SEC. ____. SPECIAL EMERGENCY PROCUREMENT AUTHORITY TO FACILITATE THE DEFENSE AGAINST OR RECOVERY FROM A CYBER ATTACK.

Section 1903(a)(2) of title 41, United States Code, is amended by inserting "cyber," before "nuclear,".

Section-by-Section Analysis

This proposal would amend section 1903 of title 41, United States Code, by adding cyber attacks to the list of situations for which Special Emergency Procurement Authority (SEPA) is authorized. Currently, SEPA may only be used in support of a contingency operation or to facilitate the defense against or recovery from a nuclear, biological, chemical, or radiological attack against the United States.

This authority is needed to facilitate the defense against or recovery from a cyber attack because a cyber operation can achieve military objectives similar to the destruction caused by the dropping of a bomb, but may or may not always be visually apparent. As the Federal lead for cyber incident response and domestic cybersecurity, the Department of Homeland Security's ability to facilitate the defense against and recovery from a cyber attack would also be greatly enhanced by this authority. Although a cyber attack is carried out in cyberspace by a computer used to degrade, disrupt, or destroy information that resides in other computers and computer networks, or the computers and networks themselves, these actions can still create devastating results, especially when the damage inflicted appears in the physical domain.

The Department of Defense (DoD) has recently taken certain strategic measures to recognize this distinct domain of warfare. For example, *Joint Publication 3-12(R)* was issued in February 2013. This publication "provides joint doctrine for the planning, preparation, execution, and assessment of joint cyberspace operations across the range of military operations" and defines key concepts of cyberspace and cyber attacks. In June 2015, DoD published the *Law of War Manual*. This manual deals with issues of fundamental importance to the armed forces, and includes a chapter that "addresses how law of war principles and rules apply to relatively novel cyber capabilities and the cyber domain." Such efforts to modernize military doctrine reflect growing concern for the need to facilitate the defense against or recovery from a cyber-attack against the United States.

Furthermore, this proposal is consistent with duties imposed by section 1642 "Authorization of Military Cyber Operations" of the National Defense Authorization Act for Fiscal Year 2016 (P.L. 114-92). Specifically, Congress directed the Secretary of Defense to "develop, prepare, and coordinate; make ready all armed forces for purposes of; and, when appropriately authorized to do so, conduct, a military cyber operation in response to malicious cyber activity carried out against the United States…" Adding cyber attacks to the list of situations for which SEPA is authorized would enable DoD to streamline solicitation, evaluation, and award procedures. This authority would be appropriate when the circumstances of a malicious attack from cyberspace do not fit other forms of attack from air, land, sea, or space domains.

Budget Implications: The proposal has no budgetary impact. This proposal to expand the existing authority to include cyber attacks would not increase costs to the Government because this proposal only addresses procurement processes.

Changes to Existing Law: This proposal would amend section 1903(a)(2) of title 41, United States Code, as follows:

§1903. Special emergency procurement authority

(a) APPLICABILITY.—The authorities provided in subsections (b) and (c) apply with respect to a procurement of property or services by or for an executive agency that the head of the executive agency determines are to be used—

(1) in support of a contingency operation (as defined in section 101(a) of title 10); or

(2) to facilitate the defense against or recovery from **<u>cyber,</u>** nuclear, biological, chemical, or radiological attack against the United States.

(b) INCREASED THRESHOLDS AND LIMITATION.—For a procurement to which this section applies under subsection (a)—

(1) the amount specified in section 1902(a), (d), and (e) of this title shall be deemed to be—

(A) $15,000 in the case of a contract to be awarded and performed, or purchase to be made, in the United States; and

(B) $25,000 in the case of a contract to be awarded and performed, or purchase to be made, outside the United States;

(2) the term "simplified acquisition threshold" means—

(A) $250,000 in the case of a contract to be awarded and performed, or purchase to be made, in the United States; and

(B) $1,000,000 in the case of a contract to be awarded and performed, or purchase to be made, outside the United States; and

(3) the $5,000,000 limitation in sections 1901(a)(2) and 3305(a)(2) of this title and section 2304(g)(1)(B) of title 10 is deemed to be $10,000,000.

(c) AUTHORITY TO TREAT PROPERTY OR SERVICE AS COMMERCIAL ITEM.—

(1) IN GENERAL.—The head of an executive agency carrying out a procurement of property or a service to which this section applies under subsection (a)(2) may treat the property or service as a commercial item for the purpose of carrying out the procurement.

(2) CERTAIN CONTRACTS NOT EXEMPT FROM STANDARDS OR REQUIREMENTS.—A contract in an amount of more than $15,000,000 that is awarded on a sole source basis for an item or service treated as a commercial item under paragraph (1) is not exempt from-

(A) cost accounting standards prescribed under section 1502 of this title; or

(B) cost or pricing data requirements (commonly referred to as truth in negotiating) under chapter 35 of this title and section 2306a of title 10.