

SIGAR

Special Inspector General for
Afghanistan Reconstruction

SIGAR Audit 13-6

CONTRACTING WITH THE ENEMY: DOD Has Limited Assurance that Contractors with Links to Enemy Groups Are Identified and their Contracts Terminated



APRIL
2013

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WHAT SIGAR REVIEWED

To reduce the risk of inadvertently contracting with individuals or entities that provide funds to groups that oppose U.S. and coalition forces, Congress included Section 841 in the fiscal year 2012 National Defense Authorization Act (NDAA). Section 841 permits the Department of Defense (DOD) to authorize a Head of a Contracting Activity (HCA) to restrict, terminate, or void a DOD contract, grant, or cooperative agreement with an entity or individual determined to be actively supporting an insurgency or otherwise opposing U.S. or coalition forces in the Central Command (CENTCOM) theater of operations, including Afghanistan. As of January 18, 2013, CENTCOM had issued four notification letters identifying five companies and their associates as Section 841 designees.

This report describes the processes DOD has established to implement Section 841, assesses the extent to which DOD's process for implementing Section 841 has aided in identifying and preventing U.S. contracting funds from being provided to individuals and entities identified as actively supporting an insurgency or opposing U.S. or coalition forces in Afghanistan, and lists some areas of the Section 841 legislation that could be strengthened to prevent contracting with the enemy.

SIGAR conducted this work in Washington, D.C.; Tampa, Florida; San Antonio, Texas; and three provinces in Afghanistan from August 2012 to April 2013 in accordance with generally accepted government auditing standards.

APRIL 2013

CONTRACTING WITH THE ENEMY: DOD Has Limited Assurance that Contractors with Links to Enemy Groups Are Identified and their Contracts Terminated

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WHAT SIGAR FOUND

DOD has established a two-phase process to comply with Section 841. The first phase of the process involves targeting, reviewing, and designating a Section 841 person or entity, and, ultimately, notifying the Head of the Contracting Activity (HCA) of this designation. U.S. Forces–Afghanistan's Task Force 2010 (TF2010) currently administers the intelligence portion established by Section 841. Once a target has been identified, TF2010 assembles an information package on the target and conducts preliminary intelligence and legal analyses. The Section 841 information package is routed through a series of coordinating agencies of the International Security Assistance Force Joint Command for review and concurrence before it goes to CENTCOM for a final decision. Upon approval, the CENTCOM Commander prepares a Section 841 notification listing the entities identified, along with a request that the HCAs exercise the authority provided in Section 841 to restrict, terminate, or void contracts with those listed. CENTCOM then distributes the notification to the HCAs. In the second phase, the HCAs determine if they have any contracts with the person or entity listed in the CENTCOM notification. The process concludes when the HCA responds to CENTCOM with the actions taken on the contracts.

SIGAR identified several weaknesses in DOD's process for implementing Section 841 that prevent the department from having reasonable assurance that U.S. government contracting funds are not being provided to persons and entities supporting the insurgency and opposing U.S. and coalition forces. As a result, millions of contracting dollars could be diverted to forces seeking to harm U.S. military and civilian personnel in Afghanistan and derail the multi-billion dollar reconstruction effort.

Specifically, SIGAR found:

- Some contracts did not (1) contain the required language clause prohibiting contractors from entering into subcontracts with Section 841 designees or (2) notify contractors of HCAs' authorities. The agency's failure to include the clause in contracts may prevent contractors from knowing their legal requirement to avoid contracting with Section 841 designees and understanding the HCAs' authorities to restrict, terminate, or void their contracts if they fail to meet their legal obligations.
- Some HCAs did not receive CENTCOM's notification identifying supporters of enemy groups, which may make it difficult for HCAs to take necessary actions on any contracts issued to Section 841 designees.

- HCAs have not consistently informed their prime contractors of Section 841 designations, even though the most recent Section 841 notification requests that they do so. Furthermore, DOD has not developed a formal policy for all HCAs to notify prime contractors of Section 841 designations, leaving it to the individual HCAs to develop their own. In the absence of a formal policy, HCAs and prime contractors may continue to contract with and award future contracts to Section 841 designees in violation of the law.
- CENTCOM began posting Section 841 designations on its public website in January 2013; however, contracting officers and prime contractors are not required to regularly review the information.
- Because HCAs do not have full visibility over most subcontracts, they must rely on their prime contractors to identify subcontracts with Section 841 designees and take necessary steps to terminate, restrict, or void them. Currently, prime contractors are not required to formally certify that they do not hold any subcontracts with Section 841 designees. As a result, HCAs have little assurance that they are identifying all contracts with Section 841 designees.
- HCAs and prime contractors are at risk of legal challenges from Section 841 designees because DOD has not provided guidance addressing the consequences of and actions to take after exercising Section 841 authorities. Contracting officials also lack guidance for absorbing the financial costs, such as seeking a new contractor, associated with restricting, terminating, or voiding a contract with a Section 841 designee. Without such guidance, HCAs and prime contractors may not be able to formulate an appropriate response to current and future legal challenges.
- DOD does not centrally track actions taken pursuant to Section 841 authorities. Section 841 requires the Secretary of Defense to report annually to Congress in 2013, 2014, and 2015 on the use of authorities during the preceding year. Currently, both DPAP and CENTCOM are collecting this data, resulting in a duplication of effort.

Finally, SIGAR found areas where Section 841 could be strengthened. For instance, Section 841 only applies to contracts valued in excess of \$100,000, although approximately 80 percent of contracts awarded in Afghanistan fall below the \$100,000 threshold. In addition, Section 841 will expire on December 31, 2014, putting in question the status of designations made under the section and relevant clauses included in contracts issued prior to this date.

SIGAR is addressing Department of State and U.S. Agency for International Development efforts to prevent contracting with the enemy in a separate review.

WHAT SIGAR RECOMMENDS

SIGAR is making seven recommendations to the Director of the Office of Defense Procurement and Acquisition Policy (DPAP): five recommendations to improve visibility over active contracts in Afghanistan; one to formally determine, in coordination with the Commander of CENTCOM, which entity will be responsible for centrally tracking data on Section 841 actions, thus preventing duplication of effort; and one to ensure that HCAs have the information needed to respond to legal challenges and address any financial liabilities that may result from exercising their Section 841 authorities. DPAP provided informal comments that generally supported our recommendations for improving the process for notifying the DOD acquisition community and contractors of Section 841 designees. However, formal comments will be provided after the release of the final report.

