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Title 2 - Grants and Agreements

Subtitle A - Office of Management and Budget Guidance for Grants and Agreements

Chapter I - Office of Management and Budget Governmentwide Guidance for Grants and Agreements

Part 183 Never Contract with the Enemy

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Award Terms for Never Contract With the Enemy

PART 183 - NEVER CONTRACT WITH THE ENEMY

Authority: Pub. L. 113-291.

Source: 85 FR 49527, Aug. 13, 2020, unless otherwise noted.

§ 183.5 Purpose of this part.

This part provides guidance to Federal awarding agencies on the implementation of the Never Contract with the Enemy requirements applicable to certain grants and cooperative agreements, as specified in subtitle E, title VIII of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2015 (Pub. L. 113-291), as amended by Sec. 822 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116-92).

§ 183.10 Applicability.

- (a) This part applies only to grants and cooperative agreements that are expected to exceed \$50,000 and that are performed outside the United States, including U.S. territories, and that are in support of a contingency operation in which members of the Armed Forces are actively engaged in hostilities. It does not apply to the authorized intelligence or law enforcement activities of the Federal Government.
- (b) All elements of this part are applicable until the date of expiration as provided in law.

§ 183.15 Responsibilities of Federal awarding agencies.

- (a) Prior to making an award for a covered grant or cooperative agreement (see also § 183.35), the Federal awarding agency must check the current list of prohibited or restricted persons or entities in the System Award Management (SAM) Exclusions.
- (b) The Federal awarding agency may include the award term provided in appendix A of this part in all covered grant and cooperative agreement awards in accordance with Never Contract with the Enemy.
- (c) A Federal awarding agency may become aware of a person or entity that:
 - (1) Provides funds, including goods and services, received under a covered grant or cooperative agreement of an executive agency directly or indirectly to covered persons or entities; or
 - (2) Fails to exercise due diligence to ensure that none of the funds, including goods and services, received under a covered grant or cooperative agreement of an executive agency are provided directly or indirectly to covered persons or entities.
- (d) When a Federal awarding agency becomes aware of such a person or entity, it may do any of the following actions:
 - (1) Restrict the future award of all Federal contracts, grants, and cooperative agreements to the person or entity based upon concerns that Federal awards to the entity would provide grant funds directly or indirectly to a covered person or entity.
 - (2) Terminate any contract, grant, or cooperative agreement to a covered person or entity upon becoming aware that the recipient has failed to exercise due diligence to ensure that none of the award funds are provided directly or indirectly to a covered person or entity.
 - (3) Void in whole or in part any grant, cooperative agreement or contracts of the executive agency concerned upon a written determination by the head of contracting activity or other appropriate official that the grant or cooperative agreement provides funds directly or indirectly to a covered person or entity.
- (e) The Federal awarding agency must notify recipients in writing regarding its decision to restrict all future awards and/or to terminate or void a grant or cooperative agreement. The agency must also notify the recipient in writing about the recipient's right to request an administrative review (using the agency's procedures) of the restriction, termination, or void of the grant or cooperative agreement within 30 days of receiving notification.

§ 183.20 Reporting responsibilities of Federal awarding agencies.

- (a) If a Federal awarding agency restricts all future awards to a covered person or entity, it must enter information on the ineligible person or entity into SAM Exclusions as a prohibited or restricted source pursuant to Subtitle E, Title VIII of the NDAA for FY 2015 (Pub. L. 113-291).
- (b) When a Federal awarding agency terminates or voids a grant or cooperative agreement due to Never Contract with the Enemy, it must report the termination as a Termination for Material Failure to Comply in the Office of Management and Budget (OMB)-designated integrity and performance system accessible through SAM (currently the Federal Awardee Performance and Integrity Information System (FAPIIS)).
- (c) The Federal awarding agency shall document and report to the head of the executive agency concerned (or the designee of such head) and the commander of the covered combatant command concerned (or specific deputies):

- (1) Any action to restrict all future awards or to terminate or void an award with a covered person or entity.
 - (2) Any decision not to restrict all future awards, terminate, or void an award along with the agency's reasoning for not taking one of these actions after the agency became aware that a person or entity is a prohibited or restricted source.
- (d) Each report referenced in paragraph (c)(1) of this section shall include:
- (1) The executive agency taking such action.
 - (2) An explanation of the basis for the action taken.
 - (3) The value of the terminated or voided grant or cooperative agreement.
 - (4) The value of all grants and cooperative agreements of the executive agency with the person or entity concerned at the time the grant or cooperative agreement was terminated or voided.
- (e) Each report referenced in paragraph (c)(2) of this section shall include:
- (1) The executive agency concerned.
 - (2) An explanation of the basis for not taking the action.
- (f) For each instance in which an executive agency exercised the additional authority to examine recipient and lower tier entity (e.g., subrecipient or contractor) records, the agency must report in writing to the head of the executive agency concerned (or the designee of such head) and the commander of the covered combatant command concerned (or specific deputies) the following:
- (1) An explanation of the basis for the action taken; and
 - (2) A summary of the results of any examination of records.

