

CONTRACTING IN COMBAT ZONES: WHO ARE OUR CONTRACTORS?

HEARING

BEFORE THE
SUBCOMMITTEE ON NATIONAL SECURITY
AND FOREIGN AFFAIRS
OF THE
COMMITTEE ON OVERSIGHT
AND GOVERNMENT REFORM
HOUSE OF REPRESENTATIVES
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CONTRACTING IN COMBAT ZONES: WHO ARE OUR CONTRACTORS?

TUESDAY, JUNE 29, 2010

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON NATIONAL SECURITY AND FOREIGN
AFFAIRS,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:05 a.m., in room 2154, Rayburn House Office Building, Hon. John F. Tierney (chairman of the subcommittee) presiding.

Present: Representatives Tierney, Lynch, Van Hollen, Welch, Quigley, Chu, Flake, Duncan, and Luetkemeyer.

Staff present: Andy Wright, staff director; Talia Dubovi and Scott Lindsay, counsels; LaToya King, GAO detailee; Boris Maguire, clerk; Aaron Blacksberg, professional staff member; Brendon Olson and Alexandra Mahler-Haug, interns; John Cuaderes, minority deputy staff director; Jennifer Safavian, minority chief counsel for oversight and investigations; Adam Fromm, minority chief clerk and Member liaison; Seamus Kraft, minority director of new media and press secretary; Justin LoFranco, minority press assistant and clerk; Ashley Callen, minority counsel; and Christopher Bright, minority senior professional staff member.

Mr. TIERNEY. A quorum being present, the Subcommittee on National Security and Foreign Affairs hearing entitled, "Contracting in Combat Zones: Who Are Our Subcontractors?" will come to order.

I ask unanimous consent that only the chairman and the ranking member of the subcommittee be allowed the make opening statements.

Without objection, so ordered.

I ask unanimous consent that the hearing record be kept open for 5 business days so that all members of the subcommittee may be allowed to submit a written statement for the record.

Without objection, so ordered.

Good morning. And my apologies for being a bit late. I have to say, it is seldom that Mr. Flake is here before I am. So we know that it certainly was not intended, but I appreciate Jeff for being here and all of you for showing up today and giving us your considerable expertise.

I sadly report that I understand we are going to have votes at about 10:30, so that there will be an interruption. And we will try to make it as brief a one as possible and get back here.

Today, we are continuing our oversight on the U.S. Government contracting in our conflicts overseas. We are going to ask the important questions: Who is getting U.S. taxpayer money? And how are they using those funds once they get it?

Last week, this subcommittee held a hearing that examined the results of a 6-month examination into the Host Nation Trucking contract in Afghanistan. That investigation uncovered distressing details of how U.S. taxpayer money is funding warlordism and corruption in Afghanistan and how the contractors are undermining U.S. counterinsurgency strategy.

Equally troubling is the finding that the U.S. officials charged with overseeing this contract had no visibility into the actual operations of the contractors and subcontractors. In most cases, officials did not know who the subcontractors were, let alone who they employed, how they functioned, and where they spent their money.

To give one example, seven of the eight prime contractors in the Host Nation Trucking contract employ, either directly or indirectly, a man by the name of Commander Ruhullah. And he provides security for the supply convoys. Commander Ruhullah claims to spend \$1½ million per month on ammunition and has reportedly attacked convoys that do not use his security services. Still, no U.S. military officials have ever met with Commander Ruhullah. And, despite the fact that he receives millions of dollars of taxpayer money, there have been no attempts to enforce the U.S. laws that govern his U.S.-funded contractual relationship. With \$2.16 billion of taxpayer funds at stake, it is unconscionable that the military does not have tighter control over Host Nation Trucking subcontractors.

But the Host Nation Trucking contract is not the only problem. This week's Economist reports that 570 NATO contracts worth millions of dollars were issued in southern Afghanistan but nobody is quite sure to whom. In January, the Special Inspector General for Iraq Reconstruction, one of our witnesses here today, issued a report about a State Department contract with DynCorp which noted that, "Over \$2.5 billion in U.S. funds were vulnerable to waste and fraud."

In May, the Inspector General for the U.S. Agency for International Development issued an audit of its private security contractors in Afghanistan which highlighted significant problems with USAID contracts. It found that USAID does not have, "reasonable assurance that private security contractors are reporting all serious security incidents, are suitably qualified, and are authorized to operate in Afghanistan."

Audits from the Department of State, USAID, and others have found problems with subcontractor management in areas as diverse as embassy construction, fuel delivery, and educational outreach programs. The Government Accountability Office, another of our witnesses here today, has reported that the agencies are not even able to accurately report the number of contractor and subcontractor personnel working on U.S. contracts.

And just yesterday, the Wall Street Journal reported that over \$3 billion in cash has been flown out of Afghanistan in the last 3 years. That is \$3 billion of cash on a plane flying out Afghanistan.

Officials believe that at least some of that money has been skimmed from U.S. contracts and aid projects.

The conflicts in Iraq and Afghanistan have dramatically changed the way the U.S. wages war. With more contractors than combat troops currently in both countries, the role that these civilians play has become increasingly important. The changing role of contractors have challenged the agencies that employ them. Thus far, the agencies have not risen to meet those challenges.

Over the last several years, Congress has tried to impose greater control over contingency contractors and subcontractors, including private security companies. The last three Defense Authorization Acts included provisions aimed to strengthen oversight mechanisms and mandate more stringent controls over all of the contractors and subcontractors working on U.S. contracts. These new regulations apparently have not been sufficient.