MATTERS FOR CONGRESSIONAL CONSIDERATION

SIGAR is also including matters for congressional consideration. To ensure all contracts in Afghanistan are subject to Section 841, Congress may wish to consider eliminating the \$100,000 threshold value for contracts. To provide DOD with greater clarity on the future of designations and efforts made under Section 841, Congress may wish to provide guidance on the status of the designations once the legislation expires on December 31, 2014. Lastly, if the intent is for Section 841 designations to expire with the legislation, Congress may wish to consider requiring contracting agencies to preserve information and intelligence gathered through the Section 841 process.



SIGAR

Office of the Special Inspector General
for Afghanistan Reconstruction

April 11, 2013

The Honorable Charles T. Hagel
Secretary of Defense

Mr. Richard T. Ginman
Director, Defense Procurement and Acquisition Policy
Department of Defense

General Lloyd J. Austin III
Commander, U.S. Central Command

General Joseph F. Dunford, Jr.
Commander, U.S. Forces–Afghanistan, and
Commander, International Security Assistance Force

The Honorable James Cunningham
U.S. Ambassador to Afghanistan

This report discusses the results of SIGAR's audit of the Department of Defense's (DOD) compliance with Section 841—Prohibition on Contracting with the Enemy in the United States Central Command (CENTCOM) Theater of Operations—of the Fiscal Year 2012 National Defense Authorization Act. This report includes seven recommendations to DOD's Office of Defense Procurement and Acquisition Policy to improve visibility over contracts, particularly subcontracts, in Afghanistan. The recommendations are designed to ensure that DOD has a central mechanism for tracking data on actions taken in response to Section 841 and that contracting agencies have the guidance needed to respond to legal challenges and address financial liabilities that result after they have exercised their Section 841 authorities.

When preparing the final report, we considered technical comments from CENTCOM, the U.S. Army Corps of Engineers, and the Air Force Civil Engineering Center. DOD's Office of Defense Procurement and Acquisition Policy also provided informal comments that generally supported our recommendations. However, Defense Procurement and Acquisition Policy officials stated that formal comments will be provided after the release of the final report. SIGAR conducted this performance audit under the authority of Public Law No. 110-181, as amended; the Inspector General Act of 1978; and the Inspector General Reform Act of 2008.

A handwritten signature in black ink, appearing to read "John F. Sopko".

John F. Sopko
Special Inspector General
for Afghanistan Reconstruction

TABLE OF CONTENTS

Background	3
DOD Has Established a Two-phase Process to Comply with Section 841	4
Weaknesses Exist in DOD’s Section 841 Process	5
Section 841 Legislation Needs to Be Strengthened	7
Conclusion	8
Recommendations	8
Matters for Congressional Consideration	9
Agency Comments	9
Appendix I - Scope and Methodology	10
Appendix II - Department of Defense Section 841 Implementation Process	12
Appendix III - Acknowledgments	15

FIGURES

Figure I - Section 841 Process	12
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ABBREVIATIONS

AFCEC	Air Force Civil Engineer Center
CENTCOM	Central Command
C-JTSCC	Central Command-Joint Theater Support Contracting Command
DFARS	Defense Federal Acquisition Regulation Supplement
DOD	Department of Defense
HCA	Head of Contracting Activity
ISAF	International Security Assistance Force
NDAA	National Defense Authorization Act
OSD AT&L	Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics
TF2010	Task Force 2010
SIGAR	Special Inspector General for Afghanistan Reconstruction
USACE	U.S. Army Corps of Engineers

After 10 years of contingency operations, contractors continue to support U.S. military and civilian-led efforts in Afghanistan by providing a broad range of supplies, services, and critical logistics functions. In fiscal year 2012, the U.S. Central Command (CENTCOM)¹ Joint Theater Support Contracting Command (C-JTSCC) data showed that it awarded 9,733 contracts, valued at approximately \$1.7 billion.² The first quarter fiscal year 2013 manual census conducted by CENTCOM reported 110,000 contract personnel working in Afghanistan between October and December 2012. Reflecting U.S. and coalition guidance that emphasizes the importance of local contracting, C-JTSCC awarded 8,634 of these contracts—about 89 percent of the total contract value—to Afghan contractors. Several prior audit and research reports discuss the numerous and unique challenges of contracting in Afghanistan, particularly with non-U.S. contractors.³ These challenges include the limited availability of oversight staff for contracts, the small pool of qualified local contractors, and an environment of insecurity and corruption that increases the risk of U.S. funds being misused to finance terrorist or insurgent groups.

To reduce the risk and effects of inadvertently contracting with individuals or entities that have links to and could provide funds to insurgents and others who oppose U.S. and coalition forces, Congress included Section 841—Prohibition on Contracting with the Enemy in the United States Central Command Theater of Operations—in the National Defense Authorization Act (NDAA) for Fiscal Year 2012.⁴ Section 841 permits the Department of Defense (DOD), pursuant to a request from the CENTCOM Commander, to authorize the Head of a Contracting Activity (HCA) to restrict, terminate, or void a DOD contract, grant, or cooperative agreement that it determines would provide funding directly or indirectly to a person or entity identified as actively supporting an insurgency or otherwise actively opposing U.S. or coalition forces in the CENTCOM theater of operations, including Afghanistan.⁵

This report (1) describes the processes DOD has established to implement Section 841, (2) assesses the extent to which DOD's policies and procedures for implementing Section 841 have been able to identify and prevent U.S. contracting funds from being provided to individuals and entities identified as actively supporting an insurgency or opposing U.S. or coalition forces in Afghanistan, and (3) lists some areas of the Section 841 legislation that could be strengthened to prevent contracting with the enemy.