§ 183.25 Responsibilities of recipients.

- (a) Recipients of covered grants or cooperative agreements must fulfill the requirements outlined in the award term provided in appendix A to this part.
- (b) Recipients must also flow down the provisions in award terms covered in appendix A to this part to all contracts and subawards under the award.

§ 183.30 Access to records.

In addition to any other existing examination-of-records authority, the Federal Government is authorized to examine any records of the recipient and its subawards, to the extent necessary, to ensure that funds, including supplies and services, received under a covered grant or cooperative agreement (see § 183.35) are not provided directly or indirectly to a covered person or entity in accordance with Never Contract with the Enemy. The Federal awarding agency may only exercise this authority upon a written determination by the Federal awarding agency that relies on a finding by the commander of a covered combatant command that there is reason to believe that funds, including supplies and services, received under the grant or cooperative agreement may have been provided directly or indirectly to a covered person or entity.

§ 183.35 Definitions.

Terms used in this part are defined as follows:

Contingency operation, as defined in 10 U.S.C. 101a, means a military operation that -

- (1) 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
- (2) Results in the call or order to, or retention on, active duty of members of the uniformed services under 10 U.S.C. 688, 12301a, 12302, 12304, 12304a, 12305, 12406 of 10 U.S.C. chapter 15, 14 U.S.C. 712 or any other provision of law during a war or during a national emergency declared by the President or Congress.

Covered combatant command means the following:

- (1) The United States Africa Command.
- (2) The United States Central Command.
- (3) The United States European Command.
- (4) The United States Pacific Command.
- (5) The United States Southern Command.
- (6) The United States Transportation Command.

Covered grant or cooperative agreement means a grant or cooperative agreement, as defined in 2 CFR 200.1 with an estimated value in excess of \$50,000 that is performed outside the United States, including its possessions and territories, in support of a contingency operation in which members of the Armed Forces are actively engaged in hostilities. Except for U.S. Department of Defense grants and cooperative agreements that were awarded on or before December 19, 2017, that will be performed in the United States Central Command, where the estimated value is in excess of \$100,000.

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.

Appendix A to Part 183 - Award Terms for Never Contract With the Enemy

Federal awarding agencies may include the following award terms in all awards for covered grants and cooperative agreements in accordance with Never Contract with the Enemy:

Term 1

Prohibition on Providing Funds to the Enemy

- (a) The recipient must -
 - (1) Exercise due diligence to ensure that none of the funds, including supplies and services, received under this grant or cooperative agreement are provided directly or indirectly (including through subawards or contracts) to a person or entity who is actively opposing the United States or coalition forces involved in a contingency operation in which members of the Armed Forces are actively engaged in hostilities, which must be completed through 2 CFR 180.300 prior to issuing a subaward or contract and;

- (2) Terminate or void in whole or in part any subaward or contract with a person or entity listed in SAM as a prohibited or restricted source pursuant to subtitle E of Title VIII of the NDAA for FY 2015, unless the Federal awarding agency provides written approval to continue the subaward or contract.
- (b) The recipient may include the substance of this clause, including paragraph (a) of this clause, in subawards under this grant or cooperative agreement that have an estimated value over \$50,000 and will be performed outside the United States, including its outlying areas.
- (c) The Federal awarding agency has the authority to terminate or void this grant or cooperative agreement, in whole or in part, if the Federal awarding agency becomes aware that the recipient failed to exercise due diligence as required by paragraph (a) of this clause or if the Federal awarding agency becomes aware that any funds received under this grant or cooperative agreement have been provided directly or indirectly to a person or entity who is actively opposing coalition forces involved in a contingency operation in which members of the Armed Forces are actively engaged in hostilities.

(End of term)

Term 2

Additional Access to Recipient Records

- (a) In addition to any other existing examination-of-records authority, the Federal Government is authorized to examine any records of the recipient and its subawards or contracts to the extent necessary to ensure that funds, including supplies and services, available under this grant or cooperative agreement are not provided, directly or indirectly, 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, except for awards awarded by the Department of Defense on or before Dec 19, 2017 that will be performed in the United States Central Command (USCENTCOM) theater of operations.
- (b) The substance of this clause, including this paragraph (b), is required to be included in subawards or contracts under this grant or cooperative agreement that have an estimated value over \$50,000 and will be performed outside the United States, including its outlying areas.

(End of term)