SEC. 813. ACCESS TO CONTRACTOR AND SUBCONTRACTOR RECORDS FOR CONTRACTS WITH FOREIGN ENTITIES IN SUPPORT OF CONTINGENCY OPERATIONS IN THE UNITED STATES CENTRAL COMMAND AREA OF RESPONSIBILITY.

(a) REQUIREMENT.—In the case of any contract or purchase order to be awarded, or task or delivery order to be issued, by the Department of Defense for performance in support of a contingency operation in the United States Central Command area of responsibility, the contract or purchase order may be awarded, or the task or delivery order issued, only if —

(1) in the case of contract or purchase order to be awarded, or task or delivery order to be issued, to a foreign entity, the foreign entity agrees to provide access to the Secretary of Defense, acting through an authorized representative, to examine all records of such foreign entity relating to the contract or order; and

(2) the entity to be awarded the contract or purchase order, or to be issued the task or delivery order, agrees to require that, if any subcontract is to be awarded to a foreign entity under the contract or purchase order or the task or delivery order, the foreign entity must agree to provide access to the Secretary of Defense, acting through an authorized representative, to examine all records of such foreign entity relating to the subcontract.

(b) COMBATANT COMMANDER WAIVER AUTHORITY.—The commander of the United States Central Command may authorize a waiver of subsection (a) in any case in which the commander determines that such a waiver is in the best interest of the Government**.**

Section-by-Section Analysis

This proposal is part of a comprehensive approach established by the Chairman of the Joint Chiefs of Staff and the Commander of the United States Central Command to resolve serious issues of corruption revealed by Warlord, Inc. June 2010 report on “Extortion and Corruption Along the U.S. Supply Chain in Afghanistan.”

In support of the Commander, the International Security Assistance Forces – Afghanistan (ISAF) Counterinsurgency (COIN) Contracting Guidance and to further the U.S. Government's ability to reduce corruption, which has evolved as a secondary effect of the significant flow of funds into the Afghanistan economy under U.S. Government contracts, the authority to examine records under all contracts and subcontracts, to include fixed price contracts and encompassing contracts awarded using sealed bid procedures, regardless of dollar value, is critical. This authority will provide an enhanced ability for the U.S. Government to uncover linkages to corruption and criminal networks. Such linkages provide meaningful counterinsurgency options to U.S. warfighters and other U.S. missions in contingency operations.

10 U.S.C. 2313, Examination of records of contractor, subsection (a), Agency authority and subsection (c), Comptroller General authority, preclude the examination of records of contractors or subcontractors under fixed price contracts or contracts awarded through sealed bid procedures. These provisions authorize examination of contract records only for "each contract awarded using other than sealed bid procedures shall provide that the Comptroller General and his representatives are authorized to examine any records of the contractor, or any of its subcontractors…and to interview any current employee regarding such transactions" and, 10 U.S.C. 2313, subsection (f), "Inapplicability to Certain Contracts, precludes the examination of records under "a contract or subcontract that is for an amount not greater than the simplified acquisition threshold."

Similarly, 41 U.S.C. 4706, subsections (b) and (d) preclude the examination of records of contractors or subcontractors under fixed price contracts or contracts awarded using sealed bid procedures.

Current law poses three obstacles which restrict the U.S. Government's insight into contractor and subcontractor performance, impeding the ability to uncover corruption arising under contracts: (1) no access to contractor or subcontractor records for acquisition of commercial items below the simplified acquisition threshold; (2) no access to contractor or subcontractor records under negotiated, non-commercial items acquisitions below the simplified acquisition threshold; and, (3) no access to contractor or subcontractor records when contracting for supplies and services (including construction) by sealed bidding procedures, regardless of dollar value.

The simplified acquisition threshold for the acquisition of supplies or services that, as determined by the head of the agency, are to be used to support a contingency operation (41 U.S.C. 1903), is $1 million for any contract to be awarded and performed, or purchase to be made, outside the United States.

Budget Implications: This proposal would not increase costs to the government to expand the authority to examine records under contracts and subcontracts below the simplified acquisition threshold (for commercial items and non-commercial items acquisitions), and under sealed bid procedures, in a contingency operation.

Changes to Existing Law: This proposal would make no changes to the text of existing law.