We are here today, however, not to criticize what has or has not been done so far. We want to work in the spirit of constructive oversight. So today we are asking what can be done to keep from these significant problems from reoccurring.

We have invited a panel of witnesses with considerable expertise and experience in the area of contingency contracting. It is my hope that today we can discuss what more Congress, the agencies, and others can do to increase visibility, oversight, and accountability over the contractors and subcontractors who are now crucial to the success of our missions in Iraq and Afghanistan.

As we learned from the Host Nation Trucking investigation, the actions of the subcontractors on that contract may be undermining our entire strategy in the region. With so much at stake, it is time to dig in and find solutions. I look forward to continuing that conversation today.

And, with that, I would like to recognize Mr. Flake for his opening statement.

Mr. FLAKE. I thank the chairman for holding this hearing and thank the witnesses for coming.

As the chairman said, given the report that was issued just a couple of weeks ago and the hearing held last week, this is a very important hearing. There is enough water under the bridge, we have enough time with Iraq and Afghanistan, with these contracts in place, to have some kind of history that we can look to and to see what we are doing wrong and what we can do better.

So I look forward to the testimony.

Mr. TIERNEY. Well, thank you.

And, with that, we will introduce the witnesses for today's hearing. And I will introduce each of you here now, and then we will start again with Mr. Solis at the end of the introductions.

Mr. William Solis is Director of the Defense Capabilities and Management Team at the U.S. Government Accountability Office, where he is responsible for a wide range of program audits and evaluations in the area of defense logistics and warfighter support. Throughout his career at GAO, Mr. Solis's audit engagements have included work on military readiness and training, weapons system effectiveness, housing, and military doctrine. He has received numerous GAO awards, including the GAO Distinguished Service Award in 2008.

Ms. Mary Ugone is the Deputy Inspector General for Auditing in the Department of Defense Office of the Inspector General. Ms. Ugone is a certified public accountant with more than 29 years of accounting experience, the last 26 of which have been with the Inspector General. Ms. Ugone was also chair of the Federal Audit Executive Council from 2007 to 2009 and publicly was recognized by the President of the United States as the 2007 recipient of the Prestigious Meritorious Executive Presidential Rank Award. This award is one of the highest in the Federal Government service. She is also a recipient of the Inspector General Distinguished Service Award and the Secretary of Defense Exceptional Civilian Service Award and a member of the Association of Government Accountants and a graduate of the Federal Executive Institute.

And now that I have said your name three times, have I said it properly?

Ms. UGONE. Yes.

Mr. TIERNEY. Thank you. Appreciate that.

Mr. Stuart Bowen, Jr., is the Special Inspector General for Iraq Reconstruction. He previously served as the Inspector General for the Coalition Provisional Authority. Mr. Bowen's mission includes ensuring effective oversight of the \$52 billion appropriated for the reconstruction of Iraq. Under the previous administration, Mr. Bowen served as the Deputy Assistant to the President, the Deputy Staff Secretary, and the Special Assistant to the President and Associate Counsel. Prior to his White House tenure, Mr. Bowen was a partner at the law firm of Patton Boggs LLP. He also spent 4 years on active duty as an intelligence officer in the U.S. Air Force, achieving the rank of Captain. He holds a BA from the University of the South and received a JD from St. Mary's Law School.

We welcome you back, sir. You have been with us before.

Mr. Richard Fontaine is a senior fellow at the Center for a New American Security. He previously served as foreign policy advisor to Senator John McCain for more than 5 years. During his tenure with Senator McCain, Mr. Fontaine worked on numerous pieces of important foreign policy legislation, such as the 9/11 Commission Report Implementation Act. He also served as Associate Director for Near Eastern Affairs at the National Security Council from 2003 to 2004 and as a policy analyst in that same council's Asian Affairs Directorate. Prior to that, Mr. Fontaine worked in the office of former Deputy Secretary of State Richard Armitage and in the State Department's South Asia Bureau. Mr. Fontaine holds a BA from Tulane University and an MA in international affairs from the Johns Hopkins School of Advanced International Studies.

I want to thank all of you for being our witnesses here today and for taking time out of your schedules.

It looks like I will swear you in and we will go down and vote. Maybe we will get one or two statements in before we head off, if we could.

But it is the practice of this committee to swear our witnesses in, so if you would please rise and raise your right hands.

[Witnesses sworn.]

Mr. TIERNEY. The record will please reflect that all of the witnesses answered in the affirmative.

As Mr. Bowen knows and I think the others also probably know, your full statement is going to be entered into the record, by consent of the committee members. So we ask that you try to synopsize your remarks down to about 5 minutes so that we will have some time for questions and answers after that.

So, Mr. Solis, please, if you would.

STATEMENTS OF WILLIAM SOLIS, DIRECTOR, DEFENSE CAPABILITIES AND MANAGEMENT, GOVERNMENT ACCOUNTABILITY OFFICE; MARY UGONE, DEPUTY INSPECTOR GENERAL FOR AUDITING, DEPARTMENT OF DEFENSE INSPECTOR GENERAL; STUART BOWEN, JR., SPECIAL INSPECTOR GENERAL FOR IRAQ RECONSTRUCTION; AND RICHARD FONTAINE, SENIOR FELLOW, CENTER FOR A NEW AMERICAN SECURITY

STATEMENT OF WILLIAM SOLIS

Mr. SOLIS. Chairman Tierney, Ranking Member Flake, members of the subcommittee, I appreciate the opportunity to be here to discuss a number of issues related to DOD's use of contractors to support U.S. forces and contingency operations.

