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Emergency Contracting: Themes from Agencies' Disaster and Pandemic Response Efforts

Marie Mak—is a Director at the U.S. Government Accountability Office. Her portfolio includes a wide range of acquisitions and contracting issues in the DHS and the DoD, including areas such as disaster response contracting, annual assessments of DHS major acquisition programs, and Air Force acquisition programs. [makm@gao.gov]

Janet McKelvey—is an Assistant Director at the U.S. Government Accountability Office. She has spent the majority of her GAO career working on a variety of contracting-related reviews, including examinations of contracts for U.S. construction and stabilization in Iraq, agencies' use of award and incentive fees, agencies' use of market research, and updates to the DoD contract management high risk area. In recent years, her focus shifted to emergency contracting issues—including reviews of contracting in response to hurricanes and wildfires and COVID-19, as well as a review of construction contracts for the southwest border wall. [mckelveyj@gao.gov]

Meghan Perez—is a Senior Analyst at the U.S. Government Accountability Office. She has written reports across a variety of topics, including contracting in response to COVID-19 and natural disasters, DHS contracting issues, contractor whistleblower protections, and the Committee on Foreign Investment in the United States. [perezmc@gao.gov]

Abstract

The federal response to the rising number of natural disasters coupled with other emergency response efforts, such as those for COVID-19, have illustrated the important role that federal contracts have in providing life-saving and life-sustaining goods and services. However, contracting during an emergency can pose a unique set of challenges as contracting officials face significant pressure to provide these services as quickly as possible. Leveraging several U.S. Government Accountability Office (GAO) reviews of emergency contracting issues, this paper examines (1) contract and agreement mechanisms agencies used to facilitate response efforts; (2) challenges planning and executing contracts in an emergency environment; and (3) how tracking contract obligations and contracting lessons learned can inform future response efforts.

Report Objectives, Scope, and Methodology

The GAO has conducted a number of reviews in recent years that examine agencies' use of contracts and agreements when responding to emergencies such as the COVID-19 pandemic, hurricanes, and wildfires. Details on the scope and methodology underpinning these reviews are available in methodology section of each of the reports listed at the end of this paper.

Summary

Contracts play a critical role providing life-saving and life-sustaining goods and services in response to emergencies such as COVID-19, hurricanes, and wildfires. The GAO has conducted a number of reviews examining the federal contracting response during emergencies, and challenges that contracting officials may face. Through these reviews, the GAO has examined contract and agreement mechanisms that agencies can use to facilitate emergency response efforts, along with a variety of challenges agencies encounter when contracting during an emergency. The GAO has also made observations about tracking contract use for emergencies, and collecting and sharing contracting lessons learned.



Contract and Agreement Mechanisms

Agencies can use a variety of contract and agreement mechanisms to assist in responding quickly during an emergency, including:

Advance Contracts: The Post-Katrina Emergency Management Reform Act of 2006 required the Federal Emergency Management Agency (FEMA) to establish advance contracts—which are established prior to disasters and are typically needed to quickly provide life-sustaining goods and services in the immediate aftermath of disasters. According to FEMA’s advance contracting strategy, the agency 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. Other agencies—such as the U.S. Army Corps of Engineers (USACE)—have also awarded advance contracts as a preparedness measure. These contracts are typically indefinite delivery contracts, which allow the agency to place orders against an existing contract vehicle when needs arise.

Other Transaction Agreements: Certain agencies—such as the Departments of Defense (DoD), Homeland Security (DHS), and Health and Human Services (HHS)—have received legislative authority to award other transaction agreements, which are not subject to the Federal Acquisition Regulation (FAR). Other transaction agreements are not required to include terms and conditions that are typically required when using procurement contracts subject to the FAR. They enable agencies and companies to start with a “blank sheet of paper” to negotiate contractual terms and conditions specific to the agreement. This flexibility may help agencies address concerns from nontraditional contractors—entities that do not typically do business with the federal government such as start-up companies—about requirements that apply to federal procurement contracts.

Undefinitized Contracts: To help meet urgent needs, agencies can also use undefinitized contracts to authorize contractors to begin work and incur costs before reaching final agreement on contract terms and conditions. Before these contracts are finalized, they are called undefinitized. In contrast, a definitized contract is one in which all terms and conditions, including price, are agreed to by the parties to the contract at the time of contract award.

Government Purchase Cards: In addition to awarding contracts during emergency response and recovery, agencies can use government purchase cards to acquire goods and services, either under an existing contract vehicle or directly from merchants. Purchase cards can provide a convenient and often faster alternative to using a contract in a disaster response environment, particularly for certain lower dollar thresholds, such as purchases below the micro-purchase threshold.¹

Challenges Planning and Executing Contracts in an Emergency Environment

The GAO’s prior work has identified a variety of challenges agencies may face when awarding contracts during an emergency. The GAO made recommendations to a variety of federal agencies to address each of these challenges. In most cases, the agencies agreed with the recommendations, and the agencies have either addressed them or are in process of doing so.

