

SIGAR

**Special Inspector General for
Afghanistan Reconstruction**

SIGAR 22-29 Audit Report

Contracting with the Enemy: DOD Has Not Fully Implemented Processes Intended to Prevent Payments to Enemies of the United States



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Special Inspector General for Afghanistan Reconstruction

WHAT SIGAR REVIEWED

Section 841 of the National Defense Authorization Act (NDAA) for fiscal year (FY) 2012 and Section 841 of the NDAA for FY 2015 directed the Department of Defense (DOD) to take action to help prevent U.S. government contracting funds from going to persons or entities opposing (hereafter referred to as “enemy” or “Section 841 designee”) U.S. or coalition forces involved in a contingency operation. DOD subsequently established processes and controls to implement Section 841 requirements.

In an April 2013 audit, *Contracting with the Enemy*, SIGAR identified weaknesses in DOD’s processes and controls for implementing Section 841 of the FY 2012 NDAA, which required DOD to have reasonable assurance that it was not providing U.S. contracting funds to enemies in Afghanistan. SIGAR made seven recommendations to strengthen and improve DOD’s processes and controls.

The objectives of this audit were to (1) evaluate DOD’s actions to address SIGAR’s prior recommendations, and (2) determine the extent to which DOD’s policies and procedures for implementing the FY 2015 NDAA’s “Never Contract with the Enemy” provisions have enabled DOD to identify and prevent funds disbursed under its contracts from being provided to persons or entities identified as actively supporting an insurgency or opposing U.S. or coalition forces in Afghanistan.

June 2022

Contracting with the Enemy: DOD Has Not Fully Implemented Processes Intended to Prevent Payments to Enemies of the United States

SIGAR 22-29 AUDIT REPORT

On August 15, 2021, following the completion of our sample contract selection and our initial analysis of DOD actions, the Afghan government collapsed and the Taliban returned to power. However, in order to avert a humanitarian catastrophe amid an economic meltdown, the U.S. agreed to ease sanctions against the Taliban and allow aid to reenter Afghanistan. It is now more important than ever for the U.S. to exercise due diligence to ensure that U.S. taxpayer funds do not flow to a person or entity actively engaged in hostilities against the U.S.

WHAT SIGAR FOUND

SIGAR found that DOD did not implement all seven recommendations from SIGAR’s 2013 report, leaving DOD vulnerable to providing funds to enemies of U.S. and coalition forces. Subcontracts are particularly vulnerable to funds being diverted in support of the enemy because DOD did not proactively monitor awards below the prime contract level, even though Congress empowered it to review subcontractor records. Additionally, SIGAR found weaknesses in DOD’s processes for implementing Section 841 provisions. Because Section 841 requirements, as amended, will remain in effect through at least December 31, 2023, and the Taliban returned to power in August 2021, the department has ample reason and opportunity to strengthen its processes and controls to prevent contract funds from being diverted to enemies, not only in Afghanistan but in other contingency environments, as well.

SIGAR’s April 2013 report identified two areas for potential congressional action: lower the contract award threshold for the applicability of Section 841 provisions, and provide DOD with greater clarity on the status of the Section 841 designations after December 31, 2014, and guidance related to the preservation of information and intelligence gathered through the Section 841 process. Over succeeding years, Congress extended Section 841 requirements, which are now scheduled to sunset on December 31, 2023. Congress also placed additional responsibilities on executive agencies to share information. Subsequently, DOD designated the System for Award Management (SAM) as the official repository of the contracting exclusions list that heads of contracting activities (HCA) shall use when making decisions to restrict vendors from future U.S. government awards.

SIGAR also found that DOD took action to address several issues SIGAR identified in the April 2013 report, including implementing five of the seven recommendations. Of the remaining two recommendations, DOD partially implemented one and did not implement another. DOD implemented SIGAR’s 2013 recommendation that DOD require all its contracting agencies and

prime contractors with contracts in the U.S. Central Command (CENTCOM) theater of operations to use the dedicated SAM information system to communicate and track Section 841 designations. DOD also took steps to address SIGAR's 2013 recommendation that DOD assign responsibility for centrally tracking, at a minimum, the number and value of contracts, grants, and cooperative agreements that HCAs restricted, terminated, or voided using Section 841 authorities. However, DOD did not formalize and implement a process to notify HCAs of Section 841 designees and for the HCAs to take action. DOD also did not implement SIGAR's 2013 recommendation that DOD direct HCAs to require prime contractors to certify that they do not have subcontracts with Section 841 designees.

SIGAR did not find any DOD contracts awarded to Section 841 designees based on a sample taken from 4,824 prime contracts signed from October 1, 2014, through June 30, 2020. However, SIGAR found other weaknesses in DOD's process for implementing Section 841 provisions. These weaknesses left the department vulnerable to providing funds to enemies, especially through subcontracts.

SIGAR found that DOD has not updated Section 841 designees on the SAM list since FY 2015, even though CENTCOM identified at least five additional Section 841 designees since then. DOD directed contracting officers and prime contractors to review the prohibited persons on the SAM exclusions list prior to awarding a contract. However, without an updated, accurate list, contracting officers and prime contractors may not have the information necessary to prevent the enemies from receiving U.S. taxpayer funds. Furthermore, DOD never confirmed to SIGAR whether the five Section 841 designee notification letters distributed since FY 2015, but that were not included on the SAM exclusion list, were the only notification letters circulated. Therefore, there could be more persons or entities identified since FY 2015 that are missing from the DOD and SAM exclusion lists. As a result, DOD, other executive agencies, and prime contractors could unknowingly award contracts and subcontracts to Section 841 designees. The SAM exclusion list is necessary for compliance with Section 841 because DOD's contracting officers and prime contractors are required to review the SAM exclusions list prior to contract award and every 30 days thereafter when supporting a contingency operation. Therefore, the integrity and reliability of the SAM list is critical because prime contractors base their contracting decisions on it, resulting in their due diligence only being as good as the information contained in the SAM list. Further, SIGAR found that DOD does not have procedures for ensuring that prime contractors have exercised due diligence.

SIGAR also found that DOD has not enforced all regulations related to implementing Sections 841 and 842 of the FY 2015 through FY 2020 NDAA. Despite a requirement for the inclusion of two specific Defense Federal Acquisition Regulations Supplement clauses in DOD contracts with an estimated value in excess of \$50,000, SIGAR found that the "Prohibition on Providing Funds to the Enemy" clause was missing from 18 of the 88 contracts (20 percent), and the "Additional Access to Contractor and Subcontractor Records" clause was missing from 20 of the 88 contracts (23 percent). SIGAR also found that contracting officers incorporated 35 of the contracts (41 percent) using only the reference number, but did not include the actual text of the clause. The absence of the required clauses may jeopardize the legal authorities available to DOD when terminating, restricting, or voiding contracts for Section 841 violations.

Finally, SIGAR found unclear processes and incomplete reporting related to Section 841 notifications. For example, CENTCOM's five Section 841 notification letters issued since FY 2015 instructed the HCAs to report the number of contracts in their purview awarded to the identified entity, and if the HCA exercised the authority to restrict, terminate, or void any contracts related to the entity. However, SIGAR found that the notification letters contained inconsistent instructions for the HCAs following the identification of a covered person or entity. In addition, SIGAR found that DOD does not have a formal process for informing prime contractors of new Section 841 designations; instead, the HCAs determine for themselves how to inform the contractor of any actions taken. The lack of a standard process creates ambiguity and results in a reliance on outdated information, weakening the effectiveness of the Section 841 program.