To accomplish our objectives, we reviewed Section 841 and examined a variety of DOD contracting policies and procedures. These policies and procedures included the Defense Federal Acquisition Regulation Supplement (DFARS), C-JTSCC acquisition procedures, and International Security Assistance Force (ISAF) contracting and counterinsurgency guidance. Additionally, we sent a standardized questionnaire to DOD's HCAs in order to identify the policies and procedures they used to consider the CENTCOM Commander's request and the factors considered when determining whether to restrict, terminate, or void a contract, grant, or cooperative agreement after being notified of a Section 841 designation. We also reviewed a judgmental sample of 230 contracts from the U.S. Army Corp of Engineers (USACE), Air Force Civil Engineering Center (AFCEC), and C-JTSCC to ensure compliance with Section 841 requirements. We interviewed relevant DOD officials from the Office of

¹ CENTCOM is one of the nine combatant commands in the U.S. military. Its area of responsibility consists of 20 countries in Middle East and Southwest Asia, including Afghanistan.

² This figure represents C-JTSCC only and does not reflect the entire universe of contracts in the Afghanistan theater of operation.

³ Government Accountability Office, U.S. Efforts to Vet Non-U.S. Contractors Need Improvement, GAO-11-355, 6/8/2011; Congressional Research Service, *Wartime Contracting in Afghanistan: Analysis and Issues for Congress*, 11/14/2011. Committee on Oversight and Government Reform, *Warlord, Inc.: Extortion and Corruption Along the U.S. Supply Chain in Afghanistan*, 6/22/2010.

⁴ Pub. L. 112-81.

⁵ According to Defense Federal Acquisition Regulation Supplement, Subpart 202.1, a DOD contracting activity is an entity designated by the director of a defense agency with contracting authority through its agency charter. For example, the U.S. Army Corps of Engineers is considered an HCA. Large DOD agencies, such as the Department of the Army, may have multiple HCAs under their command.

the Under Secretary of Defense for Acquisition, Technology, and Logistics (OSD AT&L), CENTCOM, USACE, and AFCEC. We conducted our work in Washington, D.C.; Tampa, Florida; San Antonio, Texas; and Kabul, Kandahar, and Parwan provinces in Afghanistan from August 2012 to April 2013 in accordance with generally accepted government auditing standards. A discussion of our scope and methodology is included in appendix I

BACKGROUND

The International Security Assistance Force (ISAF) Commander's counterinsurgency contracting guidance issued in September 2010, and similar contracting guidance issued by the Department of State and the U.S. Agency for International Development in November 2010, confirmed the importance of contracting to the U.S. mission in Afghanistan. In particular, the guidance emphasizes the importance of contracting with Afghan contractors and purchasing Afghan goods—a policy collectively known as Afghan First—as a key element of the U.S. counterinsurgency strategy.⁶ However, in light of cases like the Host Nation Trucking contract,⁷ in which funds paid by contractors for the safe passage of U.S. military goods are widely believed to have been funneled to insurgents, the U.S. government has launched a variety of efforts to prevent contracting abuse and decrease the likelihood of funds being diverted to terrorist or insurgent groups.⁸

In an effort to prevent U.S. government contracting funds from being diverted to terrorist or insurgent groups, Congress included Section 841 in the fiscal year 2012 NDAA. In addition to establishing the prohibition on contracting with terrorist or insurgent groups, Section 841:

- Directs the Secretary of Defense to revise DFARS to reflect provisions of Section 841 no later than 30 days after the date of enactment of the NDAA.⁹
- Calls for the CENTCOM Commander to establish a program that uses intelligence data to review and identify persons and entities with DOD contracts, grants, or cooperative agreements that are actively supporting an insurgency or otherwise opposing U.S. or coalition forces in a contingency operation in Afghanistan or other countries in the CENTCOM theater of operations.¹⁰
- Permits the Secretary of Defense to authorize an HCA, pursuant to a request from the CENTCOM Commander, to restrict, terminate, or void a contract determined to provide funding to active insurgent elements and opponents of U.S. or coalition forces.
- Requires all contracts with an estimated value over \$100,000 that will be performed in the CENTCOM theater of operations to include a clause notifying the contractor or recipient to exercise due diligence to ensure that none of the funds received under the contract are provided directly or indirectly to a person or entity actively supporting an insurgency or opposing U.S. or coalition forces. The clause also

⁶ We previously reported on the Afghan First Initiative (see SIGAR Audit-12-6, *Afghan First Initiative Has Placed Work with Afghan Companies, but Is Affected by Inconsistent Contract Solicitation and Vetting, and Employment Data Is Limited*, January 31, 2012).

⁷ The principal contract supporting the U.S. supply chain in Afghanistan was Host Nation Trucking, a \$2.16 billion contract split among eight Afghan, American, and Middle Eastern companies. The Host Nation Trucking contract provided trucking for over 70 percent of the total goods and materiel distributed to U.S. troops in the field—roughly 6,000 to 8,000 truck missions per month. The trucks carried food, supplies, fuel, ammunition, and Mine Resistant Ambush Protected vehicles.

⁸ The U.S. government's efforts to prevent contracting abuse and prevent the diversion of funds to terrorist or insurgent group include (1) DOD and U.S. Agency for International Development programs to vet non-U.S. contractors; (2) interagency task forces created to identify malign actors, encourage transparency, and prevent corruption, such as Task Force 2010 and the Afghan Finance Threat Cell; and (3) DOD training programs for contracting officer representatives with a focus on contingency operations.

⁹ This was achieved through DFARS Class Deviation 2012-00005, which the Under Secretary of Defense for Acquisition, Technology, and Logistics Office of Defense Procurement and Acquisition Policy issued on January 26, 2012.

¹⁰ For the purposes of this report, we use the term “contract” to refer collectively to contracts, grants, cooperative agreements, and task orders, unless noted otherwise.

requires HCAs to inform contractors or recipients of grants and cooperative agreements of the HCAs' authority to terminate, restrict, or void the contract.

- Requires the Secretary of Defense to report annually to the congressional defense committees on the use of authorities provided under Section 841.

