

113TH CONGRESS
1ST SESSION

H. R. 1688

To prohibit contracting with the enemy.

IN THE HOUSE OF REPRESENTATIVES

APRIL 23, 2013

Ms. SHEA-PORTER introduced the following bill; which was referred to the Committee on Oversight and Government Reform, and in addition to the Committee on Armed Services, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To prohibit contracting with the enemy.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Never Contract With
5 the Enemy Act”.

6 **SEC. 2. PROHIBITION ON CONTRACTING WITH THE ENEMY.**

7 (a) STATEMENT OF POLICY.—It shall be the policy
8 of the United States that executive agencies shall not con-
9 tract with the enemy or with a person or entity that has
10 been identified as providing funds received under a con-

1 tract, grant, or cooperative agreement directly or indi-
2 rectly to an enemy of the United States or otherwise sup-
3 porting those who are actively opposing the United States
4 or coalition forces in a contingency operation.

5 (b) AUTHORITY TO TERMINATE OR VOID CON-
6 TRACTS, GRANTS, AND COOPERATIVE AGREEMENTS AND
7 TO RESTRICT FUTURE AWARD.—

8 (1) IN GENERAL.—Not later than 30 days after
9 the date of the enactment of this Act, the Federal
10 Acquisition Regulation shall be revised to provide
11 that, upon notice from a Senior Procurement Execu-
12 tive or the commander of a geographic combatant
13 command under subsection (e)(3), the head of con-
14 tracting activity of an executive agency may do the
15 following:

16 (A) If the notice is that a person or entity
17 has been identified as providing funds received
18 under a contract, grant, or cooperative agree-
19 ment of the executive agency directly or indi-
20 rectly to an enemy of the United States or a
21 person or entity who is actively supporting an
22 enemy of the United States or otherwise sup-
23 porting those who are actively opposing United
24 States or coalition forces in a contingency oper-
25 ation—

1 (i) either—

2 (I) terminate for default the con-
3 tract, grant, or cooperative agreement;
4 or

5 (II) void the contract, grant, or
6 cooperative agreement in whole or in
7 part; and

8 (ii) restrict the future award to the
9 person or entity so identified of contracts,
10 grants, or cooperative agreements of the
11 executive agency.

12 (B) If the notice is that the person or enti-
13 ty has failed to exercise due diligence to ensure
14 that none of the funds received under a con-
15 tract, grant, or cooperative agreement of the ex-
16 ecutive entity are provided directly or indirectly
17 to an enemy of the United States or a person
18 or entity who is actively supporting an enemy of
19 the United States or otherwise supporting those
20 who are actively opposing United States or coa-
21 lition forces in a contingency operation, termi-
22 nate for default the contract, grant, or coopera-
23 tive agreement.

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

1 (A) A contract, grant, or cooperative
2 agreement that is void is unenforceable as con-
3 trary to public policy.

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

9 (c) CONTRACT CLAUSE.—

10 (1) IN GENERAL.—Not later than 30 days after
11 the date of the enactment of this Act, the Federal
12 Acquisition Regulation shall be revised to require
13 that—

14 (A) the clause described in paragraph (2)
15 shall be included in each covered contract,
16 grant, and cooperative agreement of an execu-
17 tive agency that is awarded on or after the date
18 of the enactment of this Act; and

19 (B) to the maximum extent practicable,
20 each covered contract, grant, and cooperative
21 agreement of an executive agency that is award-
22 ed before the date of the enactment of this Act
23 shall be modified to include the clause described
24 in paragraph (2), other than the matter pro-

1 vided for in subparagraph (A) of that para-
2 graph.

