

KEEPING POLITICS OUT OF FEDERAL CONTRACTING ACT
 OF 2011

JUNE 15, 2012.—Committed to the Committee of the Whole House on the State of
 the Union and ordered to be printed

Mr. ISSA, from the Committee on Oversight and Government
 Reform, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 2008]

[Including cost estimate of the Congressional Budget Office]

The Committee on Oversight and Government Reform, to whom
 was referred the bill (H.R. 2008) to amend title 41, United States
 Code, to prohibit inserting politics into the Federal acquisition
 process by prohibiting the submission of political contribution infor-
 mation as a condition of receiving a Federal contract, having con-
 sidered the same, report favorably thereon without amendment and
 recommend that the bill do pass.

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COMMITTEE STATEMENT AND VIEWS

PURPOSE AND SUMMARY

This legislation, H.R. 2008, the “Keeping Politics Out of Federal Contracting Act of 2011,” prohibits the head of an executive agency from: (1) requiring a contractor to submit political information as part of a soliticitation, request for bid, request for proposal, or any other communication in connection with the award of a contract for procurement of property or services or during the course of the contract performance until the completion of a contract; (2) using such political information as a factor or consideration in the source selection process used to award a competitive or non-competitive contract; or (3) including such political information in a contracting past performance database.

It defines “political information” as information relating to political spending, including any payment for an electioneering communication, by a contractor or persons related to such contractor to a candidate for Federal office, a political committee, a political party, or to a third party entity for political purposes.

BACKGROUND AND NEED FOR LEGISLATION

The acquisition and procurement laws and regulations are designed to ensure impartiality in the selection of contractors. These laws require that firms seeking to do business with the government are given the opportunity to compete on a level playing field, where the government is best able to obtain the goods and services that it needs based solely on best price, best quality, or the best combination thereof. Politics should not influence what the government purchases with taxpayer money.

This law addresses a draft Executive Order advanced by the Obama Administration. That proposed Executive Order would require that bidders disclose information about their political spending. These bidders, and the government’s own contracting officials, however, would not have control over how that information is used. Indeed, the proposed Executive Order would require the political donation information to be made available on a publicly available, searchable database as soon as practicable. The disclosure of private political donations by government contractors would improperly politicize the government procurement process. This legislation prohibits the implementation of the proposed Executive Order.

LEGISLATIVE HISTORY

This bill was introduced on May 26, 2011, and referred to the House Committee on Oversight and Government Reform. On June 20, 2011, it was referred to the Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform. On April 26, 2012, it was submitted for Committee consideration and the bill was ordered to be reported by voice vote. A companion bill in the Senate, S. 1100, was introduced on May 26, 2011, and ordered reported on May 16, 2012, by the Senate Committee on Homeland Security and Government Affairs.

SECTION-BY-SECTION

Section 1. Short title

This Act may be cited as the ‘Keeping Politics Out of Federal Contracting Act of 2011’.

Section 2. Prohibition on certain uses of political information

Amends Chapter 47 of title 41, United States Code to prohibit the head of an executive agency from:

- (1) requiring a contractor to submit political information as part of a solicitation, request for bid, request for proposal, or any other communication in connection with the award of a contract for procurement of property or services or during the course of the contract performance until the completion of a contract;
- (2) using such political information as a factor or consideration in the source selection process used to award a competitive or non-competitive contract; or
- (3) including such political information in a contracting past performance database.

Applies the prohibitions to the procurement of commercial items, commercial off-the-shelf items, and the non-commercial procurement of supplies, property, services, and manufactured items, irrespective of contract vehicle, including contracts, purchase orders, task or deliver orders under indefinite delivery/indefinite quantity contracts, blanket purchase agreements, and basic ordering agreements.

Defines “political information” as information relating to political spending, including any payment for an electioneering communication by a contractor or persons related to such contractor to a candidate for Federal office, a political committee, a political party, or to a third party entity for political purposes.

EXPLANATION OF AMENDMENTS

No amendments were offered.

COMMITTEE CONSIDERATION

On April 26, 2012, the Committee met in open session and ordered reported favorably the bill, H.R. 2008, by voice vote, a quorum being present.