WHAT SIGAR RECOMMENDS

To ensure greater adherence to legislative requirements and improved oversight over contracts, SIGAR recommends that DOD's Principal Director, Defense Pricing and Contracting (DPC):

- 1. Establish or enforce procedures to ensure that new Section 841-identified persons or entities are added to the SAM exclusions list upon determination by the appropriate HCA to restrict the identified persons or entities.**
- 2. Take steps to enforce the requirement that Defense Federal Acquisition Regulations Supplement Clauses 252.225.7993 ("Prohibition on Providing Funds to the Enemy") and 252.225.7975 ("Additional Access to Contractor and Subcontractor Records") be included in contracts, unless HCAs provide justification for exemption.**
- 3. In coordination with the covered combatant command(s), take steps to ensure that notifications concerning Section 841 designees, whether through an automated or manual process, are accurate and issued in a timely manner.**
- 4. Direct the HCAs to require that prime contractors make a representation to the best of the contractor's knowledge or belief that it does not have subcontracts with Section 841 designees, prior to awarding contracts valued over \$50,000.**

SIGAR received written comments on its draft report from DOD's Principal Director, DPC, which are reproduced in appendix II. The Principal Director, DPC concurred with the first three recommendations, and partially concurred with the fourth recommendation. DPC stated it partially concurred with the fourth recommendation because the department has already met the intent of the recommendation; however, the Principal Director stated that DPC will further evaluate the most appropriate way(s) to implement the recommendation. Based on DPC's stated actions, SIGAR closed recommendations one and three as implemented. Recommendations two and four will remain open until DPC provides SIGAR documentation demonstrating that it took corrective actions. DPC also provided technical comments, which SIGAR incorporated into the report as appropriate.

SIGAR will follow up with DOD within 60 days of the issuance of this report to identify DOD's actions to address the respective recommendations.



SIGAR

Office of the Special Inspector General
for Afghanistan Reconstruction

June 7, 2022

The Honorable Lloyd J. Austin III
Secretary of Defense

General Kenneth F. McKenzie Jr.
Commander, U.S. Central Command

Mr. John M. Tenaglia
Principal Director, Defense Pricing and Contracting

In April 2013, we identified opportunities for Congress and the Department of Defense (DOD) to clarify and strengthen implementation of Sections 841 and 842's "Never Contract with the Enemy" provisions of the "FY 2012 National Defense Authorization Act" (NDAA). Specifically, Sections 841 and 842 of the NDAA for fiscal year (FY) 2012 and FY 2015 directed DOD to take actions intended to prevent U.S. government contracting funds from going to persons or entities that support an insurgency or oppose U.S. or coalition forces involved in a contingency operation (hereafter referred to as "enemy") within seven combatant commands.

This report discusses our audit of DOD's compliance with the requirements of the 2015 through FY 2020 NDAA's "Never Contract with the Enemy" provision. Specifically, the objectives of this audit were to (1) evaluate DOD's actions to address SIGAR's prior report recommendations, and (2) determine the extent to which DOD's policies and procedures for implementing the 2015 through FY 2020 NDAA's "Never Contract with the Enemy" provisions enabled DOD to identify and prevent funds disbursed under its contracts from being provided to persons or entities identified as actively supporting an insurgency or opposing U.S. or coalition forces in Afghanistan.

On August 15, 2021, following the completion of our sample contract selection and our initial analysis of DOD actions, the Afghan government collapsed and the Taliban returned to power. However, in order to avert a humanitarian catastrophe amid an economic meltdown, the U.S. agreed to ease sanctions against the Taliban and allow aid to reenter Afghanistan. It is now more important than ever for the U.S. to exercise due diligence to ensure that U.S. taxpayer funds do not flow to a person or entity actively engaged in hostilities against the U.S.

Although we found that DOD implemented five of the seven recommendations from SIGAR's 2013 report, we also found that DOD did not implement two of the recommendations, leaving the department vulnerable to providing funds to the enemy. DOD was particularly vulnerable to providing funds to prohibited entities at the subcontractor level because it did not maintain effective oversight beyond prime awards. During this audit, from the 88 contracts sampled, we found that DOD did not award any contracts to enemies identified in the System for Award Management. However, we found additional weaknesses in DOD's processes and controls for implementing Sections 841 and 842 provisions. These provisions will remain in effect through at least December 31, 2023, and the department now has another opportunity to strengthen its processes and controls to prevent U.S. government funds from flowing to the enemy.

We are making four recommendations in this report. We recommend that DOD's Principal Director, Defense Pricing and Contracting (1) establish or enforce procedures to ensure that new Section 841-identified persons or entities are added to the SAM exclusions list upon determination by the appropriate HCA to restrict the identified persons or entities; (2) take steps to enforce the requirement that Defense Federal Acquisition Regulations Supplement Clauses 252.225.7993 ("Prohibition on Providing Funds to the Enemy") and 252.225.7975 ("Additional Access to Contractor and Subcontractor Records") be included in contracts, unless



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for Afghanistan Reconstruction

heads of contracting activities (HCA) provide justification for exemption; (3) in coordination with the covered combatant command(s), take steps to ensure that notifications concerning Section 841 designees, whether through an automated or manual process, are accurate and issued in a timely manner; and (4) direct the HCAs to require that prime contractors make a representation to the best of the contractor's knowledge or belief that it does not have subcontracts with Section 841 designees prior to awarding contracts valued over \$50,000.

We provided a draft of this report to DOD for comment. We received written comments from DOD's Principal Director, Defense Pricing and Contracting (DPC) in May 2022, which are reproduced in appendix II. The Principal Director, DPC, concurred with the first three recommendations, and partially concurred with the fourth recommendation. The Principal Director stated that DPC partially concurred with the fourth recommendation because the department has already met the intent of the recommendation, but DPC will further evaluate the most appropriate way(s) to implement the recommendation. Based on DPC's stated actions, we closed recommendations one and three as implemented. Recommendations two and four will remain open until DPC provides SIGAR documentation demonstrating that it took planned corrective actions.

SIGAR conducted this work under the authority of Public Law No. 110-181, as amended, and the Inspector General Act of 1978, as amended, and in accordance with generally accepted government auditing standards.

We are requesting documentation of the corrective actions taken and/or target dates for completion of the recommendations. Please provide your responses to sigar.pentagon.audits.mbx.recommendation-follow-up@mail.mil within 60 days from the issue date of this report.

John F. Sopko
Special Inspector General
for Afghanistan Reconstruction

TABLE OF CONTENTS

Background	2
DOD’s Implementation of SIGAR’s Prior Recommendations Strengthened the Safeguards Intended to Prevent DOD Contracting Funds from Inadvertently Going to Enemies in Afghanistan	3
Inadequate Reporting and Inconsistent Processes Left DOD Vulnerable to Inadvertently Providing Funds to the Enemy	5
Conclusion.....	8
Recommendations	9
Agency Comments	9
Appendix I - Scope and Methodology	11
Appendix II - Comments From the Department of Defense	12
Appendix III - Acknowledgments	16

ABBREVIATIONS

CENTCOM	U.S. Central Command
DFARS	Defense Federal Acquisition Regulation Supplement
DOD	Department of Defense
DPC	Defense Pricing and Contracting
FAR	Federal Acquisition Regulation
FY	fiscal year
HCA	head of the contracting activity
NDAA	National Defense Authorization Act
OMB	Office of Management and Budget
SAM	System for Award Management

In 2008, Congress established the Commission on Wartime Contracting in Iraq and Afghanistan and tasked it to examine issues regarding federal agency contracting related to reconstruction, logistical support of military forces, and security functions in Iraq and Afghanistan. The commission identified the diversion of U.S. government funds to insurgents in Afghanistan as a major concern.¹ In its final report to Congress in August 2011, the commission reported that U.S. agencies engaged in contingency operations were overly reliant on contractors, and that inadequate planning and lack of oversight for such contracting led to an exceptional level of waste, fraud, and abuse.²

