

Calendar No. 565

113TH CONGRESS }
2d Session

SENATE

{ REPORT
113-257

PREVENTING CONFLICTS OF INTEREST
WITH CONTRACTORS ACT

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

S. 2061

TO PREVENT CONFLICTS OF INTEREST RELATING TO CONTRAC-
TORS PROVIDING BACKGROUND INVESTIGATION FIELDWORK
SERVICES AND INVESTIGATIVE SUPPORT SERVICES



SEPTEMBER 16, 2014.—Ordered to be printed

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PREVENTING CONFLICTS OF INTEREST WITH CONTRACTORS ACT

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Mr. CARPER, from the Committee on Homeland Security and
Governmental Affairs, submitted the following

R E P O R T

[To accompany S. 2061]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 2061), to prevent conflicts of interest relating to contractors providing background investigation fieldwork services and investigative support services, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill, as amended, do pass.

CONTENTS

	Page
I. Purpose and Summary	1
II. Background and Need for the Legislation	2
III. Legislative History	5
IV. Section-by-Section Analysis of the Bill, as Reported	5
V. Evaluation of Regulatory Impact	7
VI. Congressional Budget Office Estimate	7
VII. Changes in Existing Law Made by the Bill, as Reported	7

I. PURPOSE AND SUMMARY

The United States government performs background investigations of individuals to determine an individual's suitability to work as a federal employee or fitness to serve as an employee of a federal contractor, to assess whether to allow an individual to have access to classified information or to hold a national security sensitive position in the government, and to assess whether to allow an individual to have access to sensitive government facilities or information systems. Often the government employs contractors to compile the information required for the background checks. Final

quality reviews of the contractor's work product ensure that the background investigation is complete and meets all applicable standards.

S. 2061 would prohibit agencies, when they employ a contractor to perform background investigations, from hiring the same contractor to perform the final quality review of the contractor's own work. This simple rule will prevent a conflict of interest that may otherwise undermine the impartiality and objectivity of the quality review, or give a contractor an unfair competitive advantage over other contractors.

II. BACKGROUND AND NEED FOR LEGISLATION

Federal agencies conduct background investigations of individuals for purposes related to civilian or military service with the federal government or employment with a federal contractor. The level of detail of the investigation depends on the nature of the job or responsibility. General background checks help determine whether an individual is suitable for employment, and more detailed investigations are used to determine whether to allow an individual to have access to classified information and hold a security clearance or whether to allow an individual to occupy a national security sensitive position with the government. Investigations are also used to check background information about individuals to determine whether to allow them access to sensitive federal facilities or federal information technology systems.

The federal government relies heavily on contractors to assist with the process of background investigations. For example, contractors are hired to search educational and employment records, research criminal and other legal records, check credit histories, and interview the individual who is the subject of the background check, as well as the family, friends, employers and other acquaintances of the individual. Final decisions based on records compiled by contractors, though, rest with the federal government. For example, the final decision of whether to grant a security clearance must be made by federal employees and rests with the agency that performed the background investigation, or requested that the background investigation be performed, for a particular individual. Flaws in the background investigation upon which an agency relies may result in the agency granting a security clearance to an individual who may be a risk to national security. The final quality review of an investigation, therefore, is a critical step to ensure that documentation is complete, interviews have been conducted properly, and the investigation complies with all applicable standards.

Twenty-two agencies (many within the intelligence community) are authorized to perform background investigations, and these agencies may have background checks performed by their own employees or a contractor. The vast majority of background investigations (over 90 percent) are performed by the Federal Investigative Services (FIS) within the Office of Personnel Management (OPM), at the request of other agencies.¹ OPM hires contractors to perform investigative services for a majority of the investigations it conducts. A company called United States Investigations Services,

¹ Suitability and Security Clearance Performance Accountability Council, Suitability and Security Process Review Report to the President (February 2014), p.2.

LLC (USIS) has, until very recently, performed almost half of the investigative work contracted out by OPM,² and has also provided similar investigative services to several other agencies.

