AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

Calendar No. 485

113TH CONGRESS *2d Session*	SENATE	REPORT 113–216

NEVER CONTRACT WITH THE ENEMY ACT

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS UNITED STATES SENATE

TO ACCOMPANY

S. 675

TO PROHIBIT CONTRACTING WITH THE ENEMY



JULY 23, 2014.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE

39–010 WASHINGTON : 2014

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

THOMAS R. CARPER, Delaware, *Chairman*

CARL LEVIN, Michigan
MARK L. PRYOR, Arkansas
MARY L. LANDRIEU, Louisiana
CLAIRE MCCASKILL, Missouri
JON TESTER, Montana
MARK BEGICH, Alaska
TAMMY BALDWIN, Wisconsin
HEIDI HEITKAMP, North Dakota

TOM COBURN, Oklahoma
JOHN MCCAIN, Arizona
RON JOHNSON, Wisconsin
ROB PORTMAN, Ohio
RAND PAUL, Kentucky
MICHAEL B. ENZI, Wyoming
KELLY AYOTTE, New Hampshire

GABRIELLE A. BATKIN, *Staff Director*
JOHN P. KILVINGTON, *Deputy Staff Director*
MARY BETH SCHULTZ, *Chief Counsel*
TROY H. CRIBB, *Chief Counsel for Governmental Affairs*
KEITH B. ASHDOWN, *Minority Staff Director*
CHRISTOPHER J. BARKLEY, *Minority Deputy Staff Director*
ANDREW C. DOCKHAM, *Minority Chief Counsel*
KATHRYN M. EDELMAN, *Minority Senior Investigator*
LAURA W. KILBRIDE, *Chief Clerk*

CONTENTS

		Page
I.	Purpose and Summary	1
II.	Background	1
III.	Legislative History	4
IV.	Section-by-Section Analysis of the Bill, as Reported	5
V.	Estimated Cost of Legislation	9
VI.	Evaluation of Regulatory Impact	10
VII.	Changes in Existing Law	10

Calendar No. 485

113TH CONGRESS *2d Session* | SENATE | REPORT 113–216

NEVER CONTRACT WITH THE ENEMY ACT

JULY 23, 2014.—Ordered to be printed

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

R E P O R T

[To accompany S. 675]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 675), to prohibit contracting with the enemy, having considered the same, reports favorably thereon with an amendment and recommends that the bill, as amended, do pass.

I. PURPOSE AND SUMMARY

The Never Contract with the Enemy Act provides federal agencies with streamlined procedures for stopping money from federal contracts, grants and cooperative agreements from going to people and entities who actively oppose U.S. forces engaged in hostilities.

II. BACKGROUND AND NEED FOR LEGISLATION

The U.S. government contracts with many individuals and companies around the world in order to support U.S. government activities and promote U.S. interests, especially in times of major deployments of U.S. forces.[1]

In 2008, Congress established the Commission on Wartime Contracting in Iraq and Afghanistan and tasked it with examining a range of issues related to wartime contracting, including the extent of waste, fraud, abuse and mismanagement of wartime contracts.[2] The Commission identified diversion of U.S. government funds to

[1] For purposes of the discussion in this report, the term "contract" includes contracts, grants and cooperative agreements and the term "contractor" includes contractors, recipients of grants and cooperative agreements.

[2] The independent and bipartisan Commission was established by section 841 of the National Defense Authorization Act for Fiscal Year 2008, Public Law 110–181 (Jan. 28, 2008).

insurgents in Afghanistan as a major concern. In their final report to Congress, the Commissioners recounted that experts they interviewed believed that extortion of funds from U.S. construction projects and transportation contracts was the second-largest funding source for the insurgents (the first being money from the drug trade).[3]

Another issue examined by the Commission was the use of suspension and debarment procedures in Iraq and Afghanistan to protect the government's interest in doing business only with responsible contractors. Suspensions and debarments are administrative remedies that allow agencies to bar additional U.S. government business with particular contractors in order to protect the government from fraud, noncompliance with contractual terms or applicable laws, poor performance, or other behavior that puts taxpayer dollars at risk of misuse. In 2011, the Commission reported to Congress that agency officials cited the complexity of suspension and debarment procedures as a reason for not using those tools as often as they believed would be warranted in a wartime environment.[4]

In the context of these concerns, Congress, in the National Defense Authorization Act for Fiscal Year 2012, directed the Secretary of Defense to develop a process under which the Combatant Commander of the Central Command (CENTCOM)[5] would identify persons or entities actively supporting an insurgency or otherwise actively opposing U.S. or coalition forces in a contingency operation in the CENTCOM theater.[6] Section 841 further authorized the head of a contracting activity (i.e., the person designated by the head of an agency to manage the agency's contracting functions), pursuant to a request from the Combatant Commander, to restrict, terminate or void contracts that would provide funds directly or indirectly to such persons or entities.

