OFFICE OF THE UNDER SECRETARY OF DEFENSE
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WASHINGTON, DC 20301-3000

ACQUISITION,
TECHNOLOGY
AND LOGISTICS

SEP 15 2015

In reply refer to
DARS Tracking Number: 2015-O0016

MEMORANDUM FOR COMMANDER, UNITED STATES SPECIAL OPERATIONS COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION COMMAND (ATTN: ACQUISITION EXECUTIVE)
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY (ACQUISITION AND PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING)
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Class Deviation—Prohibition on Providing Funds to the Enemy and Authorization of Additional Access to Records

Effective September 15, 2015, this class deviation supersedes Class Deviation 2014-O0020, dated September 17, 2014. Contracting officers shall include the attached clauses in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, as prescribed below:

- Include the clause at 252.225-7993, Prohibition on Providing Funds to the Enemy (DEVIATION 2015-O0016)(SEP 2015), (see Attachment 1) in solicitations and contracts to be awarded on or before December 31, 2019, with an estimated value in excess of $50,000 that are being, or will be, performed outside the United States and its outlying areas, in support of a contingency operation in which members of the Armed Forces are actively engaged in hostilities. To the maximum extent practicable, existing contracts subject to the criteria in the clause prescription shall be modified bilaterally, in accordance with FAR 1.108(d), to include the deviation clause 252.225-7993.

- Include the clause 252.225-7981, Additional Access to Contractor and Subcontractor Records (Other than USCENTCOM) (DEVIATION 2015-O0016)(SEP 2015), (see Attachment 2) in all solicitations and contracts with an estimated value in excess of $50,000 that are to be performed outside the United States and its outlying areas, in support of a contingency operation in which members of the armed forces are actively engaged in hostilities, except for contracts that will be performed in the United States Central Command theater of operations (see Class Deviation 2015-O013).

This class deviation implements sections 841 and 842 of the National Defense Authorization Act for Fiscal Year 2015. Section 841 grants authority to the heads of contracting activities (HCAs) to terminate or void contracts and to restrict future awards directly or indirectly to any person 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. Section 842 grants the authority for additional access to contractor and subcontractor records to the extent necessary to ensure that funds available under covered contracts are not provided directly or indirectly to the enemy.

HCAs shall follow the procedures in Attachment 3 when exercising the authorities provided by this class deviation, which may be exercised only upon written notification from a combatant commander identifying persons or entities within the combatant commander's area of responsibility that are believed to have—

- Provided funds, including goods and services, received under a covered contract, grant, or cooperative agreement of an executive agency directly or indirectly to any person 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; or

- Failed to exercise due diligence to ensure that none of the funds, including goods and services, received under a covered contract, grant, or cooperative agreement of an executive agency are provided directly or indirectly to any person 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.

This class deviation remains in effect until incorporated in the Federal Acquisition Regulation, or otherwise rescinded. My point of contact is Col James DeLong, USAF, who may be reached at 571-256-7009, or at james.m.delong4.mil@mail.mil.

Claire M. Grady
Director, Defense Procurement
and Acquisition Policy

Attachments:
As stated

252.225-7993 Prohibition on Providing Funds to the Enemy (DEVIATION 2015-O0016)

Incorporate the following clause in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, to be awarded on or before December 31, 2019, with an estimated value in excess of $50,000, that are being, or will be, performed outside the United States and its outlying areas, in support of a contingency operation in which members of the Armed Forces are actively engaged in hostilities.

PROHIBITION ON PROVIDING FUNDS TO THE ENEMY (DEVIATION 2015-O0016) (SEP 2015)

(a) The Contractor shall—

(1) Exercise due diligence to ensure that none of the funds, including supplies and services, received under this contract are provided directly or indirectly (including through subcontracts) to a person or entity who 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;

(2) Check the list of prohibited/restricted sources in the System for Award Management at www.sam.gov —

(i) Prior to subcontract award; and
(ii) At least on a monthly basis; and

(3) Terminate or void in whole or in part any subcontract 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 Contracting Officer provides to the Contractor written approval of the Head of the Contracting Activity to continue the subcontract.

