SEC. 816. RESTRICTION ON CONTRACTING AND VOIDING CONTRACTS AND SUBCONTRACTS IN SUPPORT OF CONTINGENCY OPERATIONS IN THE UNITED STATES CENTRAL COMMAND THEATER OF OPERATIONS.

(a) During a contingency operation, the Secretary of Defense, through the commander of a combatant command, may determine, based upon credible evidence, that a foreign entity or individual is supporting an insurgency or otherwise opposing United States or coalition forces. The commander of the combatant command shall notify the responsible head of the contracting activity in writing of all such adverse entity determinations.

(b) Upon notification from the commander of a combatant command of an adverse entity determination made pursuant to subsection (a), the head of the contracting activity shall review all contracts and subcontracts issued under the authority of that contracting activity to determine whether any such adverse entity is currently performing under contract or subcontract with the contracting activity. The head of the contracting activity shall notify the commander if any adverse entity is performing under a contract or subcontract.

(c) With respect to any contract or subcontract identified pursuant to subsection (b), the head of the contracting activity may void any such contract or direct the prime contractor to void any such subcontract in accordance with applicable regulations prescribed pursuant to this section.

Section-by-Section Analysis

This proposal is part of a comprehensive approach established by the Chairman of the Joint Chiefs of Staff and the U.S. Central Command to resolve serious issues of corruption revealed by Warlord, Inc. June 2010 report on “Extortion and Corruption Along the U.S. Supply Chain in Afghanistan.”

The Department of Defense (DoD) established Task Force 2010 to examine the impact of U.S. contracting on corruption in Afghanistan, and develop and implement strategic and operational initiatives and action plans, in direct support of the International Security Assistance Forces – Afghanistan (ISAF) Anti-Corruption Contracting Line of Effort (LoE). Task Force 2010 is examining the full spectrum of the DoD's contract placement and contract administration practices with a focus on synchronizing contracting activities, increasing transparency and accountability in the contracting process, reducing contracting corruption, and promoting economic development.

Through Intelligence and Force Protection assessments, U.S. Commanders and contracting agencies in Afghanistan are aware that some of the prime and sub-tier contractors under DoD contract are possibly members of an insurgency or are providing monetary support to organizations that support the enemy.

Federal Acquisition Regulation (FAR) 49, Termination of Contracts, precludes immediate termination of contracts or subcontracts to stop payment to insurgent groups or activities opposing U.S. or coalition forces. FAR Part 49 grants contracting officers the authority to terminate contracts for convenience or default only by a written notice to the contractor. This is a very lengthy process.

Under the current FAR 49 -

a. If the contract is terminated for convenience, the contractor may submit a termination proposal and is legally entitled to payment for work performed and preparations made for terminated work, as well as a reasonable profit. Termination for default is only based on the contractor's actual or anticipated failure to perform its contractual obligations.

b. Terminating the contract based upon post-award non-responsibility criteria requires the contracting officer to follow termination procedures including providing a show cause letter. In addition, if the contract has outstanding invoices, those invoices would be paid in the normal course of business along with invoices submitted for work performed prior to the termination and for preparations for terminated work.

To remedy the problem, a new provision is required to grant contracting officers the authority to restrict contracting and void any contract and subcontract determined to have been awarded to an individual or organization supporting insurgent or otherwise opposing U.S. or coalition forces.

Budget Implications: It would not increase costs to the government to grant contracting officers the authority to restrict contracting or void any contract or subcontract determined to be affiliated with an insurgent group or otherwise opposing U.S. or coalition forces.

Changes to Existing Law: This proposal would make no changes to the text of existing law.