Section 841 also required the Secretary of Defense to develop a contract clause requiring funding recipients to exercise due diligence to prevent funds from directly or indirectly flowing to persons or entities actively supporting an insurgency or otherwise actively opposing U.S. or coalition forces. Section 841 applies to Department of Defense contracts in excess of $100,000 that are to be performed in the CENTCOM theater.

Congress revisited and expanded the section 841 authority in section 831 of the National Defense Authorization Act for Fiscal Year 2014.[7] Section 831 requires the Secretary of Defense to establish programs in each combatant command to identify persons actively opposing U.S. or coalition forces involved in a contingency operation in which members of the armed forces are actively en-

---

[3] Commission on Wartime Contracting in Iraq and Afghanistan, Final Report to Congress (Aug. 31, 2011), p. 73.

[4] Commission on Wartime Contracting in Iraq and Afghanistan, Second Interim Report to Congress (Feb. 24, 2011), p. 50.

[5] CENTCOM is a unified command of the U.S. military whose geographic area of responsibility includes Afghanistan and Iraq.

[6] Section 841 of the National Defense Authorization Act for Fiscal Year 2012, Public Law 112–81 (Dec. 31, 2011). A "contingency operation" is defined under 10 U.S.C. 101(a)(13) as "a military operation that—(A) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations or hostilities against an enemy of the United States or against an opposing military force; or (B) results in the call or order to, or retention on, active duty of members of the uniformed services under [other portions of this title], or any other provision of law during a war or during a national emergency declared by the President or Congress."

[7] Section 831, National Defense Authorization Act for Fiscal Year 2014, Public Law 113–66 (Dec. 26, 2013).

gaged in hostilities.[8] Section 831 lays out a process similar to section 841 for restricting, terminating or voiding contracts, and it mandates a clause for Department of Defense contracts, requiring contractors to exercise due diligence to ensure that funds are not directly or indirectly given to enemies, as defined by the bill. The authorities and requirements of section 831 apply to contracts whose estimated value is in excess of $20,000. Section 831 also requires the establishment of a process allowing a recipient of funds to contest action taken under the section 831 authority within 30 days of notice of the action.

According to Department of Defense officials, as of May 2014, the Department has used the section 841 authority 12 times and has designated 29 entities as enemies, as defined by that section. As a result, ten subcontracts worth $31 million were terminated. In two instances, the Department made no contract or subcontract terminations because the entities identified as enemies did not have existing contracts. All 29 entities were added to the prohibited source list for future contracts. Additionally, the Department is processing 11 additional actions under the authorities of sections 841 and 831.[9]

The Special Inspector General for Afghanistan Reconstruction has pointed out several reasons that Congress may want to consider granting the Department of State and the U.S. Agency for International Development (USAID) similar authorities to those in place at the Department of Defense.[10] The Department of State and USAID have numerous contracts in Afghanistan, and the two civilian agencies contract with many of the same contractors used by the Department of Defense. In addition, the Department of State and USAID will have an enduring presence in the country after the drawdown of U.S. military personnel.

Building on the experience of the Department of Defense under sections 841 and 831, the Never Contract with the Enemy Act, S. 675, provides an effective tool to the Departments of Defense and State, USAID, and other civilian agencies to quickly cut off funds flowing to enemies of the United States. The bill requires the Secretary of Defense, in conjunction with the Director of National Intelligence and in consultation with the Secretary of State, to establish a program to identify people and entities that provide funds under a contract directly or indirectly, to people and entities who actively oppose U.S. or coalition forces involved in a contingency operation in which members of the armed forces are actively engaged in hostilities.[11] The Secretary will also identify those who fail to exercise due diligence to ensure that U.S. government funds do not flow to enemies.

This information would then be shared with heads of executive agencies and the commanders of the combatant commands. S. 675 then gives the heads of agencies and the combatant commanders

---

[8] Combatant Commands covered by section 831 are: the United States Central Command, the United States European Command, the United States Africa Command, the United States Southern Command, and the United States Pacific Command.

[9] E-mail correspondence from the Office of Legislative Affairs, Office of the Secretary of Defense, to staff of Senator Ayotte (May 20, 2014).

[10] Special Inspector General for Afghanistan Reconstruction ("SIGAR"), SIGAR Audit 13–6 (April 2013) and SIGAR Audit 13–14 (July 2013).

[11] The bill uses the term "covered person or entity" to refer to a person or entity that is actively opposing United States or coalition forces involved in a contingency operation in which members of the armed forces are actively engaged in hostilities.

the discretion to provide this information to the appropriate head of contracting activity (or other appropriate official in the case of grants and cooperative agreements). The bill provides those senior agency officials with an effective tool that will enable them to respond quickly and appropriately. Specifically, it authorizes those officials to restrict, terminate, or void contracts where funds would flow directly or indirectly to enemies, or where a contractor fails to exercise due diligence to ensure that funds do not flow directly or indirectly to enemies.