The report the subcommittee issued and the hearing held last week focused on a number of oversight challenges related to the Host Nation Trucking contract, an important logistics contract providing support to U.S. forces. The oversight issues associated with this contract highlight many of the longstanding challenges that our reports have addressed in the past.

My statement today will focus on some of the challenges the Department continues to face when it uses contractors in contingencies like Afghanistan. I will also discuss two steps the Department needs to take to address these challenges in future operations, to include the need for DOD to systematically evaluate its reliance on contractors and institutionally plan for their use.

As you know, DOD relies greatly on contractors to support its current operations. Currently, there are about 95,000 contractors in Iraq supporting about 90,000 troops and over 112,000 contract personnel in Afghanistan supporting 94,000 troops. In addition, GAO reported that DOD had more than 30,000 contracts in place during fiscal year 2008 and for the first 6 months of 2009 to support operations in Afghanistan. DOD officials have stated that the Department is likely to continue to rely on contractors to support future contingencies.

Based on our ongoing audit work in Iraq and Afghanistan, DOD continues to face a number of challenges to fully integrate operational contract support within the Department, to include: finalizing joint guidance for operational contract support, as required by Congress; identifying and planning for the use of contractors in support of ongoing operations and in DOD's plans for future contingencies; providing an adequate number of personnel to conduct oversight and management of contractors; training of non-acquisition personnel, such as unit commanders and contracting officer representatives, on how to work effectively with contractors in contingency operations; and, last, ensuring that local and host-country nationals have been properly screened and badged.

Since the mid-'90's, we have made numerous recommendations aimed at addressing each of these challenges. While DOD has taken some actions in response to our recommendations, it has been slow to implement others. For example, DOD continues to face challenges in identifying a plan for operations for contract support for ongoing operations.

Recently, officials from several battalions who had just returned from Afghanistan told us that, when they arrived at their locations that were intended to be their combat outpost, that they lacked housing, heating, laundry facilities, showers, and food services. Additionally, because these units were unaware that they would have the responsibility for obtaining these prior to deploying, they did not plan for and allocate adequate personnel to handle the extensive contract management and oversight duties associated with building and maintaining their combat outpost. As a result, these units had to assign military personnel away from their primary missions in order to handle these contract management duties.

Failure to identify and plan for contractor support goes well beyond Iraq and Afghanistan. As we reported earlier this year, the Department has also made limited progress in including the roles of contractors in operational plans for future contingencies. For example, DOD guidance calls for the inclusion of operational contract support annex in some operation plans. However, of the 89 plans that required such annexes, we found only four plans where these annexes had been approved, and the annexes had been drafted for an additional 30 plans.

As a result, DOD continues to risk, one, not understanding the extent to which the Department will rely on contractors to support combat operations and, two, being unprepared to provide management and oversight of these contractor personnel because they have not been included in the planning process.

Let me just say quickly, DOD has taken some steps to institutionalize contract support, such as establishing a focal point. And, in addition, they have issued a variety of contractor guidance.

Let me just close and say that, in looking toward the future, what is needed is a cultural change across DOD that emphasizes the importance of operational contract support throughout all aspects of the Department, including planning, training, and personnel requirements. Only when DOD has established its future vision for the use and role of contractors supporting deployed forces and fully institutionalizes the concepts of operational contract support can it effectively address its long-term capability to oversee and manage those contractors.

It is important that this change occur quickly while current operations keep a significant amount of attention focused on the use and role of contractors and the political will exists to effect such a change within DOD. A failure to do so will likely result in the Department continuing to confront the challenges it faces today in future contingencies.

This concludes my statement. I will be happy to answer any questions.

[The prepared statement of Mr. Solis follows:]

United States Government Accountability Office

GAO

Testimony

Before the Subcommittee on National
Security and Foreign Affairs, Committee
on Oversight and Government Reform,
House of Representatives

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WARFIGHTER SUPPORT

Cultural Change Needed to Improve How DOD Plans for and Manages Operational Contract Support

Statement of William M. Solis, Director
Defense Capabilities and Management



GAO-10-829T

G A O
Accountability Integrity Reliability
Highlights

Highlights of GAO-10-829T, a testimony before the Subcommittee on National Security and Foreign Affairs, Committee on Oversight and Government Reform, House of Representatives

Why GAO Did This Study

For decades, the Department of Defense (DOD) has relied on contractors to support contingency operations and recognizes them as part of the total force. In Iraq and Afghanistan contractor personnel now outnumber deployed troops. In Iraq more than 95,000 DOD contractors support 92,000 troops, and in Afghanistan more than 112,000 DOD contractors support approximately 94,000 troops. DOD anticipates that the number of contractors will grow in Afghanistan as the department increases its troop presence in that country.

Several long-standing challenges have hindered DOD's ability to manage and oversee contractors at deployed locations. Since 1992, GAO has designated DOD contract management as a high-risk area, in part because of concerns about the adequacy of the department's acquisition workforce, including contract oversight personnel. GAO has reported on many of the challenges that DOD faces and has made several recommendations aimed at improving the oversight and management of contracts in contingency operations. DOD has addressed some, but not all of these recommendations.

This testimony addresses the extent to which DOD has institutionalized operational contract support. It is based on GAO's recently published reports and testimonies on planning for operational contract support and on DOD's efforts to manage and oversee contractors and ongoing audit work in Iraq and Afghanistan.

View GAO-10-829T or key components. For more information, contact William M. Solis at (202) 512-8365 or wsolis@gao.gov.