On October 30, 2013, the Department of Justice joined a civil fraud lawsuit against USIS, alleging that the company engaged in a systemic failure to adequately conduct security clearance background investigations.³ Specifically, the Department of Justice has alleged that the senior management of USIS “dumped” incomplete investigations on OPM in order to increase the company’s revenue and profit. This began at least as early as March 2008, according to the complaint, and continued through at least September 2012, and involved 665,000 background investigations—approximately 40 percent of the total investigations conducted by USIS during that time frame.⁴

The day after the Department of Justice announced its intervention in the lawsuit against USIS, the Committee held a hearing on background checks conducted for security clearances and other purposes.⁵ One issue raised by Committee members was the appropriate role of contractors in conducting background investigations, and whether contractors ever conduct the final quality reviews of their own work. This concern was heightened by the announcement of the fraud allegations against USIS, and the fact that USIS conducted security clearance background investigations for both Navy Yard shooter Aaron Alexis⁶ and former National Security Agency contractor employee Edward Snowden.⁷

In a letter to Ranking Member Coburn following up on her testimony, OPM Acting Director Elaine Kaplan explained that some lower-level investigations may be reviewed by contract employees, rather than federal employees.⁸ This work, in fact, was being performed by USIS under its support contract with OPM and had previously been identified by the Inspector General (IG) of OPM as raising quality concerns. Specifically, the IG reported in 2010 that internal OPM audits showed that in March 2009, 28.24 percent of sampled cases closed by USIS were unacceptable, and in June 2009, 26.87 percent of sampled cases were deficient.⁹

OPM reversed its policy on February 6, 2014, when OPM Director Katherine Archuleta announced that only federal employees would conduct the final quality review before an investigative prod-

²*Ibid.* Staff of OPM informed Committee staff on September 9, 2014 that OPM would not exercise its options to extend its contracts with USIS, effective September 30, 2014.

³U.S. Department of Justice press release (Oct. 30, 2013), <http://www.justice.gov/opa/pr/2013/October/13-civ-1158.html>.

⁴United States complaint (Jan. 22, 2014), *United States of America ex rel. Blake Percival v. U.S. Investigations Services, M.D. Ala. (No. 11-CV-527-WKW)*.

⁵“The Navy Yard Tragedy: Examining Government Clearances and Background Checks,” Hearing before the Committee on Homeland Security and Governmental Affairs, 113th Cong. (October 31, 2013).

⁶*Ibid.*

⁷See “Safeguarding Our Nation’s Secrets: Examining the Security Clearance Process,” hearing before the Subcommittee on the Efficiency and Effectiveness of Federal Programs and the Federal Workforce, 113th Cong. (June 20, 2013).

⁸Letter from Acting Director Elaine Kaplan, U.S. Office of Personnel Management, to Ranking Member Tom Coburn, Committee on Homeland Security and Governmental Affairs, Oct. 31, 2013.

⁹Final Audit Report: Audit of the Quality Assurance Process Over Background Investigations, U.S. Office of Personnel Management, Office of the Inspector General, Office of Audits, Report No. 4A-IS-00-09-060 (June 22, 2010).

uct is sent by OPM to the agency that requested the review.¹⁰ This decision, though, is an administrative one and does not preclude a future OPM Director from again allowing contractors to review their own work. Nor does this decision preclude other agencies from permitting contractors to conduct the final quality reviews of their own work.