DOD HAS ESTABLISHED A TWO-PHASE PROCESS TO COMPLY WITH SECTION 841

DOD, through CENTCOM, has implemented a two-phase process to comply with Section 841. The first phase of the process involves targeting, reviewing, and designating a Section 841 person or entity, and, ultimately, notifying HCAs of these designations. U.S. Forces–Afghanistan's¹¹ Task Force 2010 (TF2010) currently administers the intelligence portion established by Section 841.¹² TF2010 primarily identifies targets for a potential Section 841 designation through self-initiated cases and contractor vetting reports. Once a target has been identified, TF2010 assembles an information package on the target and conducts preliminary intelligence and legal analyses for the TF2010 Director's approval. Once approved by the TF2010 Director, the Section 841 information package is routed through a series of coordinating agencies of ISAF Joint Command for review and concurrence before it goes to CENTCOM Command for a final decision and designation. If the CENTCOM Commander approves it,¹³ the Commander prepares an unclassified Section 841 notification letter listing the person or entities identified, along with a request that the heads of agency or HCAs exercise the authority provided in Section 841 to restrict, terminate, or void contacts with those listed. CENTCOM then distributes the notification letter via email to key heads of agency and select HCAs.¹⁴

In the second phase, the key heads of agency and select HCAs determine if they have any contracts with the person or entity listed in the CENTCOM notification letter. The process concludes when the head of agency or HCA responds to CENTCOM with information on the number and value of any contracts with the person or entity and the actions taken on the contracts. For a more detailed description of the Section 841 process, see appendix II.

As of January 18, 2013, CENTCOM has issued four notification letters identifying five companies and their associates as supporters of enemy groups.¹⁵ According to DOD officials, no prime contracts have been terminated as a result of these Section 841 designations because none were active when the designation took effect.¹⁶ However, at the direction of USACE and AFCEC contracting officers, a prime contractor terminated eight active subcontracts awarded to a Section 841 designee. The value of these subcontracts was

¹¹ U.S. Forces–Afghanistan is under the command of CENTCOM.

¹² TF2010 is a unit made up of intelligence, law enforcement, auditors, and forensic analysts from both military and civilian agencies. Its mission is to help commanders and acquisition teams better understand with whom they are doing business and recommend actions that deny power-brokers, criminal, and insurgent actors the opportunity to benefit from diverted U.S. contracting dollars and government-funded equipment and supplies, thus undermining the U.S. government's reconstruction and counterinsurgency efforts.

¹³ As of January 18, 2013, the CENTCOM Commander had approved all five Section 841 cases received.

¹⁴ The CENTCOM Section 841 notification letter distribution list continues to evolve, and currently is composed of a combination of heads of agency, such as the Department of the Army, and HCAs, such as the National Security Agency.

¹⁵ On January 18, 2013, CENTCOM issued the fourth notification letter on the Kam Airlines group of companies and their associates. On February 9, 2013, CENTCOM suspended the January 18, 2013, notification, with the understanding that an independent investigation of the activities of Kam Air and their associates will be conducted by the Government of Afghanistan. For a complete listing of Section 841 designated companies and their affiliates, please visit the CENTCOM website at www2.centcom.mil/sites/contracts.

¹⁶ DOD previously held contracts with parties identified within the four Section 841 notification letters. According to officials, USACE had awarded at least seven contracts, valued at over \$35 million, to persons or entities that currently have a Section 841 designation. However, the agency awarded these contracts prior the enactment of the fiscal year 2012 NDAA, and the contracts were no longer active at the time of the Section 841 designation.

approximately \$12 million; about \$5 million of these funds had already been paid to the subcontractor when the contracts were terminated.

WEAKNESSES EXIST IN DOD'S SECTION 841 PROCESS

Currently, DOD's Section 841 process does not provide reasonable assurance that HCAs are identifying all contracts awarded to persons or entities that are supporting the insurgents or other enemies. Because HCAs do not have visibility over most subcontracts awarded in Afghanistan, agencies must rely on prime contractors to determine whether they have awarded any subcontracts to persons or entities listed in a Section 841 notification letter. The DFARS class deviation issued in response to the Section 841 legislation requires that all new contracts and solicitations with an estimated value over \$100,000 being performed in the CENTCOM theater of operations include language prohibiting contractors from entering into subcontracts with persons or entities determined to be aiding the enemy. It also states that agencies shall, to the maximum extent practicable, bilaterally or mutually modify existing contracts to include this language. In addition, the language informs contractors of authorities granted to HCAs under Section 841 to restrict, terminate, and void a contract if they determine the contractor failed to exercise due diligence in preventing funds from going to persons or entities receiving Section 841 designations.

However, our review of a judgmental sample of 129 contracts at select C-JTSCC Regional Contracting Centers found that contracting officers had not modified the base contracts for 28 reviewed task orders—issued on contracts awarded prior to the enactment of Section 841—to include the DFARS clause. We also found that 31 of the remaining 101 contracts, awarded after enactment of Section 841, did not contain the clause. Failure to include the clause in new and pre-existing contracts means that contractors may be unaware of the authorities granted to HCAs to terminate contracts under Section 841 and the requirement that they perform due diligence to avoid contracting with Section 841 designees.

During our reviews of contracts, we determined that 1 of the 66 USACE contracts and 4 of the 35 AFCEC contracts reviewed did not include the full text of the clause. USACE and AFCEC have already taken steps to include the DFARS clause in base contracts when a new task order is placed on a contract that was issued prior to the enactment of Section 841.

HCAs and Prime Contractors Do Not Consistently Receive Notification of Section 841 Designations

Under Section 841, HCAs are responsible for identifying and making a determination of action on any contracts issued to persons or entities designated in the CENTCOM Commander's notification letter. CENTCOM distributes the notification directly to key heads of agency and select HCAs, who are then responsible for distributing the letters to their subordinate agencies. However, not all HCAs have received the distributed notification letters. For example, USACE did not receive the first notification letter, dated July 24, 2012, from the Department of the Army until the issuance of the second letter on September 20, 2012. Also, the Office of the Undersecretary of Defense for Acquisition, Technology and Logistics (OSD AT&L)¹⁷ currently has not provided formal guidance for the dissemination of Section 841 notification letters from the head of agency level to subordinate HCAs. While HCAs and contracting officials could obtain Section 841 designations from the Joint Contingency Contracting System, they are not required to review information in the system.¹⁸ Further, some agencies overseeing contracts in Afghanistan may not be familiar with the Joint Contingency Contracting

¹⁷ OSD AT&L is responsible for establishing policies for acquisition (including procurement of goods and services, research and development, developmental testing, and contract administration), for all elements of the Department of Defense.

¹⁸ The Joint Contingency Contracting System, a contracting database, is the only system in which CENTCOM records Section 841 designations. However, a DOD official stated that only contracting officers can view that information in the system.