(b) The Head of the Contracting Activity has the authority to—

(1) Terminate this contract for default, in whole or in part, if the Head of the Contracting Activity determines in writing that the contractor failed to exercise due diligence as required by paragraph (a) of this clause; or

(2)(i) Void this contract, in whole or in part, if the Head of the Contracting Activity determines in writing that any funds received under this contract have been provided directly or indirectly to a person or entity who 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.

(ii) When voided in whole or in part, a contract is unenforceable as contrary to public policy, either in its entirety or with regard to a segregable task or effort under the contract, respectively.

(c) The Contractor shall include the substance of this clause, including this paragraph (c), in subcontracts, including subcontracts for commercial items, under this contract that have an estimated value over $50,000 and will be performed outside the United States and its outlying areas.

(End of clause)

252.225-7981 Additional Access to Contractor and Subcontractor Records (Other than USCENTCOM) (DEVIATION 2015-O0016)

Include the following clause in all solicitations and resultant contracts valued at more than $50,000, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, that are to be performed outside the United States and its outlying areas, in support of a contingency operation in which members of the armed forces are actively engaged in hostilities, except for contracts that will be performed in the United States Central Command (USCENTCOM) theater of operations.

ADDITIONAL ACCESS TO CONTRACTOR AND SUBCONTRACTOR RECORDS (OTHER THAN USCENTCOM)(DEVIATION 2015-O0016) (SEP 2015)

(a) In addition to any other existing examination-of-records authority, the Government is authorized to examine any records of the Contractor and its subcontractors to the extent necessary to ensure that funds, including supplies and services, available under this contract 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.

(b) The substance of this clause, including this paragraph (b), is required to be included in subcontracts, including subcontracts for commercial items, under this contract that have an estimated value over $50,000 and will be performed outside the United States and its outlying areas.

(End of clause)

Procedures—Prohibition on Providing Funds to the Enemy and Authorization of Additional Access to Records

1. United States Africa Command (USAFRICOM), United States Central Command (USCENTCOM), United States European Command (USEUCOM), United States Pacific Command (USPACOM), United States Southern Command (USSOUTHCOM), and United States Transportation Command (USTRANSCOM) Commanders will identify persons and entities within the area of responsibility of such command that—

- Provide funds, including goods and services, received under a covered contract, grant, or cooperative agreement of an executive agency 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; or
- Fail to exercise due diligence to ensure that none of the funds, including goods and services, received under a covered contract, grant, or cooperative agreement of an executive agency are 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.

2. Upon the identification of a person or entity as described above, the combatant commanders will, in consultation with the Under Secretary of Defense for Policy, the Under Secretary of Defense for Acquisition, Technology, and Logistics, and the appropriate Chief of Missions, notify in writing the appropriate heads of contracting activities (HCA) of such identification of the person or entity.

3. Upon receipt of such notification, the HCA, without power of redelegation, will exercise this authority to determine in writing, whether to—

- Prohibit, limit, or otherwise place restrictions on the award of any DoD contracts to such identified persons or entities;
- Terminate for default any DoD contracts when the HCA determined that the contractor failed to exercise due diligence to ensure that none of the funds received under the contract are provided directly or indirectly to such identified person or entity; or
- Void, in whole or in part, any DoD contract that provided funds to such identified person or entity.

4. The HCA taking an action under paragraph 3. of these procedures to restrict, terminate, or void a contract shall, in writing, notify the affected contractor of the action.

The notice to the contractor shall inform the contractor of the right to request, within 30 days, an administrative review of the action.

5. Classified information relied upon to make a decision in accordance with paragraph 3. of these procedures may not be disclosed to a contractor with respect to which an action is taken pursuant to the authority provided in paragraph 3. of these procedures, or to their representatives, in the absence of a protective order issued by a court of competent jurisdiction established under Article I or Article III of the Constitution of the United States that specifically addresses the conditions upon which such classified information may be so disclosed.