¹The micro-purchase threshold is generally \$10,000, however agencies are generally able to increase the micro-purchase threshold to \$20,000 when an emergency or major disaster is declared under the Robert T. Stafford Disaster Relief and Emergency Assistance Act.



Acquisition Planning and Requirements Development: The GAO's prior work identified challenges in FEMA's acquisition planning for certain advance contracts. In December 2018, the GAO found shortfalls in FEMA's acquisition planning resulted in a number of bridge contracts (GAO, 2018). Specifically, the GAO found that at least 10 of the advance contracts FEMA used in response to Hurricanes Harvey, Irma, and Maria and the 2017 California wildfires were bridge contracts.² Bridge contracts can be a useful tool in certain circumstances to avoid a gap in providing products and services. However, the GAO has previously reported that when non-competitive bridge contracts are used frequently or for prolonged periods, the government is at risk of paying more than it should for products and services (GAO, 2015).

The GAO also identified challenges with requirements development related to the award of contracts in response to disasters. In April 2019, the GAO reported that contracting officers responsible for selected FEMA contracts received requirements packages that were lacking in technical specificity or were otherwise deficient (GAO, 2019). At the time of our review, FEMA had begun to address this challenge through the use of portfolio managers to provide templates and guidance to program officials on acquisition documents and by hosting informal training sessions for program officials, so the GAO did not make a recommendation at that time.

Determining Contractor Responsibility: The FAR requires that no purchase or award be made from a prospective vendor unless the contracting officer has made an affirmative determination of responsibility, and contracting officers rely on a variety of resources—including government databases and private sector resources—to assess prospective vendors. In July 2021, the GAO identified limitations in the guidance and resources available and communicated to HHS contracting officials for assessing prospective vendors during the COVID-19 emergency, which posed challenges to HHS contracting officials when working with new vendors to respond to the COVID-19 pandemic (GAO, 2021).

In July 2021, the GAO also found that some agencies involved in contracting for the COVID-19 response—such as HHS and the U.S. Department of Agriculture—had not typically been involved in contracting for other recent disasters and emergencies (GAO, 2021). However, the GAO reported that government-wide emergency acquisition guidance intended to provide federal agencies with best practices they can consider when contracting during an emergency provided limited information on resources for assessing prospective vendors, and had not been updated since 2011.

Acquisition Workforce: The GAO has also found that agencies have varied in their efforts to plan for disaster contracting activities and assess contracting workforce needs. In April 2019, the GAO reported that FEMA identified workforce shortages as a continuing challenge for disaster response and recovery following the 2017 hurricanes and California wildfires, but had not assessed its contracting workforce—including staffing levels, mission needs, and skills gaps—since 2014 (GAO, 2019).

In November 2020, the GAO reported that the efforts of selected agencies—specifically USACE, the U.S. Coast Guard, and the Department of Interior—to plan for disaster contracting activities and assess contracting workforce needs varied (GAO, 2020). For example, the GAO found that USACE and the Coast Guard assigned clear roles and responsibilities for disaster

²In October 2015, the GAO established the following definition related to bridge contracts: an extension to an existing contract beyond the period of performance (including option years), or a new, short-term contract awarded on a sole-source basis to an incumbent contractor to avoid a lapse in service caused by a delay in awarding a follow-on contract. See *Sole Source Contracting: Defining and Tracking Bridge Contracts Would Help Agencies Manage Their Use* (GAO, 2015).



response contracting activities, but neither had assessed contracting workforce needs specifically for disaster response.

Purchase Card Fraud Risks: The use of government purchase cards for smaller purchases can reduce the government's administrative costs and increase its flexibility to meet its needs. However, if not properly managed and controlled, the use of purchase cards can also expose the government to significant risk, particularly during a disaster when officials may have a higher fraud risk tolerance due to the urgent need for products and services. In November 2020, the GAO found that USACE, the Coast Guard, FEMA, the Environmental Protection Agency, and the U.S. Department of Agriculture's Forest Service had not assessed or documented how their purchase card fraud risk might differ in a disaster response environment (GAO, 2020).

Tracking Contract and Agreement Obligations and Collecting Lessons Learned

Maintaining accurate procurement data and establishing methods to collect, analyze, and share contracting lessons learned can help to inform agencies' future emergency response efforts. The GAO has made recommendations to a variety of federal agencies on the importance of these efforts. The agencies generally agreed with the recommendations, and have either addressed them or are in process of doing so.