Federal procurement regulations already lay out general principles that are designed to prevent organizational conflicts of interest (OCI). Those regulations state that agency contracting officers should identify and evaluate potential conflicts of interest as early as possible in the acquisition process, and to avoid, neutralize or mitigate potential conflicts of interest before contract award.¹¹ The regulations explain:

An OCI arises when, because of other relationships or circumstances, a contractor may be unable, or potentially unable, to render impartial advice or assistance to the government, the contractor's objectivity in performing the contract work is or might be impaired, and/or the contractor would have an unfair advantage.¹²

Despite these admonitions in the regulations, OPM, until February, did in some circumstances rely on USIS to conduct the final quality review of its own work. This conflict of interest raised a risk that the contractor could show favorable bias toward its own work, or use its position to gain an unfair advantage over competitors. Additionally, the Department of Justice has alleged that this conflict of interest facilitated the scheme by USIS to “dump” incomplete investigations on OPM, because USIS personnel working on the quality reviews used information gained through this work to identify cases that were likely to be selected by OPM for review by federal employees, as opposed to USIS employees. According to the complaint filed by the Department of Justice, this information was then improperly given to the investigative branch of USIS, which avoided “dumping” cases likely to be reviewed by federal employees in order to minimize the risk of raising concerns at OPM about the quality of the review process.¹³

S. 2061 would prohibit this type of conflict of interest. As reported by the Committee, S. 2061 would prohibit OPM, or any other agency that hires a contractor to perform background investigation work, from hiring the same contractor to do the final quality review of the contractor's own work. The bill in no way discourages a contractor performing background investigations from conducting internal quality reviews to ensure that the product meets requisite standards before the product is presented to OPM (or to any other agency that hired the contractor). However, the bill will ensure that the final quality review is not performed by the same contractor. This conflict of interest rule will increase the overall quality of background investigations by removing the risk that the final quality review would be conducted with the best interests of

¹⁰ E-mail communication from Office of Congressional and Legislative Affairs, U.S. Office of Personnel Management, to Committee staff (Feb. 6, 2014).

¹¹ Federal Acquisition Regulation 9.504(a).

¹² Federal Acquisition Regulation 2.101.

¹³ United States complaint (Jan. 22, 2014), *United States of America ex rel. Blake Percival v. U.S. Investigations Services*, M.D. Ala. (No. 11-CV-527-WKW), p. 22.

the contractor in mind, rather than the best interests of the government.

III. LEGISLATIVE HISTORY

On February 27, 2014, Senators Tester, McCaskill and Begich introduced the Preventing Conflicts of Interest with Contractors Act (S. 2061). S. 2061 was referred to the Senate Committee on Homeland Security and Governmental Affairs.

The Committee considered S. 2061 at a business meeting on June 25, 2014. Senators Tester and McCaskill offered a substitute amendment. The substitute contains a number of changes based on staff discussions with agencies that participate in the Suitability and Security Performance Accountability Council (PAC), which is the inter-agency committee responsible for promoting reforms related to background investigations and the decisions that are based on those investigations.¹⁴ The substitute provides that the bill's conflict of interest rule, in addition to applying to background investigations for security clearances, will also apply to investigations related to eligibility to occupy a national security sensitive position, eligibility for logical and physical access to federal-controlled facilities or information systems, suitability or fitness for federal employment, and fitness to perform work for or on behalf of the federal government as a contractor or employee. The substitute also ensures that the conflict of interest rule will apply to any federal agency that contracts for background investigation fieldwork or support services, not just OPM, and that the rule applies to both original contracts and extensions or options exercised on those contracts. Finally, the substitute ensures that the definitions of key terms used in the bill are consistent with those terms as used by the PAC.

The Committee adopted the Tester-McCaskill substitute amendment by unanimous consent and ordered S. 2061 reported favorably by voice vote as amended by the Tester-McCaskill substitute amendment. Senators present for the vote were Carper, Levin, McCaskill, Tester, Heitkamp, Coburn, McCain, Johnson and Portman. Senators Coburn and McCain asked to be recorded as voting no.

IV. SECTION-BY-SECTION ANALYSIS OF THE BILL, AS REPORTED

Section 1. Short title

This section establishes the title of the legislation as the "Preventing Conflicts of Interest with Contractors Act."