June 2010

WARFIGHTER SUPPORT

Cultural Change Needed to Improve How DOD Plans for and Manages Operational Contract Support

What GAO Found

In response to congressional direction and GAO recommendations, DOD has taken some actions to address challenges in overseeing and managing contractors in ongoing operations. However, DOD still faces challenges that stem from the department's failure to fully integrate operational contract support within DOD, including planning for the use of contractors, training military personnel on the use of contractor support, accurately tracking contractor use, and establishing measures to ensure that contractors are accountable. A cultural change in DOD that emphasizes an awareness of operational contract support throughout all aspects of the department, including planning, training, and personnel requirements, would help the department address these challenges in ongoing and future operations.

Developing guidance. DOD has issued some guidance to assist in planning for and conducting and assessing operational contract support, but it has yet to finalize joint policies required by Congress in the National Defense Authorization Acts for Fiscal Years 2007 and 2008.

Planning for operations. DOD has not fully planned for the use of contractors in support of ongoing operations in Iraq and Afghanistan, although some efforts are under way at the individual unit level. In addition, while the department has started to integrate operational contract support into plans for future operations, it has not made significant progress.

Tracking contractor personnel. DOD has developed a system to track contractor personnel deployed with U.S. forces, but the data collected by the system are unreliable.

Providing oversight personnel. DOD continues to face challenges in ensuring that it has an adequate number of personnel to provide oversight and management of contracts. DOD has acknowledged shortages of personnel and has made some efforts to address them, but these efforts are in the early stages of implementation.

Training non-acquisition personnel. DOD continues to be challenged in ensuring that nonacquisition personnel, such as unit commanders, have been trained on how to work effectively with contractors in contingency operations. As a result, officials from several units that recently redeployed from Afghanistan indicated that a lack of knowledge of contracting resulted in shortfalls in critical oversight areas.

Screening contractor personnel. While a significant number of contractor personnel supporting DOD are local or third-country national personnel, DOD has yet to develop a departmentwide policy for screening them.

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to discuss the challenges the Department of Defense (DOD) faces in institutionalizing operational contract support throughout the department. The institutionalization of operational contract support includes planning for the use of contractors, training of military personnel on the use of contractor support, accurately tracking contractor use, and establishing measures to ensure that contractors are accountable. For decades, DOD has relied on contractors to support contingency operations and has long considered them a part of the total force. For example, in its 2006 Quadrennial Defense Review the department reiterated that contractors were part of a total force that includes active and reserve military components, civilians and contractors. Additionally, in 2008 the Deputy Under Secretary of Defense for Logistics and Materiel Readiness testified that the structure of the U.S. military had been adapted to an environment in which contractors were an important part of the force. Further, an Army commission chaired by Dr. Jacques Gansler acknowledged that contractors were a significant part of the military's total force.¹

While DOD joint guidance recognizes contractors as part of its total workforce, we have previously reported that DOD has not yet developed a strategy for determining the appropriate mix of contractor and government personnel.² In addition, we recently testified that several long-standing challenges have hindered DOD's ability to manage and oversee contractors at deployed locations.³ For example, DOD has not followed long-standing planning guidance, ensured that there is an adequate number of contract oversight and management personnel, and comprehensively trained non-acquisition personnel, such as military commanders. Since 1992, we have designated DOD contract management as a high-risk area, in part due to concerns over the adequacy of the department's acquisition and contract oversight workforce.⁴ As we have

¹ *Report of the Commission on Army Acquisition and Program Management in Expeditionary Operations* (Washington, D.C. September 2007).

² GAO, *Contingency Contracting: Improvements Needed in Management of Contractors Supporting Contract and Grant Administration in Iraq and Afghanistan*, GAO-10-357 (Washington, D.C.: April 12, 2010).

³ GAO, *Warfighter Support: Continued Actions Needed by DOD to Improve and Institutionalize Contractor Support in Contingency Operations*, GAO-10-551T (Washington, D.C.: Mar. 17, 2010).

⁴ GAO, *High-Risk Series: An Update*, GAO-09-271 (Washington, D.C.: January 22, 2009).

previously testified, many of the long-standing problems we have identified regarding managing and overseeing contractor support to deployed forces stem from DOD's reluctance to plan for contractors as an integral part of the total force.⁵ We have also testified that DOD's long-standing problems in managing and overseeing contractors at deployed locations make it difficult for the department to ensure that it is getting the services it needs on time and at a fair and reasonable price. We have found numerous instances where poor oversight and management of contractors have led to negative monetary and operational outcomes. As a result, since the advent of our work on contractor support to deployed forces in 1997,⁶ we have made numerous recommendations to improve DOD's management of contractors in deployed locations. While DOD has taken some actions to address these challenges, it has not addressed all of them, as I will discuss in further detail.

My statement today will focus on the extent to which DOD has institutionalized operational contract support. My statement is based on recently published reports and testimonies that examined planning for operational contract support and the department's efforts to manage and oversee contractors in Iraq and Afghanistan as well as our ongoing work involving operational contract support related issues in Iraq and Afghanistan. Our work was conducted in accordance with generally accepted government auditing standards.⁷

Background

The U.S. military has long used contractors to provide supplies and services to deployed U.S. forces. However, the scale of contractor support DOD relies on today has increased considerably from what DOD relied on during previous military operations. In Iraq and Afghanistan contractor personnel now outnumber deployed troops. For example, according to DOD, as of March 2010, there were more than 95,000 DOD contractor

⁵ GAO, *Military Operations: Implementation of Existing Guidance and Other Actions Needed to Improve DOD's Oversight and Management of Contractors in Future Operations*, GAO-08-436T (Washington, D.C.: Jan. 24, 2008).