S. 675 also requires the federal agencies responsible for rules governing contracts and grants to develop a clause to be included in contracts, requiring the recipient of the funding to exercise due diligence to prevent funds from directly or indirectly flowing to those who actively oppose U.S. or coalition forces involved in a contingency operation in which members of the armed forces are actively engaged in hostilities.[12] The bill ensures that the process for promulgating regulations governing this clause will include an opportunity for the public to comment on the definition of the "due diligence" required by the bill. S. 675 also requires agencies to provide written notification to contractors of any action taken under the bill to restrict, terminate or void a contract, and to allow the contractor to challenge the action by requesting administrative review not later than 30 days after receipt of notice of the action.

In order to help agencies get the information they need to avoid entering into contracts and other agreements with enemies (as defined by the bill), the bill requires the Secretary of Defense, in consultation with the Director of the Office of Management and Budget to carry out a program that will allow agencies to share information on funds that may be flowing to enemies. The program will be designed to facilitate and encourage the sharing of risk and threat information between agencies and combatant commands. Also, the bill ensures that actions taken to terminate or otherwise restrict contracts will be entered into the Federal Awardee Performance and Integrity Information System, which is a repository of information related to the business ethics and performance records of federal contractors.

The bill provides for the repeal of the authorities granted under section 841 and section 831 upon implementation of the new authorities of S.675. The bill also includes a sunset date of December 31, 2019 for both the process and authorities for restricting, terminating or voiding contracts. This sunset will allow Congress to assess the use, or non-use, of the authorities and consider reauthorization or amendment as appropriate.

III. LEGISLATIVE HISTORY

On April 9, 2013, Senators Kelly Ayotte and Richard Blumenthal introduced S. 675. The bill was referred to the Committee on Homeland Security and Governmental Affairs. The bill is cospon-

[12] Specifically, the bill requires amendment of (1) the Federal Acquisition Regulation, which is the government-wide regulatory framework for procurement and is overseen by the Federal Acquisition Regulatory Council, consisting of the Administrator for Federal Procurement Policy at the Office of Management and Budget, the Secretary of Defense, the Administrator of the General Services Administration, and the Administrator of NASA; (2) the Defense Federal Acquisition Regulation Supplement, which is maintained by the Department of Defense; and (3) the Uniform Administrative Requirements, Cost Principles, and Account Requirements, which is the government-wide guidance for grants issued by the Office of Management and Budget.

sored by Senators Boozman, Burr, Chambliss, Manchin, Moran, Roberts, Shaheen, and Vitter.

The Committee considered the bill at a business meeting on May 21, 2014. Senator Ayotte offered a substitute amendment, which made a number of changes to the bill to align the proposed government-wide authorities with those already in place for the Department of Defense under section 841 of the National Defense Authorization Act for Fiscal Year 2012 and section 831 of the National Defense Authorization Act for Fiscal Year 2014. The substitute also incorporates some suggestions provided to Committee staff by officials of the Department of State and USAID, including a provision clarifying that the authorities in the bill shall be in addition to, and not the exclusion of, any other authorities available to agencies to implement policies similar to those set out in the bill.

The Committee adopted the substitute amendment and then ordered S. 675 reported favorably, both by voice vote. Members present for both votes were: Carper, Pryor, Landrieu, McCaskill, Tester, Begich, Coburn, Johnson, Portman, and Enzi.

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

Section 1. Short title

Section 1 establishes the short title of the bill as the "Never Contract with the Enemy Act."

Section 2. Prohibition on providing funds to the enemy

Subsection 2(a) requires the Secretary of Defense, in conjunction with the Director of National Intelligence and in consultation with the Secretary of State, to establish a program in each combatant command to identify people and entities that provide funds received under a contract, grant or cooperative agreement directly or indirectly to an enemy (defined as a "covered person or entity" in Section 4 below), or who fail to exercise due diligence to ensure that funds received under a contract, grant or cooperative agreement are not provided directly or indirectly to an enemy.

Subsection 2(b) provides that upon identification of a person or entity, pursuant to subsection 2(a), the head of an executive agency or the commander of a covered combatant command shall be notified of the identification in writing. Upon receipt of the notification, the head of the executive agency or the commander of the combatant command may notify the heads of contracting activities, or other appropriate officials of the agency or command, in writing of such identification.

Under subsection 2(c), not later than 270 days after enactment of the Act, the Federal Acquisition Regulation, the Defense Federal Acquisition Regulation Supplement, and the Uniform Administrative Requirements, Cost Principles, and Account Requirements for Federal Awards (referred to hereafter as "applicable regulations")[13] shall be revised to provide that certain actions may be taken upon written notice from the head of an executive agency or the commander of a combatant command to the head of contracting activity (the person designated by the head of an agency to carry out con-

[13] See footnote 12.

tract functions). Specifically, subsection 2(c) provides that the head of contracting activity may:

(1) restrict the award of contracts, grants, or cooperative agreements upon written determination that a contract, grant or cooperative agreement so awarded would provide funds received under such contract, grant or cooperative agreement directly or indirectly to an enemy;

(2) terminate for default any contract, grant or cooperative agreement upon a written determination that the contractor, or the recipient of the grant or cooperative agreement, has failed to exercise due diligence to ensure that none of the funds received under the contract, grant or cooperative agreement are provided directly or indirectly to an enemy; or

(3) void in whole or in part any contract, grant or cooperative agreement upon a written determination that the contract, grant or cooperative agreement provides funds directly or indirectly to an enemy.