Following issuance of the commission's report, Congress added requirements to the National Defense Authorization Act (NDAA) related to contracting in contingency operations throughout the world. Specifically, Sections 841 and 842 of the NDAA for fiscal year (FY) 2012 and FY 2015 directed the Department of Defense (DOD) to take actions intended to prevent U.S. government contracting funds from going to persons or entities that support an insurgency or oppose U.S. or coalition forces involved in a contingency operation (hereafter referred to as "enemy" or "Section 841 designee").³ Our April 2013 report, *Contracting with the Enemy*, identified several weaknesses in DOD's processes for implementing Section 841 of the FY 2012 NDAA that prevented the department from having reasonable assurance that it did not provide funds to the enemy in Afghanistan.⁴ For example, we found DOD contracts that did not contain the required Section 841 contract clauses. We also found instances in which the head of the contracting activity (HCA) did not receive notification letters from U.S. Central Command's (CENTCOM) identifying supporters of enemy groups that should have been excluded from receiving awards of federal funds.⁵ We made seven recommendations in our 2013 report to improve DOD's contracting processes and oversight, particularly related to subcontracts, in Afghanistan.

The objectives of this audit were to (1) evaluate DOD's actions to address SIGAR's prior report recommendations, and (2) determine the extent to which DOD's policies and procedures for implementing the 2015 through FY 2020 NDAA's "Never Contract with the Enemy" provisions enabled DOD to identify and prevent funds disbursed under its contracts from being provided to persons or entities identified as actively supporting an insurgency or opposing U.S. or coalition forces in Afghanistan. To accomplish these objectives, we reviewed applicable laws and regulations, as well as contract documents and other documentation necessary to assess compliance, and interviewed officials from DOD, U.S. Forces–Afghanistan, the Afghan government, and other agencies. We also obtained a list of 4,824 contracts from the Federal Procurement Data System that were (a) valued over \$50,000, (b) signed from October 1, 2014, through June 30, 2020, and (c) DOD-awarded and identified as being performed in Afghanistan. We selected a stratified random sample of 88 contracts for review. We performed our work in Arlington, Virginia, from July 2020 through June 2022.

On August 15, 2021, following the completion of our sample contract selection and our initial analysis of DOD actions, the Afghan government collapsed and the Taliban returned to power. However, in order to avert a humanitarian catastrophe amid an economic meltdown, the U.S. agreed to ease sanctions against the Taliban and allow aid to reenter Afghanistan. It is now more important than ever for the U.S. to exercise due diligence to ensure that U.S. taxpayer funds do not flow to a person or entity actively engaged in hostilities against the U.S., not only in Afghanistan but in other contingency environments, as well.

¹ Commission on Wartime Contracting in Iraq and Afghanistan, *Transforming Wartime Contracting: Controlling costs, reducing risks*, August 11, 2011, p. 70.

² Commission on Wartime Contracting..., *Transforming Wartime Contracting*, August 11, 2011, ch. 1–2. A contingency operation is a military operation involving United States Armed Forces, conducted in response to natural disasters, terrorists, subversives, or as otherwise directed by appropriate authority to protect national interests.

³ NDAA for FY 2012, Pub. L. No. 112-81 § 841 (2011); NDAA for FY 2015, Pub. L. No. 113-291 § 841 (2014) (codified as amended at 10 U.S.C. § 2302 note (2021)).

⁴ SIGAR, *Contracting with the Enemy: DOD Has Limited Assurance that Contractors with Links to Enemy Groups Are Identified and their Contracts Terminated*, SIGAR Audit 13-6, April 11, 2013.

⁵ According to the Defense Federal Acquisition Regulation Supplement § 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 commands.

BACKGROUND

Section 841 of the FY 2012 NDAA required the Secretary of Defense to revise the Defense Federal Acquisition Regulation Supplement (DFARS) to authorize the HCA, pursuant to a request from the CENTCOM Commander to (1) restrict the award of contracts, grants, and cooperative agreements that would provide funding to persons or entities identified by the CENTCOM Commander as actively opposing U.S. or coalition forces; (2) terminate awards to Section 841 designees; or (3) void awards to Section 841 designees. Furthermore, Section 841 required the Secretary to revise the DFARS to require that a clause be included in DOD awards to implement the authority of the HCAs to restrict, terminate, or void awards to Section 841 designees. Section 842 of the FY 2012 NDAA also required DOD to include a contract clause authorizing additional access to examine any contractor and subcontractor records to the extent necessary to ensure that U.S. taxpayer funds are not provided, directly or indirectly, to enemies.

SIGAR's April 2013 report, *Contracting with the Enemy*, identified two areas for potential congressional action. First, Section 841 originally only applied to contracts valued in excess of \$100,000, although about 80 percent of contracts awarded in Afghanistan fell below that threshold. SIGAR suggested that Congress consider lowering the \$100,000 threshold. Following our report, Congress reduced it to \$50,000 in 2014. Second, the FY 2012 NDAA included a December 31, 2014, expiration date for Section 841 requirements. The expiration date resulted in uncertainties regarding how DOD was to treat designees after Section 841 requirements expired. Therefore, SIGAR suggested that Congress consider providing DOD with greater clarity on the status of the Section 841 designations after December 31, 2014, and provide guidance related to the preservation of information and intelligence gathered through the Section 841 process. Over succeeding years, Congress continued to extend the Section 841 requirements, which is now scheduled to end on December 31, 2023. Congress also placed additional responsibilities on executive agencies to share information. Subsequently, DOD designated the System for Award Management (SAM), a record management system for HCAs to document designated enemies and, as appropriate, take action to restrict, terminate, or void contracts.⁶

Section 831 of the FY 2014 NDAA lowered the dollar threshold so that the types of requirements and authorities contained in Section 841 of the FY 2012 NDAA applied to awards over \$50,000. Section 831 also expanded the scope of these requirements and authorities by making them apply not only to the CENTCOM, but also to six other combatant commands engaged in contingency operations. The FY 2015 NDAA then repealed Section 841 of the FY 2012 NDAA and Section 831 of the FY 2014 NDAA, and replaced them with a new Section 841 that incorporated the changes from those prior NDAs. Additionally, Section 841 of the FY 2015 NDAA required DOD to coordinate with the Director of National Intelligence and the Secretary of State regarding implementation of the programs Congress had begun mandating in Section 841 of the FY 2012 NDAA.

Furthermore, Section 842 of the FY 2015 NDAA authorized the U.S. government to examine any contractor or subcontractor records to ensure they are not providing funds, including goods and services, to the enemy.⁷ Section 842 also required that a clause effectuating the government's right to examine subcontractor records be included in the same contracts covered by Section 841 and that the clause flow down to any sub-award valued at over \$50,000.

DOD's Office of the Under Secretary of Defense, Defense Pricing and Contracting (DPC), is responsible for pricing and contracting policy matters across the DOD. DPC implements statutes, executive orders, and departmental policies pertaining to acquisitions by updating the Federal Acquisition Regulation (FAR) and DFARS, and issues memoranda and guidance. DOD established procedures to notify HCAs of Section 841 designees and to terminate, void, or restrict contracts with such designees.⁸ For Afghanistan, CENTCOM was responsible for reviewing contractors and first tier subcontractors, a process referred to as vendor vetting, to determine if they

⁶ The SAM system can be accessed at www.SAM.gov.