⁶ GAO, *Contingency Operations: Opportunities to Improve the Logistics Civil Augmentation Program*, GAO/NSIAD-97-63 (Washington, D.C.: Feb. 11, 1997).

⁷ Generally accepted government auditing 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.

personnel operating in Iraq and more than 112,000 DOD contractor personnel operating in Afghanistan. While the number of troops fluctuates based on the drawdown in Iraq and the troop increase in Afghanistan, as of June 2010 there were approximately 88,000 troops in Iraq and DOD estimates that the number of troops in Afghanistan will increase to 93,000 by the end of fiscal year 2010. DOD anticipates that the number of contractor personnel will grow in Afghanistan as the department increases its troop presence in that country. However, these numbers do not reflect the thousands of contractor personnel located in Kuwait and elsewhere who support operations in Iraq and Afghanistan. By way of contrast, an estimated 9,200 contractor personnel supported military operations in the 1991 Gulf War.

Furthermore, the composition of the contractor workforce in Iraq and Afghanistan differs. For example, in Iraq the majority of contractor personnel are U.S. citizens or third-country nationals (82 percent), whereas in Afghanistan the majority of contractor personnel are local Afghan nationals (70 percent). The difference becomes even more apparent when looking at the subset of private security contractor personnel who perform personal security, convoy security, and static security missions. In Iraq, 90 percent of private security contractors are U.S. citizens or third-country nationals, whereas in Afghanistan 93 percent of private security contractors are Afghans. Today, contractors located throughout the Middle East and Southwest Asia provide U.S. forces with such services as linguist support, equipment maintenance, and support for base operations and security. Contractors are an integral part of DOD's operations, and DOD officials have stated that without a significant increase in the department's civilian and military workforce, DOD is likely to continue to rely on contractors both in the United States and overseas in support of future deployments.

DOD defines operational contract support as the process of planning for and obtaining supplies, services, and construction from commercial sources in support of joint operations along with the associated contractor management functions. According to DOD joint guidance, successful operational contract support is the ability to orchestrate and synchronize the provision of integrated contracted support and management of contractor personnel providing that support to the joint force in a designated operational area.

DOD Has Taken Some Steps to Institutionalize Operational Contract Support, though Challenges Remain

In response to congressional direction and GAO recommendations, DOD has taken some actions to institutionalize operational contract support, such as establishing a focal point to lead the department's effort to improve contingency contractor management and oversight at deployed locations, issuing new guidance, and beginning to assess its reliance on contractors. However, DOD still faces challenges in eight areas related to operational contract support.

(1) *Developing guidance.* DOD has yet to finalize joint policies required by Congress in the National Defense Authorization Acts for Fiscal Years 2007 and 2008.⁸

(2) *Planning for contractors in ongoing operations.* The department has not fully planned for the use of contractors in support of ongoing operations in Iraq and Afghanistan, although some efforts are underway at the individual unit level.

(3) *Planning for contractors in future operations.* DOD needs to take additional actions to improve its planning for operational contract support in future operations. For example, while DOD has started to institutionalize operational contract support into combatant commands' operation plans, it has not yet made significant progress.

(4) *Tracking contractor personnel.* While DOD has developed a system to collect data on contractors deployed with U.S. forces, our reviews of this database have highlighted significant shortcomings in its implementation in Iraq and Afghanistan.

(5) *Providing oversight personnel.* DOD continues to face challenges in providing an adequate number of personnel to oversee and manage contractors in contingency operations, such as Iraq and Afghanistan.

(6) *Training non-acquisition personnel.* DOD faces challenges in ensuring that non-acquisition personnel, such as unit commanders,

⁸ John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 100-364, § 854 (2006) (codified at 10 U.S.C. § 2333); National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 849 (2008).

have been trained on how to work effectively with contractors in contingency operations.

(7) *Screening contractor personnel.* DOD has yet to develop a departmentwide policy for screening the significant number of local and third-country national contractor personnel who support deployed U.S. forces.

(8) *Capturing lessons learned.* DOD has not implemented previous GAO recommendations to develop a departmentwide lessons learned program to capture the department's institutional knowledge regarding all forms of contractor support to deployed forces in order to facilitate a more effective working relationship between contractors and the military.

Given the contractor-related challenges DOD continues to face, a cultural change is necessary to integrate operational contract support throughout the department. Without such a change, DOD is likely to continue to face these challenges in ongoing and future contingency operations.

Some Departmentwide Steps Taken to Institutionalize Operational Contract Support

In October 2006, the Deputy Under Secretary of Defense for Logistics and Materiel Readiness established the Office of the Assistant Deputy Under Secretary of Defense (Program Support) to act as a focal point for leading DOD's efforts to improve contingency contractor management and oversight at deployed locations. Among the office's accomplishments is the establishment of a community of practice for operational contract support comprising of subject matter experts from the Office of the Secretary of Defense, the Joint Staff, and the services. In March 2010 the office issued an Operational Contract Support Concept of Operations, and it has provided the geographic combatant commanders with operational contract support planners to assist them in meeting contract planning requirements.

To provide additional assistance to deployed forces, the department and the Army introduced several handbooks and other guidance to improve contracting and contract management in deployed locations. For example:

- In 2007 the department introduced the Joint Contingency Contracting Handbook, *Contingency Contracting: A Joint Handbook for the 21st Century*, which provides tools, templates, and training that enable a contingency contracting officer to be effective in any contracting

environment. The handbook is currently being updated and the department expects the revised edition to be issued in July 2010.