Subsection 2(d) provides that within 270 days after the date of enactment, the applicable regulations shall be revised to require a clause to be included in each contract, grant, or cooperative agreement that will require the recipient of the funds to exercise due diligence to ensure that funds are not provided directly or indirectly to an enemy. The clause will also notify the recipient of the funds of the authority of the head of contracting authority (or other appropriate official in the case of grants or cooperative agreements) to terminate the contract, grant or cooperative agreement. This subsection also ensures that the process for amending regulations will include an opportunity for public comment on the standards of due diligence required by the Act.

Subsection 2(e) requires, within 270 days of enactment, implementation of regulations to require that any head of contracting activity, or other official, taking action under subsection (c) to terminate or void a contract, grant or cooperative agreement notify in writing the recipient of the contract, grant or cooperative agreement of the action. This subsection also requires revision of the applicable regulations, so that the recipient of a contract, grant or cooperative agreement subject to such action has an opportunity to challenge the action by requesting administrative review not later than 30 days after receipt of the notice of the action.

Under subsection 2(f), the Secretary of Defense, in conjunction with the Director of National Intelligence and in consultation with the Secretary of State, shall annually review the list of covered persons or entities previously covered by a notice under subsection (b) in order to determine whether those persons or entities continue to warrant identification pursuant to subsection (a). If it is determined that a person or entity no longer warrants identification, then the Secretary of Defense shall notify the head of an executive agency or commander, as the case may be, in writing of such a determination. Classified information relied upon to make an identification in accordance with subsection (a) may not be disclosed to the recipient of a contract, grant or cooperative agreement in the absence of a protective order issued by a court of jurisdiction established under Article I or Article III of the Constitution.

Subsection 2(g) provides that the commander of a combatant command may delegate in writing the responsibilities granted by

this section to any deputy specified by the commander. The authority provided by subsection (c) to terminate, void or restrict grants may not be delegated below the level of head of contracting activity, or equivalent official in the case of grants or cooperative agreements.

Subsection 2(h) requires the Secretary of Defense, in consultation with the Director of the Office of Management and Budget, to carry out a program through which agency components may provide information to heads of executive agencies and commanders of combatant commands relating to persons or entities who may be providing funds, directly or indirectly, to enemies. The program shall be designed to facilitate and encourage the sharing of risk and threat information between agencies and combatant commands. Upon an action taken under subsection (c), the head of contracting activity shall provide for the inclusion in the Federal Awardee Performance and Integrity Information System, or other formal system of records on contractors, a notice of such action. The head of contracting activity that receives a notice pursuant to subsection (b) shall submit to the head of the executive agency concerned or the appropriate combatant command a report on the action taken, if any, pursuant to subsection (c), including any determination not to take action.

Pursuant to subsection 2(i), by March 1 of 2016, 2017, and 2018, the Director of the Office of Management and Budget shall submit to the appropriate committees of Congress a report on the use of the authorities in this section in the preceding calendar year, including instances in which an executive agency exercised authority to terminate, void, or restrict a contract, grant or cooperative agreement, or instances in which an agency did not exercise authority to take action pursuant to subsection (c). The reports required by this subsection may be submitted in unclassified form but with a classified annex, or in classified form.

Subsection 2(j) provides that nothing in this section shall apply to the authorized intelligence or law enforcement activities of the U.S. government.

Subsection 2(k) makes clear that, except as provided in subsection (l), the authorities in this section shall be in addition to, and not to the exclusion of, any other authorities available to executive agencies to implement similar policies and purposes.

Subsection 2(l) provides that, 270 days after enactment, section 841 of the National Defense Authorization Act for Fiscal Year 2012, and section 831 of the National Defense Authorization Act for Fiscal Year 2014 are repealed. The Secretary of Defense may use and modify the regulations and procedures established under those provisions for purposes of satisfying the requirements of this section.

Under subsection 2(m), the provisions of this section cease to be effective on December 31, 2019.

Section 3. Additional access to records

Subsection 3(a) requires revision of applicable regulations, within 270 days after enactment, to allow for inclusion in contracts, grants and cooperative agreements a clause that authorizes the head of the executive agency to examine any records of the recipient or sub-recipient upon a written determination that funds under the contract, grant or cooperative agreement may have been provided

directly or indirectly to a covered person or entity. A similar clause may be included in any subcontract or subgrant under a covered contract, grant or cooperative agreement with an estimated value in excess of $50,000.

Under subsection 3(b), by March 1 of 2016, 2017, and 2018, the Director of the Office of Management and Budget shall submit to the appropriate committees of Congress a report on the use of authorities provided by this section.

Subsection 3(c) provides that 270 days after the date of enactment, section 842 of the National Defense Authorization Act of Fiscal Year 2012, which provided similar authority to the Department of Defense, is repealed. The Secretary of Defense may use and modify the requirements and procedures established under section 842 for purposes of satisfying the requirements of this section.