⁷ NDAA for FY 2015, Pub. L. No. 113-291 §.842 (2014).

⁸ In response SIGAR's April 2013 report, Class Deviation 2013-00020 required DPC to develop a standard process for distributing Section 841 notification letters to HCAs.

should be Section 841 designees. When CENTCOM identified Section 841 designees, DOD regulations required it to notify the HCAs. Subsequently, the HCAs were responsible for reviewing their contracts to determine if any contracts were awarded to the Section 841 designees. In addition, the HCAs were authorized to terminate or void any awards that a Section 841 designee held and to restrict future awards.

DOD'S IMPLEMENTATION OF SIGAR'S PRIOR RECOMMENDATIONS STRENGTHENED THE SAFEGUARDS INTENDED TO PREVENT DOD CONTRACTING FUNDS FROM INADVERTENTLY GOING TO ENEMIES IN AFGHANISTAN

DOD took significant actions to address issues we identified in our April 2013 report, *Contracting with the Enemy*. Those actions improved DOD's process for implementing Section 841 and helped ensure contracting funds were not being provided to persons and entities supporting the insurgency or opposing U.S. and coalition forces. Since 2013, "Never Contract with the Enemy" provisions were amended and DPC issued multiple class deviations to streamline procedures for stopping money from federal awards from going to the enemy.⁹

DOD Fully Implemented Five of Our Seven Recommendations

Our April 2013 report included seven recommendations to help DOD improve contract oversight, and comply with and exercise its Section 841 authorities.¹⁰ DOD took actions to address several of the issues we identified and fully implemented five of the associated recommendations to improve DOD's visibility over contracts in Afghanistan, prevent duplication of data collection efforts, and help ensure that HCAs have the information needed to respond to any legal challenges and financial liabilities resulting from exercising Section 841 authorities.

First, DOD implemented our recommendation that DOD require all its contracting agencies and prime contractors with contracts in the CENTCOM theater of operations to use a dedicated information system to track Section 841 designations. In November 2019, DOD issued Class Deviation 2020-00001, which identified the SAM as the system to communicate active Section 841 designees and exclusions to contracting officers.¹¹ Class Deviation 2020-00001 stated

Upon determination by the HCA to restrict the future award of contracts or subcontracts to a person or entity, the contracting activity shall notify Under Secretary of Defense for Acquisition and Sustainment, Defense Pricing and Contracting/Contract Policy and request entry of the required data on the ineligible person or entity in the System for Award Management (SAM).¹²

In addition, in August 2020, DOD issued Class Deviation 2020-00022, which required contracting officers and contractors to check the SAM at least monthly to ensure they do not contract with the Section 841 designees. Class Deviation 2020-00022 also allowed for the SAM to list and communicate Section 841 restricted persons and entities to the entire government.¹³

⁹ The Principal Director, DPC "issues class deviations when necessary to allow organizations to deviate from the FAR and DFARS." For more see, "Class Deviations," DPC Defense Pricing and Contracting, last modified August 30, 2021, https://www.acq.osd.mil/dpap/dars/class_deviations.html.

¹⁰ SIGAR, *Contracting with the Enemy*, SIGAR Audit 13-6.

¹¹ Since 2013, the Principal Director, DPC issued multiple class deviations pertaining to Section 841 designees excluded from receiving federal contracts. DPC issues deviations when necessary to allow organizations to deviate from the FAR and DFARS; these can be an individual or class deviation. An individual deviation affects one contract action, while a class deviation affects more than one contract action.

¹² Office of the Under Secretary of Defense, "Prohibition on Providing Funds to the Enemy and Authorization of Additional Access to Records," Class Deviation 2020-00001, Attachment 3, November 21, 2019.

¹³ Office of the Under Secretary of Defense, "Prohibition on Providing Funds to the Enemy and Authorization of Additional Access to Records," Class Deviation 2020-00022, August 28, 2020.

Second, DOD addressed our recommendation that it take action necessary to enforce the DFARS class deviations that were issued pursuant to Section 841 of the FY 2012 NDAA, as well successive class deviations issued pursuant to similar requirements contained in the FY 2014 and 2015 NDAs. Most recently, DOD issued additional guidance through Class Deviation 2020-00022, which implemented Sections 841 and 842, and required both clauses (“Prohibition on Providing Funds to the Enemy” and “Authorization of Additional Access to Records”) to be included in solicitations and contracts. These sections apply to solicitations and contracts with an estimated value in excess of \$50,000 performed outside the United States and its outlying areas in support of a contingency operation in which members of the U.S. Armed Forces are actively engaged in hostilities.

Third, DOD took steps necessary to address our recommendation that it assign responsibility for centrally tracking, at a minimum, the number and value of contracts, grants, and cooperative agreements that HCAs restricted, terminated, or voided using Section 841 authorities. DOD’s November 2019 issuance of Class Deviation 2020-00001: Attachment 3 assigned HCAs with the responsibility of tracking their use of Section 841 authorities and the respective value of the associated contracts. The class deviation required the HCAs to submit a report to DPC and the appropriate Commander of the Combatant Command whenever a Section 841 action is taken; the class deviation placed responsibility on DPC to centrally track HCAs’ use of Section 841 authorities. The reports sent by the HCAs were required to include, where 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.

Fourth, DOD implemented our recommendation that it take action to help ensure that HCAs have the information needed to respond to any legal challenges and financial liabilities resulting from exercising Section 841 authorities, and develop and distribute guidance to HCAs about actions to take once they have restricted, terminated, or voided a contract under Section 841. Most recently, DOD issued Class Deviation 2020-00022, which detailed procedures for HCAs and contracting activities to take upon an HCA’s determination to restrict, terminate, or void contracts under Section 841.¹⁴

Fifth, DOD addressed our recommendation that it require all HCAs with contracts in CENTCOM’s theater of operations, including Afghanistan, to develop a standard mechanism for distributing Section 841 notification letters to all prime contractors. Specifically, DPC issued Class Deviation 2020-00001 in November 2019 requiring contractors to review the SAM exclusion list monthly and, prior to awarding subcontracts, to ensure prime contractors do not award subcontracts to designated persons or entities.

The actions taken by DOD demonstrated a willingness to address our findings and implement our recommendations. The recommendations DOD implemented resulted in important guidance that clarified roles and responsibilities and, if adhered to, would improve oversight and help prevent DOD’s contracted funds from benefiting those who actively opposed U.S. interests in Afghanistan.

DOD Partially Implemented a Standard Mechanism for Distributing Section 841 Notification Letters, But Did Not Require Contractors to Certify They Were Not Contracting with the Enemy

DOD did not fully implement formal procedures to implement our 2013 recommendation that DOD require all agency heads in CENTCOM’s theater of operations, including Afghanistan, to develop a standard mechanism for distributing Section 841 notification letters to their HCAs. The Deputy Secretary of Defense issued Directive Type Memorandum 18-003 and the Under Secretary of Defense for Acquisition and Sustainment issued Class Deviation 2020-00022 establishing contract clauses and outlining the procedures for Commanders of Combatant Commands to notify HCAs of Section 841 designees and for the HCAs to take requisite action. However, the notification process has not been formalized using a dedicated system. Instead, notifications to HCAs were made through email, and HCAs were not required to respond or acknowledge that they may need to take action. During the course of this audit, DPC, in coordination with the Office of Deputy Assistant Secretary

¹⁴ “Prohibition on Providing Funds...,” Class Deviation 2020-00022, August 28, 2020.

of Defense for Logistics and the Joint Staff, was in the process of developing procedures to use a military commander's authority to operationally direct, as well as an automated system to notify, HCAs of Section 841 designations on behalf of the Commander of Combatant Commands. Once implemented, the procedures will also require a response on actions taken or the decision not to take action. Formalizing and implementing the Section 841 notification and response process are important steps to ensuring that HCAs take appropriate action to prevent enemies from receiving DOD contracting funds. The recommendation will be fully addressed once DOD formalizes and implements these procedures.