- In 2008 the Army issued the *Deployed Contracting Officer's Representative Handbook*. This handbook provides the basic tools and knowledge to use in conjunction with formal contracting officer's representative (COR) training and was designed to address the realities that CORs face when operating outside the United States in a contingency operation.
- Additionally, in October 2008, the department issued Joint Publication 4-10, *Operational Contract Support*, which establishes doctrine and provides standardized guidance for, and information on, planning, conducting, and assessing operational contract support integration, contractor management functions, and contracting command and control organizational options in support of joint operations.⁹

Finally, in 2008, the Joint Staff (J-4, Logistics), at the direction of the Chairman of the Joint Chiefs of Staff, undertook a study to determine how much the department relied on contractors in Iraq. The intent of the study was to (1) better understand contracted capabilities in Iraq, to determine areas of high reliance or dependence; (2) determine where the department is most reliant, and in some cases dependent, on contractor support; and (3) guide the development of future contingency planning and force development. The Joint Staff's initial findings suggest that in Iraq the department was highly dependent on contractors in four of the nine joint capability areas, including Logistics.¹⁰ For example, the study showed that in the third quarter of fiscal year 2008, over 150,000 contractors were providing logistical support, while slightly more than 31,000 military personnel were providing similar support. Having determined the level of dependency and reliance on contractors in Iraq, the Joint Staff plans to examine ways to improve operational contract support planning, including the development of tools, rules, and refinements to the existing planning process.

⁹ Joint Publication 4-10 expressly does not pertain to contracting support of routine, recurring (i.e., noncontingency) DOD operations.

¹⁰ Joint capability areas are collections of like DOD capabilities functionally grouped to support capability analysis, strategy development, investment decision making, capability portfolio management, and capabilities-based force development and operational planning.

In addition, in July 2009, DOD provided Congress with a report containing an inventory of contracts for fiscal year 2008, including but not limited to service contracts supporting contingency operations.¹¹ According to Army officials, the Army is using information derived from this effort to help inform discussions on the appropriate mix of DOD civilian, military and contractor personnel in future contingency operations. However, DOD has acknowledged and we have reported limitations associated with the methodologies used to develop this initial inventory.¹²

**Operational Contract
Support Guidance Has Not
Been Finalized**

DOD has developed some policies and guidance as described above, but has not finalized other key operational contract support guidance directed by Congress. In 2006, Congress amended title 10 of the United States Code by adding section 2333, which directed the Secretary of Defense, in consultation with the Chairman of the Joint Chiefs of Staff, to develop joint policies by April 2008 for requirements definition, contingency program management, and contingency contracting during combat and postconflict operations.¹³ In January 2008, the National Defense Authorization Act for Fiscal Year 2008 amended section 2333 by adding a new subsection directing that these joint policies also provide for training of military personnel outside the acquisition workforce who are expected to have acquisition responsibility, including oversight duties associated with contracts or contractors, during combat operations, postconflict operations, and contingency operations.¹⁴ In 2008 we reported that DOD was developing an Expeditionary Contracting Policy to address the

¹¹ Section 2330a of title 10 of the United States Code, as amended by the National Defense Authorization Act for Fiscal Year 2008, requires DOD to submit an annual inventory of the activities performed pursuant to contracts for services for or on behalf of DOD during the preceding fiscal year. These inventories are to contain a number of different elements for the service contracts listed, including information on the functions and missions performed by the contractor, the funding source for the contract, and the number of full-time contractor employees or its equivalent working under the contract.

¹² GAO, *Defense Acquisitions: Observations on the Department of Defense Service Contract Inventories for Fiscal Year 2008*, GAO-10-350R (Washington, D.C.: January 29, 2010).

¹³ John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 854 (2006) (codified at 10 U.S.C. § 2333).

¹⁴ National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 849 (2008).

requirement to develop a joint policy on contingency contracting.¹⁵ In addition, we reported that DOD was revising the October 2005 version of DOD Instruction 3020.41, *Contractor Personnel Authorized to Accompany the U.S. Armed Forces*, to strengthen the department's joint policies and guidance on requirements definition; program management, including the oversight of contractor personnel supporting a contingency operation; and training. As of June 2010, the department has yet to issue either of these documents. According to the Assistant Deputy Under Secretary of Defense (Program Support), the revisions to DOD Instruction 3020.41 have been held up in the review process. Further, the department has determined that it will not issue the Expeditionary Contracting Policy because the practitioners do not believe a joint policy is necessary.

Identifying and Planning for Operational Contract Support Requirements in Current Operations

DOD guidance highlights the need to plan for operational contract support early in an operation's planning process, in part because of the challenges associated with using contractors in contingencies. These challenges include overseeing and managing contractors in contingency operations. However, in previous reports and testimonies we have noted that DOD has not followed long-standing guidance on planning for operational contract support. Our work continues to show that DOD has not fully planned for the use of contractors in support of ongoing contingency operations in Iraq and Afghanistan, although some efforts are under way at the individual unit level.

On December 1, 2009, the President announced that an additional 30,000 U.S. troops would be sent to Afghanistan to assist in the ongoing operations there, and the Congressional Research Service has estimated that from 26,000 to 56,000 additional contractors may be needed to support the additional troops. Despite the additional contractors who will be needed to support the troop increase, U.S. Forces-Afghanistan (USFOR-A),¹⁶ with the exception of planning for the increased use of the Army's Logistics Civil Augmentation Program (LOGCAP),¹⁷ was engaged in very

¹⁵ GAO, *Contract Management: DOD Developed Draft Guidance for Operational Contract Support but Has Not Met All Legislative Requirements*, GAO-09-114R (Washington, D.C.: Nov. 20, 2008).