Tracking Contract and Agreement Obligations: Contract actions and associated obligations can be tracked in the Federal Procurement Data System (FPDS) using National Interest Action (NIA) codes.³ However, the GAO has identified inconsistencies in establishing and closing these codes following previous disasters or emergencies. In April 2019, the GAO reported that the full extent of post-disaster contracting related to the 2017 disasters was unknown due to DHS's inconsistent implementation of the criteria for closing a NIA code (GAO, 2019). Further, in September 2020, during the federal response to COVID-19, GAO reported on concerns with the criteria that DHS and the DoD rely on to determine whether to extend or close a code, and whether the memorandum of agreement the agencies use to inform their decisions meets the needs of high visibility events, and of users, such as other agencies and Congress (GAO, 2020).

The GAO's prior work has also identified challenges related to tracking the use of other transaction agreements for COVID-19 in FPDS. In January 2021, the GAO found that HHS misreported its other transaction agreements related to COVID-19 as procurement contracts, including about \$1.5 billion in other transaction agreements obligated for Operation Warp Speed and other medical countermeasures (GAO, 2021). Further, in July 2021, the GAO reported that the DoD and DHS did not accurately identify certain other transaction agreements as COVID-19-related in FPDS (GAO, 2021).

Contracting Lessons Learned: Collecting and sharing lessons learned—both positive and negative—allows agencies to communicate knowledge more effectively and to ensure that beneficial information is factored into planning, processes, and activities. However, the GAO's prior work has identified shortfalls in agencies' lessons learned processes. In April 2019, the GAO found that while FEMA had taken steps to identify interagency lessons learned following the 2017 hurricanes and California wildfires, USACE and the Coast Guard lacked processes for

³The NIA code data element in FPDS was established following landfall of several major hurricanes in 2005 to enable consistent tracking of emergency or contingency-related contracting, and the General Services Administration, DoD, and DHS are jointly responsible for determining when a NIA code should be established and closed.



formally gathering and incorporating input and lessons learned and communicating this information to FEMA's interagency group (GAO, 2019).

The GAO has also identified opportunities to assess contracting lessons learned in relation to border wall construction during a national emergency. Specifically, in June 2021, the GAO found that, following a 2019 Presidential Declaration of National Emergency, USACE awarded more than \$4 billion in noncompetitive contracts and used undefinitized contract actions to quickly start construction and maximize the miles of border panels it could build on the southwest border (GAO, 2021). By focusing on expediency, the government risks paying higher costs, but USACE had not developed plans to examine its overall acquisition approach and identify lessons learned.

The GAO also identified challenges collecting and sharing lessons learned related to contracting in response to COVID-19. In July 2021, the GAO reported that selected agencies were collecting lessons learned from the response, but that the lessons learned processes at HHS and FEMA did not include contracting personnel or contracting observations (GAO, 2021).

Further, in July 2021 the GAO reported that despite the extensive interagency coordination that occurred during the response to the COVID-19 pandemic, contracting officials at the DoD, HHS, and DHS were not always aware of, or involved in, government-wide efforts to collect and share interagency lessons learned (GAO, 2021). Without a process to ensure that contracting lessons learned are incorporated into interagency lessons learned efforts, federal agencies risk missing an opportunity to memorialize contract and coordination practices that were successful, as well as those that were not, for future emergencies.

In summary, the GAO identified a variety of challenges and opportunities for improvement related to emergency contracting over the past five years. Implementation of the GAO's recommendations in these areas will improve the federal government's response to future emergencies.

References

For additional information, see the following GAO reports:

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- GAO. (2020, September 21). *COVID-19: Federal efforts could be strengthened by timely and concerted actions* (GAO-20-701). <https://www.gao.gov/products/gao-20-701>
- GAO. (2020, November 24). *Disaster response: Agencies should assess contracting workforce needs and purchase card fraud risk* (GAO-21-42). <https://www.gao.gov/products/gao-21-42>
- GAO. (2021, January 28). *COVID-19: Critical vaccine distribution, supply chain, program integrity, and other challenges require focused federal attention* (GAO-21-265). <https://www.gao.gov/products/gao-21-265>



- GAO. (2021, June 17). *Southwest border: Schedule considerations drove Army Corps of Engineers' approaches to awarding construction contracts through 2020* (GAO-21-372). <https://www.gao.gov/products/gao-21-372>
- GAO. (2021, July 26). *COVID-19 contracting: Actions needed to enhance transparency and oversight of selected awards* (GAO-21-501). <https://www.gao.gov/products/gao-21-501>
- GAO. (2021, July 29). *COVID-19 contracting: Opportunities to improve practices to assess prospective vendors and capture lessons learned* (GAO-21-528). <https://www.gao.gov/products/gao-21-528>





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NAVAL POSTGRADUATE SCHOOL
555 DYER ROAD, INGERSOLL HALL
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