Lastly, DOD did not take action to implement our recommendation that it direct HCAs to require prime contractors to certify that they do not have subcontracts with Section 841 designees. DOD stated that the Clinger-Cohen Act of 1996 prohibited requiring new certifications by prime contractors, unless specifically required by statute or approved by the Administrator of the Office of Federal Procurement Policy.¹⁵ However, DOD's objection studiously ignored the fact that the Clinger-Cohen Act does permit agencies to issue new certification requirements when they are approved in writing by the agency head.¹⁶ Therefore, DOD did not offer a substantive reason for failing to implement our recommendation regarding certification.

According to DOD, although HCAs cannot require prime contractors to certify that funds do not flow down to subcontractors that were Section 841 designees, contracting officers do have proactive mechanisms to help prevent designees from receiving subcontracts. Specifically, DFARS Class Deviation 2012-00005 allows contracting officers to examine contractor or subcontractor records to ensure funds available under the contracts are not (1) subject to extortion or corruption, or (2) provided directly or indirectly to the enemy.

DPC also issued Class Deviation 2020-00001 in November 2019, which required contractors to check the list of prohibited or restricted sources in the SAM at least monthly to ensure they do not subcontract with prohibited or restricted sources. This class deviation also required prime contractors to include clauses 252.225-7993, "Prohibition on Providing Funds to the Enemy," and 252.225-7975, "Additional Access to Contractor and Subcontractor Records," in subcontracts with an estimated value over \$50,000 that are performed outside the U.S. and its outlying areas in support of a contingency operation in which members of the Armed Forces are actively engaged in hostilities. These clauses contain language intended to help ensure that subcontractors and suppliers are aware of the prohibitions and restrictions associated with "Never Contract with the Enemy," and understand the government's authorities to terminate, void, or restrict contracts and to access contractor and subcontractor records when necessary. Furthermore, in August 2020, DPC issued Class Deviation 2020-00022, which required contractors and subcontractors to exercise due diligence to ensure they are not contracting with Section 841 designees. Specifically, the class deviation required monthly checks of SAM exclusions, which replaced HCA's responsibility to distribute Section 841 notifications to all prime contractors.

DOD took some steps to ensure that prime contractors do not award subcontracts to Section 841 designees. However, HCAs did not exercise their oversight responsibilities, were not required to formally conduct any verification (in lieu of certification), and did not maintain visibility into how prime contractors met the due diligence requirements or over most subcontracts. As a result, officials have limited assurance that they are identifying all contracts with Section 841 designees.

INADEQUATE REPORTING AND INCONSISTENT PROCESSES LEFT DOD VULNERABLE TO INADVERTENTLY PROVIDING FUNDS TO THE ENEMY

Based on our review of 88 contracts implemented in Afghanistan signed from October 1, 2014, through June 30, 2020, we did not find any DOD contracts directly awarded to Section 841 designees. However, DOD unknowingly could have been and could be awarding contracts to enemies of U.S. and coalition forces because

¹⁵ Pub. L. No. 104-106 (1996).

¹⁶ 41 U.S.C. §1304(b)(3).

it has not updated newly identified Section 841 entities in the SAM since 2015. In addition, DOD has not enforced the provisions of Sections 841 and 842 of the FY 2015 NDAA, as amended, requiring the inclusion of clauses designed to preserve the government's right to terminate contracts with Section 841 designees for default and to examine subcontractor records.¹⁷ Further, we found that delays in notifying or failure to notify prime contractors of Section 841 designees limited prime contractors' abilities to exercise due diligence and make informed decisions about their vendor choices.

DOD Has Not Updated the List of Section 841 Entities in the System for Award Management

We found that DOD has not updated the Section 841 entities in the SAM since March 3, 2015, even though CENTCOM has identified at least five additional Section 841 designees since that time. Specifically, we found that DPC did not update the SAM exclusion list to include persons and entities identified in five Section 841 notification memos dated between December 2016 and June 2020. DOD would not confirm whether these five Section 841 designee notification letters were the only letters circulated and erroneously left out of the SAM. Class Deviations 2015-00016 and 2020-00022 direct contracting officers and prime contractors to review prohibited persons and entities on the SAM exclusions list prior to awarding a contract. However, without an updated, accurate list, contracting officers and prime contractors may not have had information necessary to prevent funds from inadvertently flowing to enemies. DOD officials told us they were testing the process to identify gaps that resulted from the list not being updated. However, the officials did not specify any timeframes when the test results would be available or when a new process may be fully implemented.

Although we did not identify any contracts awarded directly to these five Section 841 designees in our sample of 88 contracts, DOD's failure to update the SAM means that prime contractors across the entire federal government did not have access to the complete Section 841 designees list. As previously discussed, HCAs were not required to regularly or formally review subcontracts, and instead relied on prime contractors to check the SAM on a monthly basis and exercise due diligence to ensure that funds do not flow down to enemies. DOD's failure to update the SAM in accordance with DOD requirements left prime contractors without the information necessary to prevent funds from inadvertently flowing to enemies.

DOD Did Not Enforce Required Section 841 and Section 842 Clauses to be Included in All Contracts

The FY 2015 NDAA, the DFARS, and Class Deviations 2015-000016, 2020-00001, and 2020-00022 required DOD to include two clauses in its contracts with an estimated value in excess of \$50,000 as part of the "Never Contract with the Enemy" provisions. The two clauses that the NDAA, DFARS, and class deviations require are the following:

- **Clause 252.225.7993, "Prohibition on Providing Funds to the Enemy"** — This clause addresses the contractor's responsibility to exercise due diligence, check the list of prohibited sources in the SAM prior to subcontract award on at least a monthly basis, and terminate any subcontract with a Section 841 designee unless the contracting officer provides the contractor with written HCA approval to continue the subcontract. This clause also informs the contractor of the HCA's authority to terminate the contract for default for failing to exercise due diligence or to void the contract if the HCA determines that any funds have been provided, directly or indirectly, to the enemy.
- **Clause 252.225.7975, "Additional Access to Contractor and Subcontractor Records"** — This clause establishes the government's authority to examine any contractor or subcontractor records to the

¹⁷ NDAA clauses 252.225.7993 and 252.225.7975.

extent necessary to ensure that funds available under the contract are not provided, directly or indirectly, to the enemy.

Contractor personnel told us that having the clauses in their contracts stresses the importance of adhering to Section 841 requirements. Of the 88 contracts we sampled that DOD awarded from October 2015 through June 2020 and performed in Afghanistan, we found that Clause 252.225.7993 was missing from 18 of the 88 contracts (about 20 percent), and Clause 252.225.7975 was missing from 20 of the 88 contracts (about 23 percent). We also found that contracting officers incorporated 35 of the clauses into contracts using only the reference number and not the text that specifically enumerated to what the clauses refer.

DOD officials told us that contracting specialists and contracting officers are responsible for ensuring that required clauses are included in a contract. DOD officials stated that a contract goes through multiple layers of review to ensure that neither clause was omitted. However, the missing clauses in over a fifth of the sampled contracts indicates that responsible officials were not adhering to requirements and the review process was not sufficient to ensure contracts include these important clauses outlining contractor responsibilities and government authorities related to Section 841. The absence of the required clauses may also jeopardize the legal authorities available to DOD when terminating, restricting, or voiding contracts with persons or entities actively opposing U.S. or coalition forces in contingency operations.