System.¹⁹ Agencies that do not receive the notification letters and do not have access to the Joint Contingency Contracting System may be unaware of the persons or entities designated under Section 841, and, as a result, maybe unable to terminate, restrict, or void contracts with the designees as stipulated in the law.

Moreover, HCAs have not consistently informed their prime contractors of Section 841 designations or sent them copies of the notification letters. The CENTCOM Commander included language in the third Section 841 notification letter requesting that HCAs disseminate the letter to their prime contractors and notify CENTCOM of any subcontracts with the designees listed.²⁰ However, OSD AT&L has not developed formal policies requiring HCAs to disseminate Section 841 notification letters to all their prime contractors. Further, prime contractors do not have access to an information system, such as the Joint Contingency Contracting System, that includes data on companies with Section 841 designations. In January 2013, CENTCOM began posting Section 841 designations on its website; however, contracting officers and prime contractors are not currently required to regularly review the listed designations. If prime contractors do not receive the notification letters or have the ability to access a system containing information on Section 841 designees, they may be unaware of Section 841 designations and continue to subcontract or award future subcontracts to persons or entities identified as actively supporting the insurgency or actively opposing U.S. or coalition forces in violation of the law.

Contractors Are Not Required to Certify That They Do Not Have Contracts with Section 841 Designees

Because HCAs do not have full visibility over most subcontracts awarded, they must rely on their prime contractors' due diligence to ensure that subcontracts are not awarded to persons or entities identified under Section 841. Although CENTCOM has begun to request that HCAs distribute the Section 841 notification to their prime contractors, there is no requirement for prime contractors to formally attest that they do not hold subcontracts with Section 841 designees.²¹ As a result, officials have limited assurance that they are identifying all contracts with Section 841 designees.

DOD Lacks Guidance on Actions to Take After Exercising Section 841 Authorities and Also Lacks Mechanisms for Tracking and Reporting Contracting Actions Implemented

DOD has not provided HCAs with guidance on how to address the possible consequences of using their Section 841 authorities to terminate, restrict, or void a contract. For example, after receiving notification of the first Section 841 designee, AFCEC requested all of its prime contractors to identify subcontracts with the designee. As directed, a prime contractor terminated a subcontract with this designee. Although the Section 841 designation is unclassified, the information CENTCOM uses to make a determination may be classified and is not shared with contractors.²² As a result, in one instance, the prime contractor could not inform the subcontractor of the reasons for the termination. In September 2012, the subcontractor filed a complaint against the prime contractor with the Afghan government. As a result of the complaint, the prime contractor contacted AFCEC for assistance. AFCEC subsequently contacted CENTCOM for guidance but did not view CENTCOM's suggestion that legal counsel should be sought as responsive to the issue. As of January 31, 2013, the matter was unresolved. USACE officials stated they experienced similar challenges with the same subcontractor.

¹⁹ A supervisory contracting officer with AFCEC informed us that contracting officials with his agency in Afghanistan do not utilize the Joint Contingency Contracting System for any contracting activities.

²⁰ The third Section 841 notification letter is dated November 16, 2012.

²¹ Section 842 of the fiscal year 2012 NDAA gives DOD authority to examine the records of contractors as well as their subcontractors, if there is reason to believe that funds available under the contract may have been subject to extortion, corruption or may have been provided to person or entities actively supporting an insurgency or opposing U.S. or coalition forces. However, DOD may not know which prime contractors hold subcontracts with Section 841 designees, and therefore may be unable to fully utilize Section 842 in support of Section 841.

²² Section 841 provides that such information can be shared pursuant to a protective order issued by a court of law.

AFCEC officials also expressed concerns about the lack of guidance for absorbing the financial costs of exercising Section 841 authorities. For example, with the termination of the contract with the Section 841 designated subcontractor, AFCEC incurred further expenses as its prime contractor sought and employed a new company to complete the work once performed by the Section 841 designee. Without established guidance, HCAs and prime contractors are at risk of facing legal challenges from Section 841 designees and may have to absorb financial costs associated with implementing Section 841 authorities.

In addition, DOD does not centrally track responses to the Section 841 notification letters and actions taken to terminate, restrict, or void contracts. Under Section 841, the Secretary of Defense is required to report annually by March 1 of 2013, 2014, and 2015, to various congressional committees on the use of the section's authorities during the preceding year. OSD AT&L, specifically the Office of Defense Procurement and Acquisition Policy, is responsible for submitting the mandated report and is obtaining this data directly from the various services and other contracting agencies. CENTCOM is also collecting Section 841 data, resulting in a duplication of effort. OSD and CENTCOM officials informed us that they plan to compare the data collected for consistency and accuracy. Without a centralized tracking mechanism, DOD may continue to duplicate data collection efforts.

SECTION 841 LEGISLATION NEEDS TO BE STRENGTHENED

In addition to the weaknesses identified in DOD's processes, we noted several limitations in Section 841 of the NDAA. First, not all DOD contracts within Afghanistan are subject to the provisions of Section 841 because the section only applies to contracts valued in excess of \$100,000. However, a large number of awarded contracts are below the \$100,000 threshold. For example, 7,730 of 9,733 (or approximately 80 percent) contracts C-JTSCC awarded in fiscal year 2012 were contracts valued under \$100,000. Furthermore, 82 percent of contracts awarded to Afghan entities fell below this threshold.

Second, because Section 841 provisions expire on December 31, 2014, the future status of contracts and Section 841 designees is unclear. Specifically, the legislation does not address whether Section 841 provisions will continue to apply to contracts entered into prior to but active after the expiration date. If Section 841 provisions are not reauthorized, HCAs' authority to terminate, restrict, or void active contracts with entities and individuals found to be in violation of Section 841 may be limited. In addition, if Section 841 designees are not prohibited from contracting with DOD under alternative measures after 2014, it is possible that DOD's contracting agencies may enter into contracts with these persons or entities in the future. Finally, DOD officials expressed concern that information and intelligence gathered through the Section 841 process may be lost if the provisions expire.

Third, as enacted, Section 841 applies only to DOD and its various agencies and organizations. Thus, agencies other than DOD—most notably the Department of State and U.S. Agency for International Development—are not subject to its provisions.²³ SIGAR issued an alert letter on October 17, 2012 notifying the Department of State and the U.S. Agency for International Development of the first two groups of individuals and entities identified as Section 841 designees. This alert letter acknowledged that, while Section 841 only affects DOD contracts, both the Department of State and the U.S. Agency for International Development use many of the same contractors as DOD, and consequently there could be a present or future risk that the Department of State and the U.S. Agency for International Development could have active prime or subcontracts with Section 841 designees. We are addressing Department of State and U.S. Agency for International Development efforts to prevent contracting with the enemy in a separate review.