6. Upon determination by the HCA to restrict the future award of contracts or subcontracts to a person or entity, the contracting activity shall notify OUSD(AT&L)DPAP/CC and request entry of the required data on the ineligible person or entity in the System for Award Management (SAM) Exclusions as follows (see FAR 9.404):

Classification = Special Entity Designation

Agency = DoD

Exclusion Status = Active

Exclusion Type = Prohibition/Restriction

Comments: Pursuant to Subtitle E, Title VIII of the NDAA for FY 2015

7. Upon termination or voiding of a contract, the contracting officer shall treat such action as a default for purposes of reporting in the Federal Awardee Performance and Integrity Information System (FAPIIS)(see FAR 42.1503(h)(1)).

8. For contracts awarded on or before December 31, 2019, to be performed outside the United States and its outlying areas, the contracting officer shall check the current list of prohibited or restricted persons or entities in SAM Exclusions prior to awarding the contract.

9. Contracting officers with contracts being performed outside the United States and its outlying areas in support of covered contingency operations shall also check SAM, at a minimum, on a monthly basis to ensure none of the existing contracts being performed in the covered combatant commands are associated with prohibited or restricted persons or entities.

10. The authority to examine records pursuant to 252.225-7984 (Attachment 2) may be exercised only upon a written determination by the contracting officer, upon a finding by the by the commanding officer of USAFRICOM, USCENTCOM, USEUCOM, USPACOM, USSOUTHCOM, or USTRANSCOM that there is reason to believe that funds available under the contract may have been provided directly or indirectly to persons or entities that are actively opposing United States or coalition forces in a contingency operation in which members of the Armed Forces are actively engaged in hostilities.

11. Each HCA shall enforce inclusion of the attached clauses 252.225-7993 (Attachment 1) and 52.225-7984 (Attachment 2) as prescribed.

12. Reports.

a. Reports on Prohibition on Providing Funds to the Enemy

i. The HCA that receives a notice pursuant to paragraph 2. of these procedures shall submit to osd.pentagon.ousd-atl.mbx.contingency-contracting@mail.mil and the commander of the combatant command concerned a report on the action, if any, taken by the HCA pursuant to paragraph 3. of these procedures, including a determination not to terminate, void, or restrict the contract as otherwise authorized. Include the following:

- The contracting activity taking such action.
- An explanation of the basis for the action taken or not taken.
- If applicable, the value of the contract voided or terminated and the value of all contracts of the contracting activity in force with the person or entity concerned at the time the contract was terminated or voided.

ii. Each covered combatant command shall track and provide, at a minimum, the following data to osd.pentagon.ousd-atl.mbx.contingency-contracting@mail.mil not later than January 15th of 2015, 2016, 2017, 2018, 2019, and 2020:

- The number of instances in which this authority was exercised to restrict, terminate, or void contracts, grants and cooperative agreements. Each such instance should include the contracting activity, contract number, contract value, requirement description, and contractor/subcontractor name at a minimum.
- The basis for the actions taken for each instance.
- A summary of the results of actions taken for each instance.
- The Commander's notification letters to HCAs.

iii. Reports may be submitted in unclassified form, but with a classified annex; or in classified form, as appropriate.

b. Reports on Authorization of Additional Access to Records.

i. For each instance in which the HCA exercised the additional authority to examine contractor and subcontractor records in accordance with this deviation or class deviation 2015-O0013, for the preceding calendar year, the HCA shall provide the following data to osd.pentagon.ousd-atl.mbx.contingency-contracting@mail.mil and the Combatant Commander of the combatant command concerned:

- An explanation of the basis for the action taken; and

- A summary of the results of any examination of records so undertaken.

ii. Each combatant commander shall track and provide, at a minimum, the following data to osd.pentagon.ousd-atl.mbx.contingency-contracting@mail.mil not later than January 15th of 2015, 2016, 2017, 2018, 2019, and 2020:

- The number of instances in which this authority was exercised to examine contractor/subcontractor's records. Each instance should include the contracting activity, contract number, contract value, requirement description, and contractor/subcontractor name.
- The basis for the action taken in each instance.
- A summary of the results of any examination of record so undertaken for each instance.
- The Commander's notification letter to HCAs.

iii. Reports may be submitted in classified form.