contract.

(b) SPECIFIC REQUIREMENT.—At a minimum, the regulations promulgated under subsection (a) shall preclude a contractor from using subcontracts for more than 65 percent of the cost of the contract or the cost of any individual task or delivery order (not including overhead and profit), unless the Secretary determines that such requirement is not feasible or practicable.

(c) COVERED CONTRACTS.—This section applies to any cost-reimbursement type contract or task or delivery order in an amount greater than the simplified acquisition threshold (as defined by section 134 of title 41) entered into by the Department to facilitate response to or recovery from a natural disaster or act of terrorism or other man-made disaster.]

* * * * *

HOMELAND SECURITY ACT OF 2002

* * * * *

TITLE I: DEPARTMENT OF HOMELAND SECURITY

* * * * *

SEC. 103. OTHER OFFICERS.

(a) * * *

* * * * *

(g) * * *

(1) * * *

(2) * * *

(3) NOTIFICATION **[OF VACANCIES]** REQUIREMENTS.—

(A) * * *

(B) REVISIONS TO ORDER OF SUCCESSION.—*The Secretary shall submit written notification to the committees referred to in subparagraph (A) not later than 3 days after—*

(i) making any modification to the order of succession pursuant to paragraph (2); or

(ii) making any modification to Annex B of DHS Delegation 0106, which sets forth the order of succession for the Deputy Secretary of Homeland Security, to the Delegation to the Senior Official Performing the Duties of the Deputy Secretary, or to any successor document.