²³ As of the third notification letter dated November 16, 2012, the Department of State and U.S. Agency for International Development are included in CENTCOM's distribution list.

CONCLUSION

Although DOD has established a process to implement Section 841, weaknesses in the process prevent the department from having reasonable assurance that it is identifying all contracts held by persons or entities determined to be actively supporting the insurgency and opposing U.S. or coalition forces. Because HCAs do not have visibility over subcontracts awarded in Afghanistan, they rely exclusively on prime contractors to determine whether they have awarded subcontracts to persons or entities with Section 841 designations. However, contracting agencies do not require prime contractors to certify that they do not have contracts with Section 841 designees, making it difficult for DOD to identify and terminate contracts with supporters of the insurgency and other enemy groups. As a result, millions of U.S. contracting dollars could be diverted to forces seeking to harm U.S. military and civilian personnel in Afghanistan and derail the multi-billion dollar reconstruction effort.

In addition, DOD also has not developed guidance describing the steps HCAs should take to respond to any legal challenges brought and financial liabilities incurred as a result of contracts terminated under Section 841. Therefore, HCAs and prime contractors may not be able to respond appropriately or consistently to these challenges. Further, prime contractors may be less inclined to terminate, restrict, or void subcontracts with Section 841 designees when faced with increased expenses and unclear or limited legal recourse.

Finally, Section 841 could be strengthened to ensure that all contracts in Afghanistan and other countries in the CENTCOM theater of operations are subject to its provisions—specifically Department of State and U.S. Agency for International Development. Further, it is unclear whether the Section 841 designations will be enforceable, and the related information will be maintained, after the legislation expires at the end of 2014, even though U.S. agencies will continue to contract in Afghanistan after the military drawdown and transition are complete. Consequently, agencies may continue to contract or enter into new contracts with persons and entities identified as supporting the enemy and other groups opposing the U.S. and coalition forces, thus increasing the risk that U.S. taxpayer funds could be diverted to these enemy groups.

RECOMMENDATIONS

To improve DOD's visibility over active contracts in Afghanistan, particularly subcontracts, so that they can take the required action if necessary, we recommend that the Director of the Office of Defense Procurement and Acquisition Policy,

- 1. Require all Heads of Agency in the CENTCOM theater of operations, including Afghanistan, develop a standard mechanism for distributing Section 841 notification letters to their HCAs.**
- 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.**
- 3. Direct HCAs to require prime contractors to certify that they do not have subcontracts with Section 841 designees.**
- 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.**
- 5. Enforce DFARS Class Deviation 2012-00005 that requires the Section 841 clause be included in contracts, unless HCAs provide justification for exemption.**

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,

- 6. 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.**

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,

- 7. Develop and distribute guidance to HCAs about actions to take once they have restricted, terminated, or voided a contract under Section 841.**

MATTERS FOR CONGRESSIONAL CONSIDERATION

To ensure that all contracts in Afghanistan are subject to the provisions of Section 841, Congress may wish to consider revising the legislation to eliminate the \$100,000 threshold value for contracts.

To provide DOD with greater clarity on the future of designations and efforts made under Section 841, Congress may wish to consider providing guidance on the status of the designations once the legislation expires on December 31, 2014. If the intent is for Section 841 designations to expire with the legislation, Congress may wish to consider requiring contracting agencies to preserve information and intelligence gathered through the Section 841 process and take this information into account when awarding new contracts in 2015 and beyond.

AGENCY COMMENTS

CENTCOM, USACE, and AFCEC provided technical comments, which we incorporated into our final report, as appropriate. DOD's Office of Defense Procurement and Acquisition Policy officials provided informal comments that generally supported our recommendations for improving the process for notifying the DOD acquisition community and contractors of Section 841 designees, and stated that they will provide formal comments after the release of the final report. When received, we will address these comments in a separate document and post to our website at www.sigar.mil.

APPENDIX I - SCOPE AND METHODOLOGY

Our objectives were to (1) describe the processes Department of Defense (DOD) has established to implement Section 841, (2) assess the extent to which DOD's policies and procedures for implementing Section 841 have been able to identify and prevent U.S. contracting funds from being provided to individuals and entities identified as actively supporting an insurgency or opposing U.S. or coalition forces in Afghanistan, and (3) identify areas of the Section 841 legislation that could be strengthened to prevent contracting with the enemy.

To describe the processes DOD established to implement Section 841, we reviewed the provisions of Section 841 and several recent DOD contracting policies. These policies included the Defense Federal Acquisition Regulation Supplement (DFARS), the September 2011 United States Central Command (CENTCOM) Contracting Command (C-JTSCC) Acquisition Instruction, the May 2012 Contracting Officer's Guide for Theater Business Clearance for Afghanistan, the International Security Assistance Force Commander's contracting guidance, and the U.S. government counterinsurgency guide.²⁴ We also examined Task Force 2010's (TF2010) Section 841 designation policies and procedures and designation packages, as well as the CENTCOM Vendor Vetting Reachback Cell's processes for vetting contractors doing work in support of U.S. forces in Afghanistan and Iraq. We sent a standardized questionnaire to 23 heads of agency and Heads of Contracting Activity (HCA) listed in the second CENTCOM Commander's Section 841 designation letter. The questionnaire sought to identify the policies and procedures used by heads of agency and HCAs to consider the CENTCOM Commander's request and the factors they considered in determining whether to exercise the authority provided by Section 841. We received and analyzed 11 responses.