Section 4. Definitions

Section 4 provides that for purposes of this Act:

(1) The term "appropriate committees of Congress" means: the Committee on Armed Services, the Committee on Homeland Security and Governmental Affairs, the Committee on Foreign Relations, and the Committee on Appropriations of the Senate; and the Committee on Armed Services, the Committee on Oversight and Government Reform, the Committee on Foreign Affairs, and the Committee on Appropriations of the House of Representatives.

(2) The term "contingency operation" has the meaning given that term in section 101(a)(13) of title 10, United States Code.[14]

(3) The term "contract" includes a contract for commercial items but is not limited to a contract for commercial items.

(4) The term "covered combatant command" means the following: the United States Africa Command, the United States Central Command, the United States European Command, the United States Pacific Command, and the United States Southern Command.

(5) The term "covered contract, grant or cooperative agreement" means a contract, grant or cooperative agreement with an estimated value in excess of $50,000 that is performed outside the United States, including its possessions and territories.

(6) The term "covered person or entity" means a person or entity that is actively opposing United States or coalition forces in a contingency operation in which members of the armed forces are actively engaged in hostilities.

(7) The term "executive agency" has the meaning given that term in section 133 of title 41, United States Code, which includes the major departments of the executive branch, the military departments, other government agencies (other than the United States Postal Service or the Postal Regulatory Commission) and wholly owned government corporations.

(8) The term "head of contracting activity" has the meaning given that term in subpart 601 part 1 of the Federal Acquisition Regulation. The head of contracting activity is the person to whom an agency head delegates the authority to manage the contracting functions for the agency.

[14] See footnote 6.

V. CONGRESSIONAL BUDGET OFFICE (CBO) COST ESTIMATE

JUNE 20, 2014.

Hon. TOM CARPER,
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. 675, the Never Contract With the Enemy Act.

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

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

S. 675—Never Contract With the Enemy Act

S. 675 would require the Department of Defense (DoD) to identify entities that use resources received from the federal government to provide aid to a person or group that is actively opposing U.S. or allied armed forces in overseas contingency operations. The bill also would require DoD to identify entities that do not take sufficient care to ensure that government resources are not being used to support the enemy.

The bill would require that contracts, grants, or cooperative agreements that are used or performed outside the United States and have a value of $50,000 or more include a clause giving federal agencies the right to examine the business records of the other party if the agency has reason to believe the recipient is supporting the enemy.

S. 675 would require DoD to develop a program under which information on those entities found to be aiding the enemy may be provided to other federal agencies. The bill would authorize all federal agencies to cancel contractual agreements with such entities and to bar them from receiving additional contracts, grants, or cooperative agreements with the federal government. The bill also would require annual reports on the use of the authority during the 2016–2018 period.

DoD currently conducts a similar program and notifies military commands engaged in overseas contingency operations of entities that have been identified as supporters of the enemy. Certain military commands are authorized under current law to cancel contracts with those identified. The department reports such cancelled contracts in the Federal Awardee Performance and Integrity Information System. DoD indicates that it would post the list of all entities identified as supporters of the enemy to that system where the information would be available to other federal agencies.

CBO estimates that providing access to the list of enemy supporters and authorizing other federal agencies to cancel contracts and disbar contractors would have discretionary costs of less than $500,000 over the 2015–2019 period; any spending would be subject to the availability of appropriated funds. Pay-as-you-go procedures do not apply to this legislation because it would not affect direct spending or revenues.

S. 675 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is David Newman. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

VI. 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.

The Committee agrees with the Congressional Budget Office that the bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments, or private entities. The enactment of this legislation would not have significant regulatory impact within the meaning of the rule.

VII. Changes in Existing Statute 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 S. 675 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): [15]

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2012

(Public Law 112–81)

DIVISION A—DEPARTMENT OF DEFENSE AUTHORIZATIONS

* * * * * * *

TITLE VIII—ACQUISITION POLICY, ACQUISITION MANAGEMENT, AND RELATED MATTERS

* * * * * * *

Subtitle D—Provisions Relating to Contracts in Support of Contingency Operations in Iraq and Afghanistan

* * * * * * *

[SEC. 841. PROHIBITION ON CONTRACTING WITH THE ENEMY IN THE UNITED STATES CENTRAL COMMAND THEATER OF OPERATIONS.

[(a) PROHIBITION.—

[15] Subsection 1(l) of the bill provides that these changes are effective 270 days after the date of enactment of the Act.