Section 2. Definitions

This section establishes that, for purposes of this Act: (1) The term "agency" means:

- (a) an Executive agency as defined in 5 U.S.C. 105 (an Executive department, a government corporation, and an independent establishment);

¹⁴The PAC was established by Executive Order 13467, Reforming Processes Related to Suitability for Government Employment, Fitness for Contractor Employees and Eligibility for Access to Classified National Security Information (June 30, 2008). The PAC is chaired by the Deputy Director for Management of the Office of Management and Budget and also includes the Office of the Director of National Intelligence and the Office of Personnel Management.

(b) a military department as defined in 5 U.S.C. 102 (Army, Navy, Air Force);

(c) an element of the intelligence community as defined in 50 U.S.C. 3003 (the Office of the Director of National Intelligence; the Central Intelligence Agency; the National Security Agency; the Defense Intelligence Agency; the National Geospatial-Intelligence Agency; the National Reconnaissance Office; other offices within the Department of Defense for the collection of specialized national intelligence through reconnaissance programs; the intelligence elements of the Army, the Navy, the Air Force, the Marine Corps, the Coast Guard, the Federal Bureau of Investigation, the Drug Enforcement Administration, and the Department of Energy; the Bureau of Intelligence and Research of the Department of State; the Office of Intelligence and Analysis of the Department of the Treasury; the Office of Intelligence and Analysis of the Department of Homeland Security; such other elements of any department or agency as may be designated by the President, or designated jointly by the Director of National Intelligence and the head of the department or agency concerned, as an element of the intelligence community);

(d) the United States Postal Service; and

(e) the Postal Regulatory Commission.

(2) The term “background investigation fieldwork services” means the investigatory fieldwork conducted to determine the eligibility of an individual for logical and physical access to federally-controlled facilities or information systems, suitability or fitness for federal employment, eligibility for access to classified information or to hold a national security sensitive position, or fitness to perform work for or on behalf of the federal government as a contractor or employee. This work includes: interviews of the individual, former and current employers, friends, family and other sources; and reviews of educational and employment records, criminal and other legal records, and credit history.

(3) The term “background investigation support services” means the clerical, administrative, and technical support services provided to various functions critical to the background investigation process, including: the initial processing and scheduling of investigative requests; information technology and information technology support, file maintenance, imaging or copying of investigation documents, and mail processing.

(4) The term “quality review process” means performing the final review of a background investigation to ensure investigative, administrative, and other required standards have been met before the completed background investigation is delivered to the adjudicating agency (i.e., the agency that requested the background check and that has final decision-making authority).

Section 3. Limitation on contracting to prevent organizational conflicts of interest

This section provides that, notwithstanding any other provision of law, after the date of enactment of this Act, an agency may not enter a contract, or extend or exercise an option on a contract, with a contractor to conduct a quality review process relating to background investigation fieldwork services or background investigation

support services if the contractor is performing the services to be reviewed.

V. EVALUATION OF REGULATORY IMPACT

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of this bill and determined that the bill will have no regulatory impact within the meaning of the rules. The Committee agrees with the Congressional Budget Office's statement that the bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

VI. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

JULY 10, 2014.

Hon. TOM CARPER,
Chairman, Committee on Homeland Security and Governmental Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 2061, the Preventing Conflicts of Interest with Contractors Act.

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.

S. 2061—Preventing Conflicts of Interest With Contractors Act

CBO estimates that enacting S. 2061 would have no impact on the federal budget. Enacting the bill would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

S. 2061 would amend federal law to prevent security clearance contractors from reviewing and approving their own background investigations. Because this legislation would put into statute the current policy and practice of the Office of Personnel Management, CBO estimates that implementing S. 2061 would have no effect on the budget.

S. 2061 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments budget.

The CBO staff contact for this estimate is Matthew Pickford. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

VII. CHANGES IN EXISTING STATUTE MADE BY THE BILL, AS REPORTED

Because this legislation would not repeal or amend any provision of current law, it would make no changes in existing law within the meaning of clauses (a) and (b) of paragraph 12 of rule XXVI of the Standing Rules of the Senate.