To assess the extent to which DOD's Section 841 policies and procedures have been able to identify and prevent U.S. contracting funds from being provided to individuals and entities identified as actively supporting an insurgency or opposing U.S. or coalition forces, we interviewed DOD officials representing the Office of Defense Procurement and Acquisition Policy,²⁵ CENTCOM and its Vendor Vetting Reachback Cell, U.S. Army Corp of Engineers (USACE) Transatlantic Division, and the Air Force Civil Engineering Center (AFCEC). We also interviewed U.S. Forces-Afghanistan and C-JTSCC officials including the Senior Contracting Official-Afghanistan, the Director and other representatives of TF2010, and officials from Regional Contracting Centers at Camp Phoenix in Kabul, Bagram Air Field, and Kandahar Air Field. In addition, we interviewed officials from the USACE Afghanistan Engineer District-North and South and a senior AFCEC contracting representative in Kabul. As part of evaluating DOD's established Section 841 policies and procedures, and to ensure compliance with Section 841 and DFARS contract clause requirements, we reviewed 230 contracts awarded between February 1, 2012 and September 30, 2012 by one of three agencies—C-JTSCC, USACE and AFCEC—with the contracts located in Kabul, Kandahar, and Parwan, Afghanistan and San Antonio, Texas.

To identify areas of the Section 841 legislation that could be strengthened, we reviewed Section 841 of the National Defense Authorization Act (NDAA) for Fiscal Year 2012. In addition, we interviewed relevant DOD officials that were familiar with Section 841 legislation.

We did not use or rely on computer-processed data for the purposes of the audit objectives. With respect to assessing internal controls, we reviewed compliance with Section 841 and the DFARS. The results of our assessment are included in the body of this report.

We conducted work in Washington, D.C.; Tampa, Florida; San Antonio, Texas; and Kabul, Kandahar, and Parwan provinces in Afghanistan from August 2012 to April 2013, in accordance with generally accepted government auditing standards. These standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our

²⁴ Theater Business Clearance requirements are generated from Battlefield Commander orders and apply to contracts in the battle space.

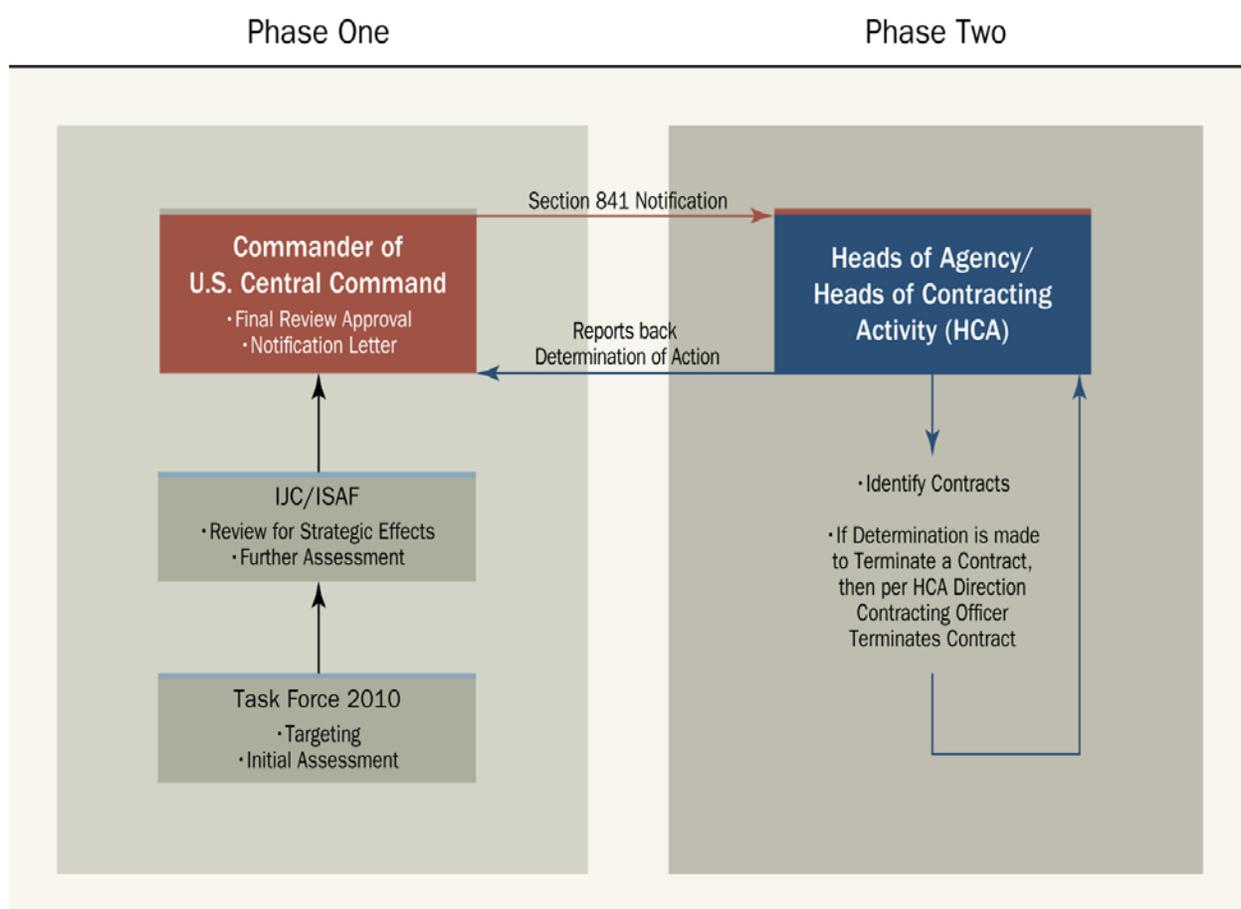
²⁵ The Office of Defense Procurement and Acquisition Policy reports to the Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics.

audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. The audit was conducted by the Office of Special Inspector General for Afghanistan Reconstruction under the authority of Public Law No. 110-181, as amended; the Inspector General Act of 1978; and the Inspector General Reform Act of 2008.

APPENDIX II - DEPARTMENT OF DEFENSE SECTION 841 IMPLEMENTATION PROCESS

The Department of Defense (DOD), through U.S. Central Command (CENTCOM), has implemented a two-phase process to comply with the provisions of Section 841—Prohibition on Contracting with the Enemy in the United States Central Command Theater of Operations—of the National Defense Authorization Act for Fiscal Year 2012.²⁶ The first phase of this process involves targeting, reviewing, and designating Section 841 persons or entities, and notifying heads of agency and Heads of Contracting Activity (HCA). In the second phase, the head of agency or HCA receives the notification and determines if it has any contracts with the person or entity listed in the notification. The process concludes when the head of agency or HCA responds to CENTCOM with the number and value of contracts identified with the person or entity and the actions taken on those contracts.