Unclear Processes and Incomplete Reporting of Section 841 Notifications Left DOD at Risk of Awarding Contracts to Section 841 Designees

The FY 2015 NDAA requires that upon designation of a person or entity as an enemy pursuant to Section 841, the respective combatant command should notify the head of the agency and the Commander of the Combatant Command concerned, in writing, of the designation.¹⁸ The agency head or commander must then notify, in writing, the HCAs or other appropriate officials of the agency or command about the designation. After being notified of a new Section 841 designation, the NDAA and Class Deviations 2015-000016, 2018-00008, 2020-00001, and 2020-00022 instruct HCAs to exercise their authority to determine 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 determines 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.

As noted above, CENTCOM submitted at least five Section 841 notification letters since FY 2015 relating to entities operating in Afghanistan. The notification letters instructed the HCAs to report the number of contracts in their purview awarded to the identified entity, and whether the HCA exercised the authority to restrict, terminate, or void any contracts related to the entity. However, we found that the notification letters contained inconsistent instructions for the HCAs following the identification of Section 841 designees. For example, one of the letters instructed the HCA to provide a response confirming there were no contracts with the identified entity, but the remaining four notification letters did not require any such response. Similarly, four of the notification letters requested that the HCAs forward a copy of the letter to all prime contractors performing in Afghanistan and requested that they disclose any subcontracts; the remaining letter did not.

We requested that DOD provide us with any written guidance instructing HCAs on how to review contracts after receiving a Section 841 notification letter. To date, DOD has not provided us with any such guidance for the HCAs. In June 2021, a DOD official stated in an interview with SIGAR that the department was working on improving the review system. We also found that DOD did not have a uniform process for informing prime

¹⁸ FY 2015 NDAA, Pub. L. No. 113-291, §841(b) (2014).

contractors of Section 841 designations, and that HCAs determine for themselves how to inform contractors of any actions taken to restrict, terminate, or void such contracts. DOD contracting officials told us they did not recall receiving any of the notification letters submitted since FY 2015.

Additionally, we found that in August 2020, DPC issued Class Deviation 2020-00022, which requires contractors and subcontractors to exercise due diligence, including monthly checks of SAM exclusions, to ensure they are not contracting with the enemy. By signing the contract, contractors acknowledge and agree to comply with the due diligence requirements. However, we found that DOD does not have a tracking mechanism for ensuring that prime contractors have exercised due diligence. Instead, a DPC official told us that contracting officers oversee contracts by exception and assume that contractors are exercising due diligence.

The lack of standard procedures for HCAs and the inaccurate SAM exclusion list has left HCAs and prime contractors at risk of awarding contracts to designated enemies. In addition, the FY 2015 NDAA authorized HCAs to examine any records of a contractor, or any affiliated subcontractor or sub-grantee, to the extent necessary to ensure that funding, including goods and services, available under such contract, grant, or cooperative agreement are not directly or indirectly awarded to a Section 841 designee.¹⁹ Our discussions with DOD officials and with several prime contractors did not reveal any routine records examination of the prime contractors or 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.

CONCLUSION

Congress designed Section 841 of the FY 2012 NDAA to empower DOD to prevent contracts, grants, and cooperative agreements from being awarded to enemies of U.S. and coalition forces in Afghanistan. In April 2013, we made seven recommendations to DOD intended to help it implement those requirements. We appreciate that DOD implemented five of the recommendations. However, even as Congress has continued to extend and refine the requirements of Sections 841 and 842, DOD did not utilize these authorities in several important ways: (1) DOD has not updated the Section 841 exclusion list in the SAM since FY 2015, even though the SAM is the sole verification mechanism to prevent contracting with the enemy; (2) DOD has not acted to ensure that the clauses required by Sections 841 and 842 are included in every applicable contract; and (3) DOD has not provided clear processes involving notifications of Section 841 designees. Separately, DOD has not implemented our recommendation that it take the extra and proactive step of requiring contractors to certify that they are not engaging enemies as subcontractors.

Further, DOD did not confirm whether the five Section 841 designee notification letters distributed since FY 2015 that we identified were the only letters circulated and erroneously left out of the SAM. The integrity and reliability of the SAM list is critical because prime contractors base their contracting decisions on it. Without confirmation, it is impossible to determine if, or the extent to which, persons or entities identified since FY 2015 are missing from DOD's SAM exclusion list. Unless that information is kept current, DOD cannot be confident that funds are not being provided directly or indirectly to a Section 841 designee. Finally, DOD did not establish controls or effective oversight to verify and track contractors' compliance with due diligence protocols on contracts over \$50,000, nor did it require contractors to certify or otherwise represent that they were not subcontracting with the enemy. Requiring these controls would support and complement existing efforts to limit funds from going to entities or individuals who are actively working against U.S. and coalition forces conducting contingency operations.

In the absence of strengthened controls, the potential for U.S. taxpayer funds winding up in the hands of our adversaries will continue. We encourage Congress, DOD, and other stakeholders to consider our findings while making decisions regarding future assistance in Afghanistan and other contingency environments.

¹⁹ FY 2015 NDAA, Pub. L. No. 113-291, §842 (2014).

RECOMMENDATIONS

To ensure improved oversight over contracts, we recommend that DOD's Principal Director, DPC:

1. **Establish or enforce procedures to ensure that new Section 841-identified persons or entities are added to the SAM exclusions list upon determination by the appropriate HCA to restrict the identified persons or entities.**
2. **Take steps to enforce the requirement that Defense Federal Acquisition Regulations Supplement Clauses 252.225.7993 ("Prohibition on Providing Funds to the Enemy") and 252.225.7975 ("Additional Access to Contractor and Subcontractor Records") be included in contracts, unless HCAs provide justification for exemption.**
3. **In coordination with the covered combatant command(s), take steps to ensure that notifications concerning Section 841 designees, whether through an automated or manual process, are accurate and issued in a timely manner.**
4. **Direct the HCAs to require that prime contractors make a representation to the best of the contractor's knowledge or belief that they do not have subcontracts with Section 841 designees, prior to awarding contracts valued over \$50,000.**

AGENCY COMMENTS

We provided a draft of this report to DOD for comment. We received written comments from DOD's Principal Director, DPC in May 2022, which we reproduced in appendix II. DPC also provided technical comments that we incorporated into the report as appropriate.

In his comments, the Principal Director, DPC, stated, "The Department of Defense (DoD) has made significant strides to implement Sections 841–843 of the National Defense Authorization Act (NDAA) for FY 2015, as amended, and address the Special Inspector General for Afghanistan Reconstruction's (SIGAR) previous recommendations from SIGAR's April 2013 report." The Principal Director also stated that DOD's Vendor Threat Mitigation Program group meets "regularly to collaborate, share vendor threat information, improve section 841 processes, and enable expeditious processing of combatant commanders' section 841 identifications." Furthermore, the Principal Director concurred with our first three recommendations, and partially concurred with the fourth recommendation. DPC stated that it partially concurred with the fourth recommendation because the department has already met the intent of the recommendation, but will further evaluate the most appropriate way(s) to implement the recommendation.