¹⁶ USFOR-A is the headquarters for U.S. forces operating in Afghanistan and was established in October 2008.

¹⁷ LOGCAP provides worldwide logistics and base and life support services in contingency environments and provides the majority of base and life support services to U.S. forces in Iraq and Afghanistan.

little planning for contractors. We did, however, identify several individual unit efforts to plan for contractors.

For example, we found some planning being done by U.S. military officials at Regional Command-East. According to planners from Regional Command-East, the command had identified the types of units that are being deployed to its operational area of Afghanistan and was coordinating with similar units already in Afghanistan to determine what types of contract support the units relied on. Furthermore, according to operational contract support personnel associated with a Marine Expeditionary Force getting ready to deploy to Afghanistan, the staff offices within the Marine Expeditionary Force headquarters organization were directed to identify force structure gaps that could be filled by contractors prior to deployment and begin contracting for those services. For example, one section responsible for civil affairs identified the need to supplement its staff with contractors possessing engineering expertise because the needed engineers were not available from the Navy.

Additionally, in April 2010 we reported that while U.S. Forces-Iraq (USF-I)¹⁸ had taken steps to identify all the LOGCAP support it needed for the drawdown, it had not identified the other contracted support it may need to support the drawdown.¹⁹ We reported that according to DOD joint guidance and Army regulations, personnel who plan, support, and execute military operations must also determine the contracted support needed to accomplish their missions. Such personnel include combat force commanders, base commanders, and logistics personnel. In particular, these personnel are responsible for determining the best approach to accomplish their assigned tasks and—if the approach includes contractors—for identifying the types and levels of contracted support needed. As we reported in April 2010, Multi-National Force-Iraq's (MNF-I) May 2009 drawdown plan delegated the responsibility for determining contract support requirements to contracting agencies, such as the Joint Contracting Command-Iraq/Afghanistan, rather than to operational personnel. However, Joint Contracting Command-Iraq/Afghanistan

¹⁸ MNF-I and its subordinate headquarters merged into a single headquarters, USF-I, in January 2010. Documents obtained and discussions held prior to January 2010 will be attributed to MNF-I or one of its subordinate commands as appropriate. Discussions held and documents obtained after January 2010 will be attributed to USF-I.

¹⁹ GAO, *Operation Iraqi Freedom: Actions Needed to Facilitate the Efficient Drawdown of U.S. Forces and Equipment from Iraq*, GAO-10-376 (Washington, D.C.: April 19, 2010).

officials told us that they could not determine the theaterwide levels of contracted services required, or plan for reductions based on those needs, because they lack sufficient, relevant information on future requirements for contracted services—information that should have been provided by operational personnel. For example, according to MNF-I documentation, during an October 2009 meeting between operational personnel and contracting officials, MNF-I reiterated that the levels of contracted service ultimately needed in Iraq during the drawdown were unknown. This is consistent with an overarching weakness identified by a Joint Staff task force, which noted limited, if any, visibility of contractor support and plans and a lack of requirements definition. As a result, rather than relying on information based on operationally driven requirements for contracted services, MNF-I planned for, and USF-I is subsequently tracking, the reduction of contracted support in Iraq by using historical ratios of contractor personnel to servicemembers in Iraq. Such ratios may not accurately reflect the levels of contracted support needed during the drawdown.

In our April 2010 report we recommended, among other things, that DOD direct the appropriate authorities to ensure that joint doctrine regarding operational planning for contract support is followed and that operational personnel identify contract support requirements in a timely manner to avoid potential waste and abuse and facilitate the continuity of services. DOD concurred with this recommendation and noted that it recognized that improvements could be made to DOD's planning for contractor support and stated that the Joint Staff is working to improve strategic guidance, processes, and tools available to plan for contracted support through the Chairman's Operational Contract Support Task Force. DOD also commented that it recognized the need for better synchronization between operational needs and contractor activities and, to that end, U.S. Central Command has taken steps to increase visibility and synchronization of operational contract support through initiatives such as creating the Joint Theater Support Contracting Command, instituting a Joint Contracting Support Board, and collaborating with the Joint Staff to improve guidance. Also, in our April report, we recommended that DOD direct the appropriate authorities to conduct an analysis of the benefits, costs, and risks of transitioning from LOGCAP III to LOGCAP IV and other service contracts in Iraq under current withdrawal timelines to determine the most efficient and effective means for providing essential services during the drawdown. DOD concurred with this recommendation and as of May of this year, has canceled the transition from LOGCAP III to LOGCAP IV for base life support in Iraq due partly to concerns about the interruption of essential services. The decision to continue LOGCAP III

rather than transition to LOGCAP IV for base life support services was based on three main factors: input from military commanders in Iraq, the projected cost of the transition, and contractor performance. Commanders in Iraq had raised concerns that a transition from LOGCAP III to LOGCAP IV would strain logistics and transportation assets in Iraq at the same time that a massive withdrawal of U.S. forces, weapons, and equipment is under way.

