



**SIGAR**

Office of the Special Inspector General  
for Afghanistan Reconstruction

John F. Sopko  
Special Inspector General

August 8, 2013

Mr. Richard T. Ginman  
Director, Defense Procurement and Acquisition Policy  
Office of the Under Secretary of Defense for Acquisition,  
Technology, and Logistics  
Department of Defense

Dear Mr. Ginman:

Thank you for your memorandum dated May 14, 2013, regarding SIGAR's recent audit report on the Department of Defense's (DOD) implementation of Section 841 of the Fiscal Year 2012 National Defense Authorization Act (FY2012 NDAA), which prohibits contracting with the enemy.<sup>1</sup> As you noted in your memorandum, DOD's Office of Defense Procurement and Acquisition Policy (DPAP) concurred with five of our seven recommendations and described specific steps it is taking to address them. In particular, your memorandum described DPAP's efforts to improve DOD's visibility over active contracts in Afghanistan; prevent duplication of data collection efforts; and ensure that Heads of Contracting Activity (HCA) have the information needed to respond to legal challenges and financial liabilities that result from exercising their Section 841 authorities. SIGAR welcomes these actions and believes they will improve DOD's ability to ensure U.S. taxpayer funds do not end up in the hands of insurgents or others in opposition to coalition forces.

However, I was particularly troubled by DPAP's refusal to concur with our recommendation to require prime contractors to certify that they do not have subcontracts with the enemy. You objected to SIGAR's recommendation on the grounds that the Clinger-Cohen Act prohibits new certification requirements unless those requirements are specifically imposed by statute or approved by the Administrator of the Office of Procurement Policy.

Your objection ignores the fact that the Clinger-Cohen Act also permits agencies to issue new certification requirements when they are approved in writing by the agency head, in this case the Secretary of Defense.<sup>2</sup> Moreover, requiring this certification would be consistent with DOD's obligation to award contracts only to "responsible" parties. If a company is subcontracting with the enemy, how can it be responsible?

The FAR requires that no award is to be made to a contractor "unless a contracting officer makes an affirmative determination of responsibility."<sup>3</sup> Prime contractors are responsible for determining the responsibility of their subcontractors and prospective contractors may also be required to

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<sup>1</sup> SIGAR 13-6, *Contracting with the Enemy: DOD Has Limited Assurance that Contractors with Links to Enemy Groups Are Identified and their Contracts Terminated*, April 11, 2013.

<sup>2</sup> 41 U.S.C. 1304(b)(3).

<sup>3</sup> FAR 9.103(b),

provide written evidence of a subcontractor's responsibility.<sup>4</sup> To be determined responsible, a contractor must, among other things, have a "satisfactory record of integrity and business ethics."<sup>5</sup>

SIGAR believes that contractors that knowingly contract with the enemy do not have the integrity and business ethics necessary to do business with the U.S. government.<sup>6</sup> Moreover, the FAR already permits contracting officers to require that contractors provide certification of responsibility.<sup>7</sup> Therefore, unless DOD can explain to the Congress and U.S. taxpayers how a contractor that knowingly contracts with supporters of the insurgency has the integrity and business ethics to warrant a government contract, DOD should require contractors to certify that they do not have subcontracts with the enemy.

Contrary to your memorandum, Section 842 is no substitute for a Section 841 certification. While Section 842 authorizes the Secretary of Defense to investigate *after the fact* whether funds available under the contract are being provided directly or indirectly to the enemy, a Section 841 certification would impose an affirmative obligation on contractors *before the fact* to help prevent contracting with the enemy.

Moreover, there is no indication that DOD is using the oversight authority granted by Section 842. In fact, DOD reported to Congress that it did not take any action under Section 842 during fiscal year 2012. DOD's apparent reticence to use this authority demonstrates the need for requiring contractors to certify that they do not have subcontracts with Section 841 designees. A certification requirement would put contractors on specific notice that they need to stand behind the determinations they make regarding the responsibility of their subcontractors.<sup>8</sup>

In sum, Section 841 was specifically intended to prohibit contracting with the enemy. SIGAR believes that DOD should immediately exercise its authority to enforce this prohibition. To do otherwise is contrary to both law and common sense.

I note also that DPAP only partially concurred with SIGAR's recommendation to enforce DOD's own regulation requiring insertion of a no-contracting-with-the-enemy clause in DOD contracts. Your response for this partial concurrence is that DPAP is accountable for DOD procurement policies and regulations, while the HCAs are responsible for ensuring that contracting personnel under their jurisdiction include all required clauses.

In my view, the fact that multiple HCAs are involved is not an adequate justification for not taking action on this important matter. SIGAR's recommendations were addressed to the Secretary of Defense and we assume that senior DOD officials will take whatever action is necessary to implement the Section 841 prohibition against contracting with the enemy. If DOD is either unable

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<sup>4</sup> FAR 9.104-4(a).

<sup>5</sup> FAR 9.104-1(d).

<sup>6</sup> Recent court cases support this principle. See, e.g., *NCL Logistics Co. v. United States*, 109 Fed. Cl. 596, 608 (2012); *Ettefaq-Meliat-Hai-Afghan Consulting, Inc. v. United States*, 106 Fed. Cl. 429, 440 (2012)

<sup>7</sup> FAR 9.104-6.

<sup>8</sup> False certification would also permit DOD to take action under the False Claims Act. See *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776 (4<sup>th</sup> Cir. 1998).

or unwilling to do so, please notify me immediately so that I can formally report this fact to the relevant Congressional committees, as required by Section 5(d) of the Inspector General Act of 1978, as amended.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. F. Sopko', with a long horizontal flourish extending to the right.