ROLLCALL VOTES

There were no votes during consideration of H.R. 2008.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch where the bill relates to the terms and conditions of employment or access to public services and accommodations. This bill prohibits the head of an executive agency from: (1) requiring a contractor to submit political information as part of a solicitation, request for bid, request for proposal, or any other communication in connection with the award of a contract for procurement of property or services or during the

course of the contract performance until the completion of a contract; (2) using such political information as a factor or consideration in the source selection process used to award a competitive or non-competitive contract; or (3) including such political information in a contracting past performance database. As such this bill does not relate to employment or access to public services and accommodations.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause (2)(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the descriptive portions of this report.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee's performance goals and objectives are reflected in the descriptive portions of this report.

FEDERAL ADVISORY COMMITTEE ACT

The Committee finds that the legislation does not establish or authorize the establishment of an advisory committee within the definition of 5 U.S.C. App., Section 5(b).

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandate Reform Act, P.L. 104-4) requires a statement as to whether the provisions of the reported include unfunded mandates. In compliance with this requirement the Committee has received a letter from the Congressional Budget Office included herein.

EARMARK IDENTIFICATION

H.R. 2008 does not include any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI.

COMMITTEE ESTIMATE

Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs that would be incurred in carrying out H.R. 2008. However, clause 3(d)(3)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act.

BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the

Congressional Budget Act of 1974 and with respect to requirements of clause (3)(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for H.R. 2008 from the Director of Congressional Budget Office:

MAY 8, 2012.

Hon. DARRELL ISSA,
Chairman, Committee on Oversight and Government Reform, House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2008, the Keeping Politics Out of Federal Contracting Act of 2011.

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

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

H.R. 2008—Keeping Politics Out of Federal Contracting Act of 2011

H.R. 2008 would prohibit federal agencies from requiring existing or potential contractors to submit information concerning any political contributions to the government, or from using political contributions as a factor in awarding contracts. According to the General Services Administration, while there is a draft executive order that would require agencies to collect information regarding a contractor's or potential contractor's political contributions, agencies are not currently collecting such information. CBO estimates that implementing H.R. 2008 would not require agencies to make a significant change in the contracting process and thus would not have a significant impact on the federal budget.

Enacting the bill could affect direct spending by agencies not funded through annual appropriations; therefore, pay-as-you-go procedures apply. CBO estimates, however, that any net increase in spending by those agencies would be negligible. Enacting H.R. 2008 would not affect revenues.

H.R. 2008 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 Matthew Pickford. This estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

CHAPTER 47 OF TITLE 41, UNITED STATES CODE

CHAPTER 47—MISCELLANEOUS

Sec.

4701. Determinations and decisions.

* * * * *

4712. *Prohibition on Certain Uses of Political Information.*

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§4712. Prohibition on certain uses of political information

(a) **PROHIBITION ON REQUIRING SUBMISSION OF POLITICAL INFORMATION.**—*The head of an executive agency may not require a contractor to submit political information related to the contractor or a subcontractor at any tier, or any partner, officer, director, or employee of the contractor or subcontractor—*

(1) *as part of a solicitation, request for bid, request for proposal, or any other form of communication designed to solicit offers in connection with the award of a contract for procurement of property or services;*

(2) *during the course of contract performance as part of the process associated with modifying a contract or exercising a contract option; or*

(3) *any time prior to contract completion and final contract closeout.*

(b) **PROHIBITION ON USE OF POLITICAL INFORMATION.**—*The head of an executive agency may not use political information, whether obtained from a contractor or prospective contractor or from an independent public or nonpublic source, as a factor or consideration in the source selection process used to award a competitive or non-competitive contract at any value or in making any decision associated with the modification of a contract or the exercise of a contract option.*

(c) **PROHIBITION ON INCLUSION OF POLITICAL INFORMATION IN CONTRACTING DATABASES.**—

(1) **IN GENERAL.**—*Except as provided under paragraph (2), an executive agency may not include political information in the contracting past performance database or any database designed to provide information to a contracting officer for purposes of supporting the responsibility determination by such officer.*

