

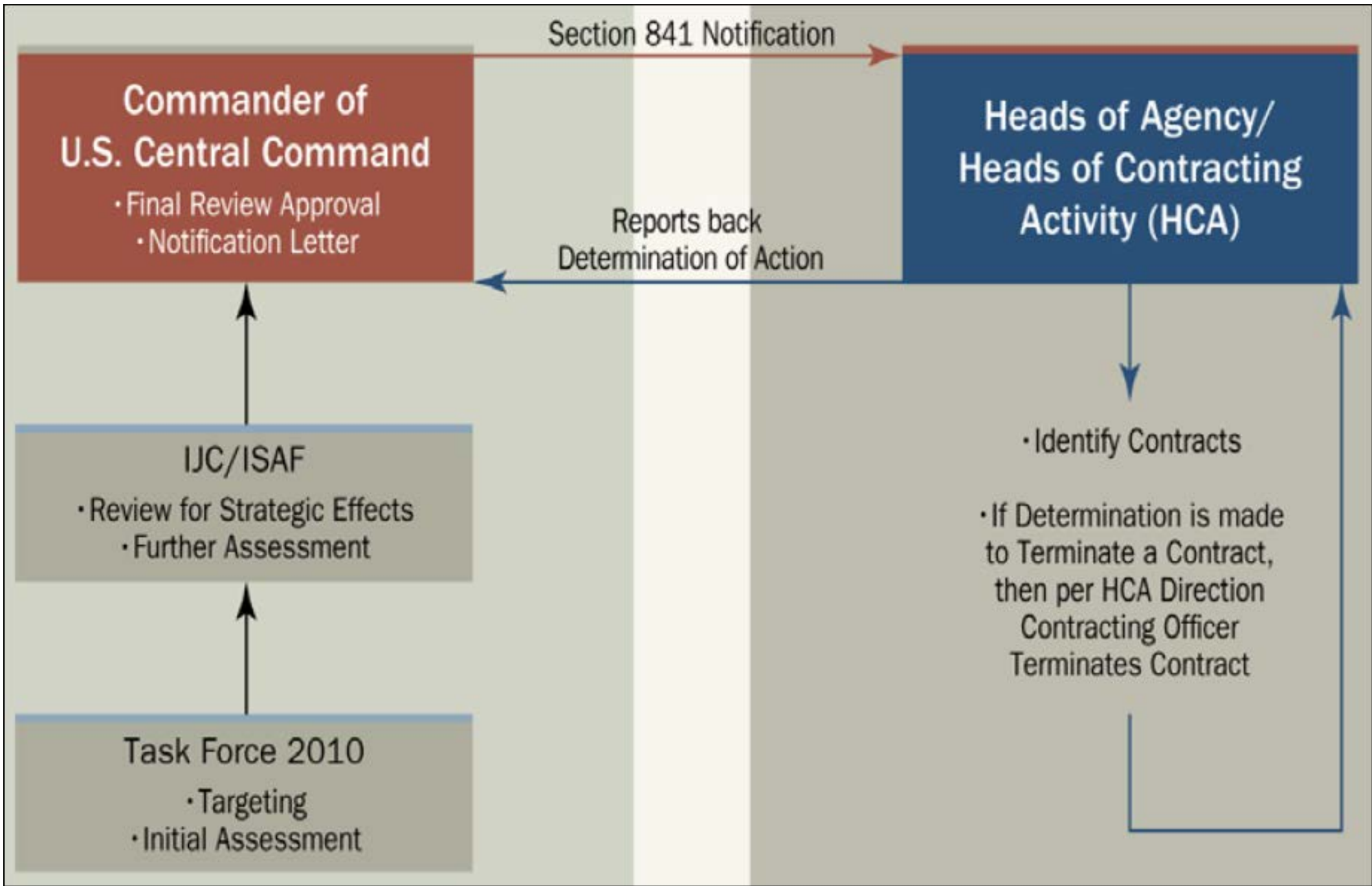
# CONTRACTING WITH THE ENEMY: THE CONTRACTING OFFICER’S DILEMMA



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## Overview

Operational Contract Support (OCS) activities during stability and reconstruction operations rely significantly on local national contractors to provide goods and services for US forces. A major risk associated with using local national contractors in contingency environments is the presence of business entities who may directly or indirectly support adversarial forces. Entering into contracts with enemy affiliated business entities creates significant contractual and security risk for US forces.



Vendor Vetting Process (from SIGAR, 2013)

Comparison of Nonresponsibility Determination, Debarment, and Lethal Targeting of US Citizens			
	Nonresponsibility	Debarment	Lethal Targeting
Decision Maker	Contracting Officer	Suspension and Debarment Official	High Level US Government Official
Criteria	Adequate financial resources Ability to comply with delivery and performance schedule Satisfactory performance record Satisfactory record of integrity and business ethics Necessary organization and experience Necessary equipment and facilities Otherwise qualified and eligible	Fraud or Criminal Offenses in obtaining or performing a public contract or subcontract Violations of federal or state antitrust laws Embezzlement, theft, forgery, bribery, etc. Intentionally misusing "Made in America" designation Other offenses indicating a lack of business integrity or honesty that seriously affect the present responsibility of a contractor	Senior operational leader of Al-Qa'ida or an affiliate organization who poses an imminent threat of violent attack against the United States, where capture is infeasible
Due Process	Only after decision is made	Yes, prior to decision	No
Evidentiary Standards	Contracting Officer Discretion, subject to review by GAO or Federal Courts	Conviction or preponderance of evidence suggesting wrongdoing	Must prove citizen in question poses an imminent threat United States

Comparison of Nonresponsibility Determination, Debarment, and Lethal Targeting (after DOJ, 2013; Manuel, 2013; FAR Subpart 9.4)

## Research Questions

- How can traditional acquisition processes like those authorized by the FAR be used by contracting officers to prevent contracting with the enemy?
- How do the evidentiary standards and burdens of proof required to prevent an enemy-affiliated contractor from competing for a contract compare with the standards typically associated with lethal military targeting?
- What conflicts are created when contracting officers use traditional acquisition processes to exclude sources from competition in order to achieve the military goal of preventing enemy businesses from competing for contract award?

## Methods

We conducted a thorough content analysis of all available and pertinent literature regarding the topic of contracting with the enemy. More specifically, we studied reports from government agencies, established laws and regulations, and court-issued decisions and interpretations on the subject. This study has helped us identify commonalities, disagreements, and gaps in knowledge that enabled us to answer our established research questions and reach our conclusion.

## Conclusions

- Existing contract processes like responsibility determinations, suspension, and debarment are insufficient in mitigating the threat of contracting with the enemy
- The evidentiary standards and due process requirements for debarment are stricter than the standards required for enemy combatant targeting
- Contracting officers must exercise due diligence and document reasons for unfavorable responsibility determinations based on suspected enemy affiliations
- Recommend modification to vendor vetting model that grants greater authority to GCCs to declare enemy-affiliated contractors ineligible



Afghan workers mix cement at a construction project (from www.dvidshubs.net)