With regard to the first recommendation, the Principal Director concurred and stated that he has taken steps to address this recommendation. The Principal Director stated that DPC has "developed draft internal operating procedures," including steps to establish a process to upload information on restricted persons or entities into the SAM exclusions list, ensure the appropriate information is included in the exclusion listing (for example, unique entity identifiers), and enacting additional exclusion oversight responsibilities. These procedures have proven to be effective and efficient, according to the Principal Director. In addition, the Principal Director stated that in March 2022, DPC added six combatant commander-identified persons or entities to the SAM exclusions list in a timely manner after HCAs made the decision to restrict them. The Principal Director also requested that we edit the recommendation language to emphasize that Section 841 designees are added to the SAM upon determination by the appropriate Head(s) of the Contracting Activity (HCA(s)) to restrict the identified persons or entities. We updated the recommendation language accordingly. We consider the recommendation implemented and will close it upon issuance of this report.

With regard to the second recommendation, the Principal Director concurred and stated that he will take steps to update guidance, systems, and tools to ensure DOD contracting officers are aware of the requirement to include the DFARS clauses in solicitations and contracts valued over \$50,000 that will be performed in areas

with a designated contingency operation in which members of the Armed Forces are actively engaged in hostilities. The Principal Director intends for this action to be completed by the fourth quarter of FY 2022. The recommendation will remain open until DPC provides documentation demonstrating that it took the planned corrective action.

With regard to the third recommendation, the Principal Director concurred and stated that he has organized a working group made up of representatives from the covered combatant commands and the military services to identify the most effective way to notify HCAs of Section 841 identifications. DPC also established a process to notify HCAs of all outstanding combatant commander Section 841 identifications, and it developed a template to assist HCAs in making Section 841 determinations. The Principal Director stated that DPC would take steps to incorporate these procedures into an official standard operating procedure for HCAs to ensure future notifications of Section 841 identified persons or entities are carried out in a timely manner. DPC also recommended that we modify the wording of the recommendation to include “in coordination with the covered combatant command(s).” We updated the recommendation language accordingly. We consider the recommendation implemented, and will close it upon issuance of this report.

With regard to the fourth recommendation, the Principal Director partially concurred, stating that while DPC will evaluate ways to implement our recommendation, the Principal Director believes the intent of the recommendation has already been met. The Principal Director stated that a contractor signing a contract that includes DFARS Clause 252.225-7993 and the due diligence requirement for contractors to check SAM exclusions prior to awarding a subcontract, and at least once monthly thereafter, already ensures that the prime contractor is not subcontracting with excluded parties. We agree that existing regulations and due diligence requirements are good ways to help ensure contracts are not awarded to excluded parties. However, as SIGAR has discussed in this report, there are deficiencies in terms of the information entered into SAM. Accordingly, the intent of recommendation 4 is to put additional onus on contractors to represent to the U.S. government that they are not contracting with the enemy, so that the U.S. government can obtain additional information that may not otherwise be available through SAM or known to government agencies. The recommendation will remain open until DPC provides documentation demonstrating that it took corrective action.

SIGAR will follow up with DOD within 60 days of the issuance of this report to identify DOD’s actions to address the respective recommendations.

APPENDIX I - SCOPE AND METHODOLOGY

This audit examined the Department of Defense's (DOD) actions, taken or planned, to address recommendations made in SIGAR's April 2013 report, *Contracting with the Enemy*.²⁰ This audit also examined DOD's adherence to the "Never Contract with the Enemy" provisions of the National Defense Authorization Act (NDAA) for fiscal year (FY) 2015 through FY 2020. The objectives of this audit were to (1) evaluate DOD's actions to address SIGAR's prior report recommendations, and (2) determine the extent to which DOD's policies and procedures for implementing the FY 2015 through FY 2020 NDAA's "Never Contract with the Enemy" provisions have enabled DOD to identify and prevent funds disbursed under its contracts from being provided to persons or entities identified as actively supporting an insurgency or opposing U.S. or coalition forces in Afghanistan.

To determine DOD's actions, taken or planned, to address SIGAR's prior report recommendations, we examined the department's responses to the prior report recommendations, reviewed the FY 2015 through FY 2020 NDAA "Never Contract with the Enemy" provisions, interviewed DOD personnel, and obtained supporting evidence for DOD's implementation of the prior audit recommendations. To test DOD's implementation of the recommendations, we sampled 88 out of 4,824 contracts awarded by DOD combatant commands supporting the contingency operations in Afghanistan from October 1, 2014, through June 30, 2020, and verified DOD's implementation of the recommendations as they related to those 88 contracts.

To assess DOD's policies and procedures for implementing the NDAA's "Never Contract with the Enemy" provisions, and whether they enabled DOD to identify and prevent funds from being disbursed to the enemy, we reviewed U.S. government-funded contracts completed and ongoing from FY 2015 through June 2020, contracts valued at \$50,000 or more, and contracts performed in Afghanistan. We selected our sample from contracts awarded from October 1, 2014, through June 30, 2020, stratified contracts by dollar value, and then randomly selected the contracts from the seven contracting agencies represented.²¹ We assessed the sufficiency and appropriateness of computer-processed information we obtained from the DOD systems. Because our focus was on compliance, we do not believe that the computer-processed data materially affected the report's findings and conclusions.

We interviewed officials from Army Contracting Command–Afghanistan, Defense Pricing and Contracting, the Office of the Deputy Assistant Secretary of Defense for Logistics, and the U.S. Army Corps of Engineers regarding DOD's policies and procedures for implementing "Never Contract with the Enemy" provisions. We also interviewed officials from prime contractors DynCorp, Mina Red Star, and BT Federal, and reviewed DOD's written responses to our interview questions. We reviewed relevant statutory and regulatory guidance, as well as contract documents and other documentation deemed necessary to assess "Never Contract with the Enemy" compliance. Lastly, we evaluated the extent and effectiveness of coordination among the different parties when sharing information and enacting authorities provided under the NDAA.

We conducted our audit work in Arlington, Virginia, from July 2020 through June 2022, in accordance with generally accepted government auditing standards. Those 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 audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. SIGAR performed this audit under the authority of Public Law No. 110-181, as amended, and the Inspector General Act of 1978, as amended.

²⁰ SIGAR, *Contracting with the Enemy*, SIGAR Audit 13-6.

²¹ The seven contracting agencies represented in the sample universe were the Defense Information Systems Agency; Defense Logistics Agency; Departments of the Army, Navy, and Air Force; U.S. Special Operations Command; and U.S. Transportation Command.

APPENDIX II - COMMENTS FROM THE DEPARTMENT OF DEFENSE



ACQUISITION
AND SUSTAINMENT

OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000

MEMORANDUM FOR SPECIAL INSPECTOR GENERAL FOR AFGHANISTAN RECONSTRUCTION

SUBJECT: Department of Defense Response to Special Inspector General for Afghanistan Reconstruction Draft Audit Report 143A – Contracting with the Enemy: DoD Has Not Fully Implemented Processes Intended to Prevent Payments To Enemies of the United States

As requested, I am responding to the general content and each recommendation contained in the subject draft report. My office submitted technical comments in advance of this response.

The Department of Defense (DoD) has made significant strides to implement sections 841-843 of the National Defense Authorization Act (NDAA) for FY 2015, as amended, and address the Special Inspector General for Afghanistan Reconstruction's (SIGAR) previous recommendations from SIGAR's April 2013 report. After the "Never Contract with the Enemy" provisions were enacted in December 2014, DoD established the Vendor Threat Mitigation (VTM) program and chartered a working group to tackle the challenges of threats posed by certain vendors and prevent taxpayer funds from reaching the enemy. The VTM working group continues to meet regularly to collaborate, share vendor threat information, improve section 841 processes, and enable expeditious processing of combatant commanders' section 841 identifications. VTM working group members developed a draft DoD Directive and draft DoD policies outlining VTM roles and responsibilities and establishing DoD VTM procedures. As a member of the VTM working group, Defense Pricing and Contracting also drafted Defense Federal Acquisition Regulation Supplement class deviations, developed internal section 841 operating procedures, and added restricted persons and entities into the System for Award Management exclusions list to ensure contracting officers, contracting officer representatives, and prime contractors and subcontractors are aware of restricted sources. The attached responses provide additional insight into the Department's efforts to improve execution of the Never Contract with Enemy program.