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

5 (A) requires the contractor, or the recipi-
6 ent of the grant or cooperative agreement, to
7 certify in connection with entry into the con-
8 tract, grant, or cooperative agreement that the
9 contractor or recipient, as the case may be, has
10 never knowingly provided funds directly or indi-
11 rectly to an enemy of the United States or a
12 person or entity who is actively supporting an
13 enemy of the United States or otherwise know-
14 ingly supported those who are actively opposing
15 United States or coalition forces in a contin-
16 gency operation;

17 (B) requires the contractor, or the recipi-
18 ent of the grant or cooperative agreement, to
19 exercise due diligence to ensure that none of the
20 funds received under the contract, grant, or co-
21 operative agreement are provided directly or in-
22 directly to an enemy of the United States or a
23 person or entity who is actively supporting an
24 enemy of the United States or otherwise sup-
25 porting those who are actively opposing United

1 States or coalition forces in a contingency oper-
2 ation; and

3 (C) notifies the contractor, or the recipient
4 of the grant or cooperative agreement, of the
5 authority of the head of the contracting activity
6 to terminate or void the contract, grant, or co-
7 operative agreement, in whole or in part, as
8 provided in subsection (b).

9 (3) COVERED CONTRACT, GRANT, OR COOPERA-
10 TIVE AGREEMENT.—In this subsection, the term
11 “covered contract, grant, or cooperative agreement”
12 means a contract, grant, or cooperative agreement
13 with an estimated value in excess of \$20,000.

14 (d) REQUIREMENTS FOLLOWING CONTRACT AC-
15 TIONS.—Not later than 30 days after the date of the en-
16 actment of this Act, the Federal Acquisition Regulation
17 shall be revised as follows:

18 (1) To require that any head of contracting ac-
19 tivity taking an action under subsection (b) to termi-
20 nate, void, or restrict a contract, grant, or coopera-
21 tive agreement notify in writing the contractor or re-
22 cipient of the grant or cooperative agreement, as ap-
23 plicable, of the action.

24 (2) To permit, in such manner as the Federal
25 Acquisition Regulation as so revised shall provide,

1 the contractor or recipient of a grant or cooperative
2 agreement subject to an action taken under sub-
3 section (b) to terminate or void the contract, grant,
4 or cooperative agreement, as the case may be, an op-
5 portunity to contest the action within 30 days of re-
6 ceipt of notice of the action.

7 (e) IDENTIFICATION OF SUPPORTERS OF THE
8 ENEMY.—

9 (1) IDENTIFICATION.—Not later than 30 days
10 after the date of the enactment of this Act, the Sec-
11 retary of Defense and each Senior Procurement Ex-
12 ecutive shall carry out a program to use available in-
13 telligence (including information made available pur-
14 suant to subsection (g)(1)) to—

15 (A) either—

16 (i) in the case of the geographic com-
17 batant commands, review persons and enti-
18 ties who receive United States funds
19 through contracts, grants, and cooperative
20 agreements performed for such commands
21 in their areas of responsibility; or

22 (ii) in the case of the Senior Procure-
23 ment Executives, review persons and enti-
24 ties who receive United States funds
25 through contracts, grants, and cooperative

1 agreements performed for their agencies;

2 and

3 (B) identify any such persons and entities
4 who are providing funds received under a con-
5 tract, grant, or cooperative agreement of an ex-
6 ecutive agency directly or indirectly to an
7 enemy of the United States or a person or enti-
8 ty who is actively supporting an enemy of the
9 United States or otherwise supporting those
10 who are actively opposing United States or coa-
11 lition forces in a contingency operation.

12 (2) DISCHARGE BY DOD THROUGH COM-
13 MANDERS OF COMBATANT COMMANDS.—The Sec-
14 retary of Defense shall carry out the program re-
15 quired by paragraph (1) through the commanders of
16 the geographic combatant commands.

17 (3) NOTIFICATION OF CONTRACTING ACTIVI-
18 TIES.—If a Senior Procurement Executive or the
19 commander of a geographic combatant command,
20 acting pursuant to a program required by paragraph
21 (1), identifies a person or entity as actively sup-
22 porting an enemy of the United States or otherwise
23 supporting those who are actively opposing United
24 States or coalition forces in a contingency operation,
25 the Senior Procurement Executive or commander, as

1 the case may be, shall notify the heads of con-
2 tracting activities of the executive agencies in writ-
3 ing of such identification. Any written notification
4 pursuant to this paragraph shall be made in accord-
5 ance with procedures established to implement the
6 revisions to the Federal Acquisition Regulation re-
7 quired by this section.