[(1) IN GENERAL.—Not later than 30 days after the date of the enactment of this Act, the Secretary of Defense shall revise the Department of Defense Supplement to the Federal Acquisition Regulation to authorize the head of a contracting activity, pursuant to a request from the Commander of the United States Central Command under subsection (c)(2)—

[(A) to restrict the award of Department of Defense contracts, grants, or cooperative agreements that the head of the contracting activity determines in writing would provide funding directly or indirectly to a person or entity that has been identified by the Commander of the United States Central Command as actively supporting an insurgency or otherwise actively opposing United States or coalition forces in a contingency operation in the United States Central Command theater of operations;

[(B) to terminate for default any Department contract, grant, or cooperative agreement upon a written determination by the head of the contracting activity that the contractor, or the recipient of the grant or cooperative agreement, has failed to exercise due diligence to ensure that none of the funds received under the contract, grant, or cooperative agreement are provided directly or indirectly to a person or entity who is actively supporting an insurgency or otherwise actively opposing United States or coalition forces in a contingency operation in the United States Central Command theater of operations; or

[(C) to void in whole or in part any Department contract, grant, or cooperative agreement upon a written determination by the head of the contracting activity that the contract, grant, or cooperative agreement provides funding directly or indirectly to a person or entity that has been identified by the Commander of the United States Central Command as actively supporting an insurgency or otherwise actively opposing United States or coalition forces in a contingency operation in the United States Central Command theater of operations.

[(2) TREATMENT AS VOID.—For purposes of this section:

[(A) A contract, grant, or cooperative agreement that is void is unenforceable as contrary to public policy.

[(B) A contract, grant, or cooperative agreement that is void in part is unenforceable as contrary to public policy with regard to a segregable task or effort under the contract, grant, or cooperative agreement.

[(b) CONTRACT CLAUSE.—

[(1) IN GENERAL.—Not later than 30 days after the date of the enactment of this Act, the Secretary shall revise the Department of Defense Supplement to the Federal Acquisition Regulation to require that—

[(A) the clause described in paragraph (2) shall be included in each covered contract, grant, and cooperative agreement of the Department that is awarded on or after the date of the enactment of this Act; and

[(B) to the maximum extent practicable, each covered contract, grant, and cooperative agreement of the Department that is awarded before the date of the enactment of

this Act shall be modified to include the clause described in paragraph (2).

[(2) CLAUSE DESCRIBED.—The clause described in this paragraph is a clause that—

[(A) requires the contractor, or the recipient of the grant or cooperative agreement, to exercise due diligence to ensure that none of the funds received under the contract, grant, or cooperative agreement are provided directly or indirectly to a person or entity who is actively supporting an insurgency or otherwise actively opposing United States or coalition forces in a contingency operation; and

[(B) notifies the contractor, or the recipient of the grant or cooperative agreement, of the authority of the head of the contracting activity to terminate or void the contract, grant, or cooperative agreement, in whole or in part, as provided in subsection (a).

[(3) COVERED CONTRACT, GRANT, OR COOPERATIVE AGREEMENT.—In this subsection, the term "covered contract, grant, or cooperative agreement" means a contract, grant, or cooperative agreement with an estimated value in excess of $100,000 that will be performed in the United States Central Command theater of operations.

[(c) IDENTIFICATION OF CONTRACTS WITH SUPPORTERS OF THE ENEMY.—

[(1) IN GENERAL.—Not later than 30 days after the date of the enactment of this Act, the Secretary, acting through the Commander of the United States Central Command, shall establish a program to use available intelligence to review persons and entities who receive United States funds through contracts, grants, and cooperative agreements performed in the United States Central Command theater of operations and identify any such persons and entities who are actively supporting an insurgency or otherwise actively opposing United States or coalition forces in a contingency operation.

[(2) NOTICE TO CONTRACTING ACTIVITIES.—If the Commander of the United States Central Command, acting pursuant to the program required by paragraph (1), identifies a person or entity as actively supporting an insurgency or otherwise actively opposing United States or coalition forces in a contingency operation, the Commander may notify the head of a contracting activity in writing of such identification and request that the head of the contracting activity exercise the authority provided in subsection (a) with regard to any contracts, grants, or cooperative agreements that provide funding directly or indirectly to the person or entity.

[(3) PROTECTION OF CLASSIFIED INFORMATION.—Classified information relied upon by the Commander of the United States Central Command to make an identification in accordance with this subsection may not be disclosed to a contractor or a recipient of a grant or cooperative agreement with respect to which an action is taken pursuant to the authority provided in subsection (a), or to their representatives, in the absence of a protective order issued by a court of competent jurisdiction established under Article III of the Constitution of the United States

that specifically addresses the conditions upon which such classified information may be so disclosed.

[(d) NONDELEGATION OF RESPONSIBILITIES.—

[(1) CONTRACT ACTIONS.—The authority provided by subsection (a) to restrict, terminate, or void contracts, grants, and cooperative agreements may not be delegated below the level of the head of a contracting activity.

[(2) IDENTIFICATION OF SUPPORT OF ENEMY.—The authority to make an identification under subsection (c)(1) may not be delegated below the level of the Commander of the United States Central Command.

[(e) REPORTS.—Not later than March 1 of each of 2013, 2014, and 2015, the Secretary shall submit to the congressional defense committees a report on the use of the authority provided by this section in the preceding calendar year. Each report shall identify, for the calendar year covered by such report, each instance in which the Department of Defense exercised the authority to restrict, terminate, or void contracts, grants, and cooperative agreements pursuant to subsection (a) and explain the basis for the action taken. Any report under this subsection may be submitted in classified form.