Thank you for the opportunity to review the draft report and for your consideration of our comments. My point of contact for this action is Col Karen Landale [REDACTED]

[REDACTED]

John M. Tenaglia
Principal Director,
Defense Pricing and Contracting

Attachment:
As stated

Defense Pricing and Contracting Responses and Comments on Special Investigator General for Afghanistan Reconstruction Recommendations – Draft Report 143A

Recommendation 1: Establish or enforce procedures to ensure that Section 841 designees are added to the System for Awards Management (SAM) exclusions list upon notification of a new Section 841 designee.

Response: Concur. Defense Pricing and Contracting (DPC) recommends changing this recommendation’s wording as follows to meet the full intent of the recommendation: “Establish or enforce procedures to ensure that new section 841-identified persons or entities are added to the SAM exclusions list upon determination by the appropriate Head(s) of the Contracting Activity (HCA(s)) to restrict the identified persons or entities.” Section 841 identifications are only added to the SAM exclusions list after an HCA determines it is appropriate to restrict the section 841-identified person or entity. DPC has taken steps to address this recommendation.

In addition to the procedures in Attachment 3 of Class Deviation 2020-O0022, “Prohibition on Providing Funds to the Enemy and Authorization of Additional Access to Records,” DPC developed draft internal operating procedures to add section 841-identified persons or entities to the SAM exclusions list upon determination by an HCA to restrict future award(s) to the identified person or entity. These procedures include the steps to establish a SAM exclusions role, the process to upload restricted persons or entities into the SAM exclusions list, the requisite information to include in the exclusion listing (e.g. unique entity identifiers), and additional exclusion oversight responsibilities. While this SIGAR audit was underway, these procedures proved to be effective and efficient. In March 2022, DPC expeditiously added six combatant commander-identified persons or entities to the SAM exclusions list in a timely manner after HCAs made the decision to restrict them. DPC will take the appropriate actions to incorporate these procedures into an official DPC standard operating procedure (SOP) to ensure new section 841-identified persons or entities are added to the SAM exclusions list in a timely fashion upon the determination by the appropriate HCA(s) to restrict the identified persons or entities.

Recommendation 2: Take steps to enforce the requirement for Defense Federal Acquisition Regulations Supplement Clauses 252.225.7993 (“Prohibition on Providing Funds to the Enemy”) and 252.225.7975 (“Additional Access to Contractor and Subcontractor Records”) to be included in contracts, unless HCAs provide justification for exemption.

Response: Concur. DPC will take steps to update guidance and/or systems and tools (e.g. update acquisition.gov with the most recent Class Deviation 2020-O0022) to ensure all DoD contracting officers are aware of the requirement to include these DFARS clauses in solicitations and contracts valued over \$50,000 that will be performed in areas with a designated contingency operation in which members of the Armed Forces are actively engaged in hostilities. This action should be completed by the fourth quarter of fiscal year 2022.

Recommendation 3: Take steps to ensure that the distribution of Section 841 notifications, whether through an automated or manual process, is carried out accurately and in a timely manner.

Response: Concur. Recommend changing this recommendation's wording as follows to meet the full intent of the recommendation: "In coordination with the covered combatant command(s), take steps to ensure that notification of section 841 identified persons or entities, whether through an automated or manual process, is carried out accurately and in a timely manner." While this SIGAR audit was underway, DPC organized a section 841 working group made up of representatives from the covered combatant commands and the Military Services to identify the most effective way to notify HCAs of section 841 identifications. Using the newly-created section 841 working group, DPC established a process to rapidly notify the HCAs of section 841-identified persons or entities, utilizing the Correspondence and Task Management System (CATMS) tasking process to notify HCAs of all outstanding combatant commander (CCDR) section 841 identifications. DPC also utilized CATMS to officially task the HCAs to review the section 841 identification(s) and to respond in writing by the suspense date with their decision to terminate, void, and/or restrict the section 841-identified persons or entities, or to take no action. This process ensured CCDRs' section 841 identifications were communicated to HCAs and acted upon in a timely manner. Further, DPC developed an HCA template to assist HCAs in making section 841 determinations, thereby reducing their response time. DPC will take the appropriate actions to incorporate these procedures into an official DPC Standard Operating Procedure to ensure future notifications of section 841 identified persons or entities are carried out in a timely manner.

Recommendation 4: Direct the HCAs to require prime contractors to make a representation to the best of the contractor's knowledge or belief that it does not have subcontracts with Section 841 designees, prior to awarding contracts valued over \$50,000.

Response: Partially Concur. DPC will evaluate the most appropriate way(s) to implement Recommendation 4; however, DPC believes the intent of the recommendation has been met.

Through signing the covered contract, the contractor agrees to comply with Defense Federal Acquisition Regulation Supplement (DFARS) clause 252.225-7993, Prohibition on Providing Funds to the Enemy (DEVIATION 2020-O0022). This clause requires the contractor to exercise due diligence to ensure none of the funds, including supplies and services, received under the respective contract are provided directly or indirectly (including through subcontracts) to the enemy. "Due diligence" requires that the contractor check SAM exclusions prior to awarding a subcontract, and at least once monthly thereafter, to ensure the contractor is not subcontracting with restricted sources. The clause also requires the contractor terminate or void in whole or in part any subcontract with a person or entity listed in SAM as a prohibited or restricted person or entity. Prime contractors must also include DFARS clause 252.225-7993 in all subcontracts.

Additionally, the HCA has the authority to terminate, void, and restrict contracts, in whole or in part, if the HCA determines in writing that any funds received under the contract

Attachment 1

have been provided directly or indirectly to the enemy. For example, if the HCA receives an intelligence report that a contractor is providing funds from a covered contract to the enemy, the HCA can terminate, void, and/or restrict the contract immediately upon that information alone; there is no requirement to tie the HCA's section 841 authority to the contractor's failure to perform due diligence or for inaccurately representing that, to the best of the contractor's knowledge or belief, the contractor did not have subcontracts with Section 841 designees. This authority is sufficient to prevent funds, goods, and services received under a covered contract from going to the enemy.

In addition to the current regulatory coverage and efforts outlined above, DPC will continue to strengthen our efforts under Section 841 as we continue to evolve and implement VTM.

APPENDIX III - ACKNOWLEDGMENTS

Adam Bonfanti, Senior Audit Manager

Jessy Joseph, Auditor in Charge

This performance audit was conducted
under project code SIGAR-143A.

SIGAR's Mission

The mission of the Special Inspector General for Afghanistan Reconstruction (SIGAR) is to enhance oversight of programs for the reconstruction of Afghanistan by conducting independent and objective audits, inspections, and investigations on the use of taxpayer dollars and related funds. SIGAR works to provide accurate and balanced information, evaluations, analysis, and recommendations to help the U.S. Congress, U.S. agencies, and other decision-makers to make informed oversight, policy, and funding decisions to:

- improve effectiveness of the overall reconstruction strategy and its component programs;
- improve management and accountability over funds administered by U.S. and Afghan agencies and their contractors;
- improve contracting and contract management processes;
- prevent fraud, waste, and abuse; and
- advance U.S. interests in reconstructing Afghanistan.

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To help prevent fraud, waste, and abuse by reporting allegations of fraud, waste, abuse, mismanagement, and reprisal, contact SIGAR's hotline:

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