8 (4) ANNUAL REVIEW.—As part of the programs
9 required by paragraph (1), the Senior Procurement
10 Executives and the commanders of the geographic
11 combatant commands shall, on an annual basis, re-
12 view the lists of persons and entities previously cov-
13 ered by a notice under paragraph (3) as having been
14 identified pursuant to paragraph (1)(B) in order to
15 determine whether or not such persons and entities
16 continue to warrant identification pursuant to para-
17 graph (1)(B). If a Senior Procurement Executive or
18 commander determines pursuant to such a review
19 that a person or entity no longer warrants identifica-
20 tion pursuant to paragraph (1)(B), the Senior Pro-
21 curement Executive or commander, as the case may
22 be, shall notify the heads of contracting activities of
23 the executive agencies in writing of such determina-
24 tion.

1 (5) PROTECTION OF CLASSIFIED INFORMA-
2 TION.—Classified information relied upon to make
3 an identification in accordance with this subsection
4 may not be disclosed to a contractor or a recipient
5 of a grant or cooperative agreement with respect to
6 which an action is taken pursuant to the authority
7 provided in subsection (b), or to their representa-
8 tives, in the absence of a protective order issued by
9 a court of competent jurisdiction established under
10 Article I or Article III of the Constitution of the
11 United States that specifically addresses the condi-
12 tions upon which such classified information may be
13 so disclosed.

14 (f) DELEGATION OF CERTAIN RESPONSIBILITIES.—

15 (1) RESPONSIBILITY TO IDENTIFY AND PRO-
16 VIDE NOTICE.—A Senior Procurement Executive
17 may delegate the responsibilities in paragraphs (1),
18 (3), and (4) of subsection (e) to the designated dep-
19 uty of such Executive. The commander of a geo-
20 graphic combatant command may delegate the re-
21 sponsibilities in such paragraphs to the deputy com-
22 mander of that combatant command. Any delegation
23 of responsibilities under this paragraph shall be
24 made in writing.

1 (2) NONDELEGATION OF RESPONSIBILITY FOR
2 CONTRACT ACTIONS.—The authority provided by
3 subsection (b) to terminate, void, or restrict con-
4 tracts, grants, and cooperative agreements may not
5 be delegated below the level of head of contracting
6 activity.

7 (g) ADDITIONAL RESPONSIBILITIES OF EXECUTIVE
8 AGENCIES.—

9 (1) DISSEMINATION OF INFORMATION ON SUP-
10 PORTERS OF THE ENEMY.—The Secretary of De-
11 fense and the Administrator for Federal Procure-
12 ment Policy shall jointly carry out a program
13 through which the contracting activities of the exec-
14 utive agencies may provide information to Senior
15 Procurement Executives and the commanders of the
16 geographic combatant commands relating to persons
17 or entities who may be providing funds received
18 under contracts, grants, or cooperative agreements
19 of the executive agencies directly or indirectly to an
20 enemy of the United States or a person or entity
21 who is actively supporting an enemy of the United
22 States or otherwise supporting those who are ac-
23 tively opposing United States or coalition forces in
24 a contingency operation. The program shall be de-
25 signed to facilitate and encourage the sharing of in-

1 formation between executive agencies and the geo-
2 graphic combatant commands.

3 (2) INCLUSION OF INFORMATION ON CONTRACT
4 ACTIONS IN FAPIIS.—Upon the termination, voiding,
5 or restriction of a contract, grant, or cooperative
6 agreement of an executive agency under subsection
7 (b), the head of contracting activity of the executive
8 agency shall provide for the inclusion in the Federal
9 Awardee Performance and Integrity Information
10 System (FAPIIS), or other formal system of records
11 on contractors or entities, of appropriate information
12 on the termination, voiding, or restriction, as the
13 case may be, of the contract, grant, or cooperative
14 agreement.