[(f) OTHER DEFINITION.—In this section, the term "contingency operation" has the meaning given that term in section 101(a)(13) of title 10, United States Code.

[(g) SUNSET.—The authority to restrict, terminate, or void contracts, grants, and cooperative agreements pursuant to subsection (a) shall cease to be effective on the date that is three years after the date of the enactment of this Act.]

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014

(Public Law 113–66)

DIVISION A—DEPARTMENT OF DEFENSE AUTHORIZATIONS

* * * * * * *

TITLE VIII—ACQUISITION POLICY, ACQUISITION MANAGEMENT, AND RELATED MATTERS

* * * * * * *

Subtitle D—Provisions Relating to Contracts in Support of Contingency Operations in Iraq and Afghanistan

* * * * * * *

[SEC. 831. PROHIBITION ON CONTRACTING WITH THE ENEMY.

[(a) AUTHORITY TO TERMINATE OR VOID CONTRACTS, GRANTS, AND COOPERATIVE AGREEMENTS AND TO RESTRICT FUTURE AWARD.—

[(1) IDENTIFICATION OF PERSONS AND ENTITIES.—The Secretary of Defense shall establish in each covered combatant command a program to identify persons or entities, within the area of responsibility of such covered combatant command, that—

[(A) provide funds received under a contract, grant, or cooperative agreement of the Department of Defense directly or indirectly to a covered person or entity; or

[(B) fail to exercise due diligence to ensure that none of the funds received under a contract, grant, or cooperative agreement of the Department of Defense are provided directly or indirectly to a covered person or entity.

[(2) NOTICE OF PERSONS OR ENTITIES IDENTIFIED.—Upon the identification of a person or entity as meeting subparagraph (A) or (B) of paragraph (1), the commander of the combatant command concerned, and any deputies of the commander specified by the commander for purposes of this section, shall be notified in writing of such identification of such person or entity.

[(3) RESPONSIVE ACTIONS.—Upon receipt of a notice under paragraph (2), the commander of the combatant command concerned may, in consultation with the Under Secretary of Defense for Policy, the Under Secretary of Defense for Acquisition, Technology, and Logistics, and the appropriate Chief of Mission, notify the heads of appropriate contracting activities, in writing, of such identification and request that the heads of such contracting activities exercise the authorities provided pursuant to paragraph (4) and the Department of Defense Supplement to the Federal Acquisition Regulation, as revised, with respect to any contract, grant, or cooperative agreement that provides funding directly or indirectly to the person or entity covered by the notice.

[(4) AUTHORITIES. Not later than 30 days after the date of the enactment of this Act, the Secretary of Defense shall revise the Department of Defense Supplement to the Federal Acquisition Regulation to authorize the head of a contracting activity in each covered combatant command, pursuant to a request from the commander of a covered combatant command under paragraph (3)—

[(A) to prohibit, limit, or otherwise place restrictions on the award of any Department of Defense contract, grant, or cooperative agreement to a person or entity identified pursuant to paragraph (1)(A);

[(B) to terminate for default any Department contract, grant, or cooperative agreement awarded to a person or entity identified pursuant to paragraph (1)(B); or

[(C) to void in whole or in part any Department contract, grant, or cooperative agreement awarded to a person or entity identified pursuant to paragraph (1)(A).

[(b) CONTRACT CLAUSE.—

[(1) IN GENERAL.—Not later than 30 days after the date of the enactment of this Act, the Department of Defense Supplement to the Federal Acquisition Regulation shall be revised to require that—

[(A) the clause described in paragraph (2) shall be included in each covered contract, grant, and cooperative

agreement of the Department of Defense that is awarded on or after the date of the enactment of this Act; and

[(B) to the maximum extent practicable, each covered contract, grant, and cooperative agreement of the Department of Defense that is awarded before the date of the enactment of this Act shall be modified to include the clause described in paragraph (2).

[(2) CLAUSE DESCRIBED.—The clause described in this paragraph is a clause that—

[(A) requires the contractor, or the recipient of the grant or cooperative agreement, to exercise due diligence to ensure that none of the funds received under the contract, grant, or cooperative agreement are provided directly or indirectly to a covered person or entity; and

[(B) notifies the contractor, or the recipient of the grant or cooperative agreement, of the authority of the head of the contracting activity to terminate or void the contract, grant, or cooperative agreement, in whole or in part.

[(3) COVERED CONTRACT, GRANT, OR COOPERATIVE AGREEMENT.—In this subsection, the term "covered contract, grant, or cooperative agreement" means a contract, grant, or cooperative agreement with an estimated value in excess of $50,000.

[(4) TREATMENT AS VOID.—For purposes of subsection (a)(4) and the exercise under subsection (a)(3) of the authorities in the Department of Defense Supplement to the Federal Acquisition Regulation pursuant to this subsection:

[(A) A contract, grant, or cooperative agreement that is void is unenforceable as contrary to public policy.