(2) **EXCEPTION FOR DISCLOSURE OF CERTAIN VIOLATIONS.**—

(A) **EXCEPTION.**—*Data required as of the date of the enactment of the Keeping Politics Out of Federal Contracting Act of 2011 to be included in the database maintained under section 2313 of this title are not subject to the prohibition under paragraph (1).*

(B) **RULE OF CONSTRUCTION.**—*Notwithstanding subparagraph (A), this paragraph shall not be construed as authorizing the inclusion of political information pursuant to subsection (c)(6) of such section.*

(d) **APPLICABILITY.**—*The prohibitions under this section apply to the procurement of commercial items, the procurement of commercial off-the-shelf items, and the non-commercial procurement of supplies, property, services, and manufactured items, irrespective of*

contract vehicle, including contracts, purchase orders, task or deliver orders under indefinite delivery/indefinite quantity contracts, blanket purchase agreements, and basic ordering agreements.

(e) RULE OF CONSTRUCTION.—Nothing in this section shall be construed as waiving, superseding, restricting, or limiting the application of the Federal Election Campaign Act of 1971 (2 U.S.C. 431 et seq.) or preventing Federal regulatory or law enforcement agencies from collecting or receiving information authorized by law.

(f) DEFINITIONS.—In this section:

(1) ACQUISITION.—The term “acquisition” has the meaning given the term in section 131 of this title.

(2) CONTRACTOR.—The term “contractor” includes contractors, bidders, and offerors, and individuals and legal entities who would reasonably be expected to submit offers or bids for Federal Government contracts.

(3) EXECUTIVE AGENCY.—The term “executive agency” has the meaning given the term in section 133 of this title.

(4) POLITICAL INFORMATION.—The term “political information” means information relating to political spending, including any payment consisting of a contribution, expenditure, independent expenditure, or disbursement for an electioneering communication that is made by the contractor, any of its partners, officers, directors or employees, or any of its affiliates or subsidiaries to a candidate or on behalf of a candidate for election for Federal office, to a political committee, to a political party, to a third-party entity with the intention or reasonable expectation that it would use the payment to make independent expenditures or electioneering communications, or that is otherwise made with respect to any election for Federal office, party affiliation, and voting history. Each of the terms “contribution”, “expenditure”, “independent expenditure”, “candidate”, “election”, “electioneering communication”, and “Federal office” has the meaning given the term in the Federal Campaign Act of 1971 (2 U.S.C. 431 et seq.).

MINORITY VIEWS

H.R. 2008, the Keeping Politics out of Federal Contracting Act, is both unnecessary and unwise. There is a vast amount of secret money now financing our election process. Transparency and the disclosure of political contributions by everyone—corporations, unions, and individuals—should be our goal.

In response to the *Citizens United* decision and the emergence of Super PACs, the Administration last year circulated a draft Executive Order that would have required disclosures by government contractors of their political contributions, particularly to third-party groups that seek to influence the outcome of federal elections.

This bill, which would prohibit these types of disclosures, seems to suggest that requiring government contractors to disclose more information about their political donations is bad policy because it could cause people in power to retaliate against them for political reasons. This is a fundamentally flawed premise. Under this logic, all campaign disclosures would be bad, not just new ones. Government contractors already disclose contributions and expenditures by their PACs and those who contribute to them. Contributions by the officers and directors of government contractors are also required to be disclosed. Obviously, we should not eliminate these provisions.

A second argument made by proponents of this bill is that contracting officers might review political contributions in order to reward allies or punish foes by awarding or withholding government contracts. But federal procurement laws already prohibit this.

A third argument—that the draft Executive Order violates the First Amendment—is also misplaced. In the recent *Citizens United* case, eight of nine justices agreed that campaign disclosure rules are consistent with the First Amendment because they do not prohibit contributions and “do not prevent anyone from speaking.”

The draft Executive Order could have been drafted differently. For example, under the draft Executive Order, agency heads would have been required to collect this information, rather than the Federal Election Commission, which is the more appropriate body. But the arguments for this bill have little merit. Members instead should support legislation that would strengthen our democratic process by ending the secret financing of elections.

ELIJAH E. CUMMINGS.

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