15 (3) REPORTS.—The head of contracting activity
16 that receives a notice pursuant to subsection (e)(3)
17 shall submit to the Senior Procurement Executives
18 and the commanders of the geographic combatant
19 commands a report on the action, if any, taken by
20 the head of contracting activity pursuant to sub-
21 section (b), including a determination not to termi-
22 nate, void, or restrict the contract, grant, or cooper-
23 ative agreement as otherwise authorized by sub-
24 section (b).

25 (h) REPORTS.—

1 (1) IN GENERAL.—Not later than March 1 each
2 year, the Secretary of Defense shall, in consultation
3 with the heads of other executive agencies, submit to
4 the appropriate committees of Congress a report on
5 the use of the authorities in this section in the pre-
6 ceding calendar year, including the following:

7 (A) For each instance in which an execu-
8 tive agency exercised the authority to terminate,
9 void, or restrict a contract, grant, and coopera-
10 tive agreement pursuant to subsection (b), the
11 following:

12 (i) The executive agency taking such
13 action.

14 (ii) An explanation of the basis for the
15 action taken.

16 (iii) The value of the contract, grant,
17 or cooperative agreement voided or termi-
18 nated.

19 (iv) The value of all contracts, grants,
20 or cooperative agreements of the executive
21 agency in force with the person or entity
22 concerned at the time the contract, grant,
23 or cooperative agreement was terminated
24 or voided.

1 (B) For each instance in which an execu-
2 tive agency did not exercise the authority to ter-
3 minate, void, or restrict a contract, grant, and
4 cooperative agreement pursuant to subsection
5 (b) as requested pursuant to subsection (e)(3),
6 the following:

7 (i) The executive agency concerned.

8 (ii) An explanation why the action was
9 not taken.

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

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

13 (1) The term “appropriate committees of Con-
14 gress” means—

15 (A) the Committee on Armed Services, the
16 Committee on Homeland Security and Govern-
17 mental Affairs, and the Committee on Appro-
18 priations of the Senate; and

19 (B) the Committee on Armed Services, the
20 Committee on Oversight and Government Re-
21 form, and the Committee on Appropriations of
22 the House of Representatives.

23 (2) The term “combatant command” means a
24 command established pursuant to chapter 6 of title
25 10, United States Code.

1 (3) The term “contingency operation” has the
2 meaning given that term in section 101(a)(13) of
3 title 10, United States Code.

4 (4) The term “enemy of the United States”
5 means any of the following:

6 (A) Any person or organization determined
7 by the Secretary of Defense or the Secretary of
8 State to be hostile to United States forces or
9 interests or providing support to any person or
10 organization hostile to United States forces or
11 interests during the time of a declared war,
12 peacekeeping operation, or other military or
13 contingency operation.

14 (B) Any organization designated as a ter-
15 rorist organization under section 219(a) of the
16 Immigration and Nationality Act (8 U.S.C.
17 1189(a)).

18 (5) The term “executive agency” has the mean-
19 ing given that term in section 133 of title 41, United
20 States Code.

21 (6) The term “head of contracting activity” has
22 the meaning given that term in subpart 601 of part
23 1 of the Federal Acquisition Regulation.

1 (7) The term “Senior Procurement Executive”
2 has the meaning given that term in section 1702 of
3 title 41, United States Code.

4 (j) COORDINATION WITH CURRENT AUTHORITIES
5 APPLICABLE TO CENTCOM.—

6 (1) REPEAL OF SUPERSEDED AUTHORITY.—Ef-
7 fective 30 days after the date of the enactment of
8 this Act, section 841 of the National Defense Au-
9 thorization Act for Fiscal Year 2012 (Public Law
10 112–81; 125 Stat. 1510; 10 U.S.C. 2302 note) is re-
11 pealed.

12 (2) USE OF SUPERSEDED AUTHORITIES IN DIS-
13 CHARGE OF REQUIREMENTS.—In providing for the
14 discharge of the requirements of this section by the
15 Department of Defense, the Secretary of Defense
16 may use and modify for that purpose requirements
17 and procedures established by the Secretary for pur-
18 poses of the discharge of the requirements of section
19 841 of the National Defense Authorization Act for
20 Fiscal Year 2012.

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