Figure I - Section 841 Process



Source: SIGAR analysis of Task Force 2010 Section 841 process flow chart and interviews with task force and select Heads of Contracting Activity officials.

²⁶ Pub. L. 112-81.

Phase One: CENTCOM Analyzes Information on Section 841 Targets, Approves Designations, and Notifies Key Heads of Agency and Select HCAs

As the entity charged by CENTCOM to initiate the Section 841 designation process, Task Force 2010 (TF2010) identifies targets from self-initiated cases, Vendor Vetting Reach Back Cell (VVRC) reports, and other sources.²⁷ Approximately 50 percent of TF2010's targets are self-initiated cases. These are cases initiated based on the task force's criminal investigations or where the task force has been investigating an individual or entity for an extended period of time.²⁸ About 25 percent of Section 841 cases are built from VVRC reports. These reports assign non-U.S. contractors a force protection evaluation rating.²⁹ Because Section 841 only applies to persons or entities that are actively supporting the insurgency or opposing U.S. and coalition forces, TF2010 determines whether the intelligence gathered is recent enough to pursue a Section 841 designation.³⁰ The remaining 25 percent of TF2010 targets are generated by other sources, such as the International Criminal Investigation Task Force³¹ and the Afghan Threat Finance Cell.³²

Review Process and Designation

According to TF2010 officials, once they have targeted a prospect, they assemble an informational intelligence package on the person or entity. The intelligence package contains information such as known civil and criminal activities, affiliations and associations with malign actors, and known terrorism and insurgent ties, and may include unclassified or classified data. The assessment is a compilation of all information TF2010 believes CENTCOM needs to make a determination of whether to give the person or entity being targeted a Section 841 designation.³³ TF2010 ultimately determines if a target is actively supporting an insurgency or otherwise opposing U.S. or coalition forces based on the quality, quantity, timeliness, and level of corroboration of the evidence. Once a target has been confirmed based on the evidence, the package also undergoes an internal legal review.

TF2010 subsequently conducts a contract impact analysis to identify any potential second or third order effects. This analysis helps to determine the consequences in the area of operations if the contractor were to be removed. For example, the person or entity targeted may be the only contractor available to provide the good or service in the area of operations and removing the contractor may prove detrimental to the overall mission.

After these steps are completed and the Director of TF2010 approves the package, it is routed through a series of coordinating agencies within the International Security Assistance Force (ISAF) Joint Command for review

²⁷ The Vendor Vetting Reachback Cell is responsible for vetting all non-U.S. contractors bidding for contracts equal to or above \$100,000 in the Afghanistan theater of operations.

²⁸ TF2010 tracks targets by maintaining a top 15 list of active targets.

²⁹ After completing an investigation on a contractor, the Vendor Vetting Reachback Cell creates an analytical report and classifies contractors into one of four force protection risk levels: moderate, significant, high, or extremely high. High or extremely high risk levels generally result in the contractor being excluded from further consideration for new contract awards. TF2010 has ranked approximately 1,600 to 1,700 Vendor Vetting Reachback Cell reports based on these assigned force protection ratings.

³⁰ TF2010 generally considers information that is no more than 90 days old.

³¹ The International Criminal Investigation Task Force conducts investigations of detainees captured in the war on terrorism. The task force includes representatives from the Army Criminal Investigation Division, Naval Criminal Investigative Service, and Air Force Office of Special Investigations.

³² Formed in 2008 by the U.S. Drug Enforcement Administration, the Afghan Threat Finance Cell identifies, tracks, and attempts to disrupt financial networks that fund insurgents.

³³ During this part of the process, TF2010 considers information such as (1) force protection—the factors that are most critical for troop safety, (2) the number of open contracts and what these contracts are providing, and (3) contract size—how much money is flowing to the enemy.

and agreement before it reaches CENTCOM for a final decision. The Section 841 designation package receives a number of senior level approvals, including approvals by the Deputy Chief of Staff of ISAF Joint Command, the Commander of ISAF Joint Command, and the Commander of ISAF/U.S. Forces–Afghanistan, before finally reaching CENTCOM. Once at CENTCOM, the package is subject to another intelligence review in addition to legal evaluation from the CENTCOM Judge Advocate. The CENTCOM Commander then reviews the package and all of the information compiled to this point and makes the final determination.³⁴

Notification

If the CENTCOM Commander approves the Section 841 designation package, the Commander writes an unclassified Section 841 notification letter listing the persons or entities involved, along with a request that the recipients exercise the authority provided in Section 841.³⁵ CENTCOM then distributes the Section 841 notification letter by email to key heads of agency and select HCAs.

Phase Two: HCAs Identify Contracts with Section 841 Designees and Determine Whether to Restrict, Terminate, or Void Affected Contracts

Once heads of agency and HCAs receive the Section 841 notification letter, they are responsible for determining if subordinate commands have any contracts with the identified persons or entities. Although not required by Section 841, the CENTCOM Commander directs the heads of agency and HCAs to report back, at a minimum, on the number of contracts they restricted, terminated, or voided, and the value of those contracts.

Based on our review of responses to a standardized questionnaire from 11 of the 23 heads of agency and HCAs on CENTCOM's 841 notification letter distribution list as of September 17, 2012, we determined that their processes to identify and report on contracts held with Section 841 designees ranged from formal to ad hoc. Seven of the 11 respondents indicated that they had no formal or written policies and procedures to comply with CENTCOM's directive or Section 841 provisions. For example, one HCA responded that a formal written policy does not exist with regard to Section 841 notifications. Instead, the agency conducts an informal poll of its contracting officers and believes this informal querying process is sufficient. Another noted that a formal process was unnecessary due to the low probability of the agency having a contract, grant, or cooperative agreement affected by the CENTCOM Commander's notification letter. Of the four agencies that reported using formal or written procedures, three stated they were currently in the draft or review stage of finalizing the procedures; however, these draft procedures primarily consisted of querying their respective contract databases and notifying their contracting officers of the Section 841 notification letter.

³⁴ A total of six Generals are part of the review, coordination, and determination process.

³⁵ According to the provisions of Section 841, the CENTCOM Commander can request, not require, that an HCA restrict, terminate, or void a contract, grant, or cooperative agreement.

APPENDIX III - ACKNOWLEDGMENTS

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