[(B) A contract, grant, or cooperative agreement that is void in part is unenforceable as contrary to public policy with regard to a segregable task or effort under the contract, grant, or cooperative agreement.

[(c) REQUIREMENTS FOLLOWING CONTRACT ACTIONS.—Not later than 30 days after the date of the enactment of this Act, the Department of Defense Supplement to the Federal Acquisition Regulation shall be revised as follows:

[(1) To require that any head of contracting activity taking an action pursuant to subsection (a)(3) or (a)(4) to terminate, void, or restrict a contract, grant, or cooperative agreement notify in writing the contractor or recipient of the grant or cooperative agreement, as applicable, of the action.

[(2) To permit, in such manner as the Department of Defense Supplement to the Federal Acquisition Regulation as so revised shall provide, the contractor or recipient of a grant or cooperative agreement subject to an action taken pursuant to subsection (a)(3) or (a)(4) to terminate or void the contract, grant, or cooperative agreement, as the case may be, an opportunity to challenge the action by requesting administrative review within 30 days after receipt of notice of the action.

[(d) ANNUAL REVIEW.—The commanders of the covered combatant commands shall, on an annual basis, review the lists of persons and entities previously identified pursuant to subsection (a)(1) in order to determine whether or not such persons and entities continue to warrant identification pursuant to that subsection. If a commander determines pursuant to such a review that a person or

entity no longer warrants identification pursuant to subsection (a)(1), the commander shall notify the heads of contracting activities of the Department of Defense in writing of such determination.

[(e) PROTECTION OF CLASSIFIED INFORMATION.—Classified information relied upon to make an identification pursuant to subsection (a)(1) may not be disclosed to a contractor or a recipient of a grant or cooperative agreement with respect to which an action is taken pursuant to subsection (a)(3) or (a)(4) or to their representatives, in the absence of a protective order issued by a court of competent jurisdiction established under Article I or Article III of the Constitution of the United States that specifically addresses the conditions upon which such classified information may be so disclosed.

[(f) DELEGATION.—

[(1) RESPONSIBILITIES RELATING TO IDENTIFICATION AND REVIEW.—The commander of a covered combatant command may delegate the responsibilities in subsection (a)(3) to any deputies of the commander specified by the commander pursuant to that subsection. The commander may delegate any responsibilities under subsection (d) to the deputy commander of the combatant command. Any delegation of responsibilities under this paragraph shall be made in writing.

[(2) NONDELEGATION OF RESPONSIBILITY FOR CONTRACT ACTIONS.—The authority provided by subsections (a)(3) and (a)(4) to terminate, void, or restrict contracts, grants, and cooperative agreements may not be delegated below the level of head of contracting activity.

[(g) INCLUSION OF INFORMATION ON CONTRACT ACTIONS IN FAPIIS.—Upon the termination, voiding, or restriction of a contract, grant, or cooperative agreement pursuant to subsection (a)(3) or (a)(4), the head of contracting activity concerned shall provide for the inclusion in the Federal Awardee Performance and Integrity Information System (FAPIIS), or other formal system of records on contractors or entities, of appropriate information on the termination, voiding, or restriction of the contract, grant, or cooperative agreement.

[(1) IN GENERAL.—Not later than March 1 each year through 2019, the Secretary of Defense shall submit to the congressional defense committees a report on the use of the authorities in this section in the preceding calendar year, including the following:

[(A) For each instance in which a contract, grant, or cooperative agreement was terminated or voided, or entry into contracts, grants, and cooperative agreements was restricted, pursuant to subsection (a)(3) or (a)(4), the following:

[(i) An explanation of the basis for the action taken.

[(ii) The value of the contract, grant, or cooperative agreement terminated or voided.

[(iii) The value of all contracts, grants, or cooperative agreements of the Department of Defense in force with the person or entity concerned at the time the contract, grant, or cooperative agreement was terminated or voided.

[(iv) Information on how the goods or services covered by the terminated or voided contract, grant, or cooperative agreement were otherwise obtained by the commander of the combatant command concerned.

[(B) For each instance in which a contract, grant, or cooperative agreement of a person or entity identified pursuant to subsection (a)(1) was not terminated or voided pursuant to subsection (a)(3) or (a)(4), or the future award of contracts, grants, and cooperative agreements to such person or entity was not restricted pursuant to subsection (a)(3) or (a)(4), an explanation why such action was not taken.

[(2) FORM.—Any report under this subsection may be submitted in classified form.

[(i) OTHER DEFINITIONS.—In this section:

[(1) The term "covered combatant command" means United States Central Command, United States European Command, United States Africa Command, United States Southern Command, or United States Pacific Command.

[(2) The term "head of contracting activity" has the meaning given that term in subpart 601 of part 1 of the Federal Acquisition Regulation.

[(3) The term "covered person or entity" means a person or entity that is actively opposing United States or coalition forces involved in a contingency operation in which members of the armed forces are actively engaged in hostilities.

[(j) SUNSET.—The provisions of this section shall cease to be effective on December 31, 2018.]

○