John F. Sopko  
Special Inspector General  
for Afghanistan Reconstruction

Enclosure



ACQUISITION,  
TECHNOLOGY  
AND LOGISTICS

OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON  
WASHINGTON, DC 20301-3000

MAY 14 2013

MEMORANDUM FOR SPECIAL INSPECTOR GENERAL FOR AFGHANISTAN  
RECONSTRUCTION

THROUGH: DIRECTOR, ACQUISITION RESOURCES AND ANALYSIS

MS  
5/21/13

SUBJECT: Response to SIGAR Audit 13-6 on "Contracting with the Enemy: DoD Has Limited Assurance That Contractors with Links to Enemy Groups Are Identified and Their Contracts Terminated" (Report No. SIGAR-13-6)

As requested, I am providing responses to the general content and recommendations contained in the subject report.

**Recommendation 1:** Require all Heads of Agency in the Central Command (CENTCOM) theater of operations, including Afghanistan, develop a standard mechanism for distributing Section 841 notification letters to their Head of Contracting Activities (HCAs).

**Response:** Concur. Defense Procurement and Acquisition Policy (DPAP) will update Defense Federal Regulation Acquisition Supplement (DFARS) Deviation 2012-O0005 to require contracting officers to check the "Identified Entities under NDAA FY2012 Section 841" list on the CENTCOM website prior to awarding contracts. See the DPAP response to Recommendation 4 below.

**Recommendation 2:** Require all HCAs with contracts in the CENTCOM theater of operations, including Afghanistan, to develop a standard mechanism for distributing Section 841 notification letters to all prime contractors.

**Response:** Concur. DPAP will update DFARS Class Deviation 2012-O0005 to require contracting officers to distribute section 841 notification letters to all prime contractors performing in the CENTCOM theater of operations.

**Recommendation 3:** Direct HCAs to require prime contractors to certify that they do not have subcontracts with Section 841 designees.

**Response:** Non-Concur. The Clinger-Cohen Act prohibits requiring a certification by a contractor or offeror, unless it is specifically imposed by statute or approved by the Administrator of the Office of Federal Procurement Policy (Ref: FAR Subpart 1.107).

When necessary, HCAs can gain visibility over their subcontracts by the statutory authority provided in section 842 of the FY2012 NDAA. Along with section 841 of FY2012 NDAA, DFARS Class Deviation 2012-O0005 implemented section 842, which allows contracting



officers to examine the records of the contractor, or any of its subcontractors to ensure funds available under the contracts are not 1) subject to extortion or corruption, or 2) provided directly or indirectly to the enemy.

**Recommendation 4:** Require all DoD contracting agencies and prime contractors with contracts in the CENTCOM theater of operations to use an information system, such as the Joint Contingency Contracting System or the CENTCOM website, to track the section 841 designations.

**Response:** Concur. DPAP and CENTCOM have coordinated and agreed to utilize the CENTCOM website as the information system in which to post the entities identified in the CENTCOM Commander's Section 841 notification letters for contracting agencies and authorized prime contractors with contracts in the CENTCOM theater of operations. This will be implemented in the DFARS Class Deviation #2012-O0005 update.

**Recommendation 5:** Enforce DFARS Class Deviation 2012-O0005 that requires the Section 841 clause be included in contracts, unless HCAs provide justification for exemption.

**Response:** Partially Concur. The Director, DPAP is accountable for DoD procurement policies and regulations. It is the HCAs' responsibility to ensure that contracting personnel under their jurisdiction include all required clauses. In the DFARS Class Deviation #2012-O0005 update, DPAP will amplify the importance of including section 841 clauses in all DoD solicitations.

**Recommendation 6:** To prevent duplication of data collection efforts, we recommend that the Director of the Office of Defense Procurement and Acquisition Policy, in coordination with the Commander of U.S. Central Command, formally assign either the Office of Defense Procurement and Acquisition Policy or CENTCOM the responsibility for centrally tracking, at a minimum, the number and value of contracts, grants, and cooperative agreements HCAs have restricted, terminated, or voided using their Section 841 authorities.

**Response:** Concur. DPAP and CENTCOM have agreed to: 1) CENTCOM CCI4 will centrally collect the sections 841 and 842 actions, resulting from CENTCOM Section 841 notification letters; 2) DPAP will use the CENTCOM database to prepare an annual report to Congress on the results of sections 841 and 842 authorities used during each calendar year.

**Recommendation 7:** To ensure that HCAs have the information needed to respond to any legal challenges and financial liabilities resulting from exercising Section 841 authorities, we recommend that the Director of the Office of Defense Procurement and Acquisition Policy, in coordination with relevant agency contracting offices, develop and distribute guidance to HCAs about actions to take once they have restricted, terminated, or voided a contract under Section 841.

**Response:** Concur. DPAP agrees with the recommendation that contracting officers require guidance to take necessary actions resulting from the USCENTCOM section 841 notification letters. Such guidance is already provided in the Federal Acquisition Regulation (FAR) 49, Termination of Contracts and FAR Part 9, Contractor Qualifications. FAR subparts 49.101,

Authorities and Responsibilities and 49.105, Duties of Termination Contracting Officer After Issuance of Notice of Termination, provide contracting officers with their specific responsibilities and detailed guidance for contract/subcontract termination actions.

Please contact Ms. Kyoung Lee, [REDACTED], if additional information is required.



Richard Ginnman  
Director, Defense Procurement  
and Acquisition Policy