In the past, we have repeatedly reported on DOD's failure to fully plan for contract support and the impact that this can have on operations. Several units that recently returned from Afghanistan discussed how a lack of planning for contract support resulted in service shortages and diminished operational capability. For example, officials from several battalions told us that when they arrived at locations that were intended to be their combat outposts, they found the area largely unprepared, including a lack of housing, heating, washing machines, showers and food. These bases were too small or too remote to be serviced by LOGCAP, and therefore the units had to make their own contract support arrangements through the appropriate regional contracting command to build, equip and maintain their bases. Because the units were unaware they would have to take on this responsibility prior to deploying, they did not plan for and allocate adequate personnel to handle the extensive contract management and oversight duties associated with building and maintaining their combat outpost. As a result, these units had to take military personnel away from their primary missions in order to handle these contract management duties. Other units faced different challenges as a result of a lack of planning for contract support. For example, another unit that recently returned from Afghanistan stated that the lack of planning for an increased requirement for linguists due to increased troop levels led to shortages that resulted in the delaying of some operations.

**Limited Progress
Integrating Contractors
into Combatant
Commands' Operation
Plans**

DOD guidance recognizes the need to include the role of contractors in its operation plans. For example, joint guidance indicates that military commanders must ensure that requisite contract planning and guidance are in place for any operations where significant reliance on contractors is anticipated, and planning for contractors should be at a level of detail on par with that for military forces. To provide greater details on contract services needed to support an operation and the capabilities that contractors would bring, DOD's guidance for contingency planning was

revised in February 2006 to require planners to include an operational contract support annex—known as Annex W—in the combatant commands' most detailed operation plans, if applicable to the plan.²⁰ In addition, joint guidance gives the combatant commanders the discretion to require Annex Ws for additional, less detailed plans. Incorporating operational contract support into these types of plans represents a critical opportunity to plan for the use of contractors at the strategic and tactical levels.

Although DOD guidance has called for the integration of an operational contract support annex—Annex W—into certain combatant command operation plans since February 2006, the department has made limited progress in meeting this requirement. We reported in March 2010 that while planners identified 89 plans that may require an Annex W, only four operation plans with Annex Ws had been approved by the Secretary of Defense or his designee, and planners had drafted Annex Ws for an additional 30 plans.²¹ According to combatant command officials, most of the draft Annex Ws developed restated broad language from existing DOD guidance on the use of contractors to support deployed forces, and they included few details on the types of contractors needed to execute a given plan, despite guidance requiring Annex Ws to list contracts likely to be used in theater. As a result, DOD risks not fully understanding the extent to which it will be relying on contractors to support combat operations and being unprepared to provide the necessary management and oversight of deployed contractor personnel. Moreover, the combatant commanders are missing a chance to fully evaluate their overall requirements for reliance on contractors.

²⁰ Chairman of the Joint Chiefs of Staff Manual 3122.03B, *Joint Operation Planning and Execution System (JOPES), Volume II, Planning Formats* (Feb. 28, 2006), superseded by Chairman of the Joint Chiefs of Staff Manual 3122.03C, *Joint Operation Planning and Execution System (JOPES), Volume II, Planning Formats* (Aug. 17, 2007).

²¹ GAO, *Warfighter Support: DOD Needs to Improve Its Planning for Using Contractors to Support Future Military Operations*, GAO-10-472 (Washington, D.C. Mar. 30, 2010).

Data Collected by DOD's System to Track Contractor Personnel in Iraq and Afghanistan Are Unreliable

In January 2007, DOD designated the Synchronized Pre-deployment and Operational Tracker (SPOT) as its primary system for collecting data on contractor personnel deployed with U.S. forces, and it directed the use of a contract clause that requires contractor firms to enter personnel data for contracts performed in Iraq and Afghanistan into this system.²² In July 2008, DOD signed a memorandum of understanding with the Department of State (State) and the U.S. Agency for International Development (USAID) in which the three agencies agreed to track information on contracts meeting specified thresholds performed in Iraq or Afghanistan and the personnel working on those contracts.²³ Although the SPOT database is designed to provide accountability of all U.S., local, and third-country national contractor personnel by name; a summary of the services being provided; and information on government-provided support, our reviews of SPOT have highlighted shortcomings in DOD's implementation of the system in Iraq and Afghanistan.²⁴ For example, we found that as a result of diverse interpretations by DOD officials as to which contractor personnel should be entered into the system, the information in SPOT does not present an accurate picture of the total number of contractor personnel in Iraq and Afghanistan. While one of the functions of SPOT is

²² This guidance was implemented in DFARS clause 252.225-7040(g), which specifies that contractors are to enter information into SPOT for all personnel authorized to accompany the U.S. Armed Forces during contingency operations and certain other actions outside the United States. Class Deviation 2007-00010 (Oct. 17, 2007) provided a new clause for contracts with performance in the U.S. Central Command area of responsibility that were not already covered by DFARS clause 252.225-7040. However, the class deviation excluded contracts that did not exceed \$25,000 and had a period of performance of less than 30 days.

²³ Section 861 of the National Defense Authorization Act for Fiscal Year 2008 directed the Secretary of Defense, the Secretary of State, and the USAID Administrator to enter into a memorandum of understanding (MOU) related to contracting in Iraq and Afghanistan. The law specified a number of matters to be covered in the MOU, including the identification of common databases to serve as repositories of information on contract and contractor personnel. Pub. L. No. 110-181, § 861 (2008).

²⁴ GAO, *Iraq and Afghanistan: Agencies Face Challenges in Tracking Contracts, Grants, Cooperative Agreements, and Associated Personnel*, GAO-10-508T (Washington, D.C.: Mar. 23, 2010); *Contingency Contracting: DOD, State, and USAID Continue to Face Challenges in Tracking Contractor Personnel and Contracts in Iraq and Afghanistan*, GAO-10-1 (Washington, D.C.: October 1, 2009); and *Contingency Contracting: DOD, State, and USAID Contracts and Contractor Personnel in Iraq and Afghanistan*, GAO-09-19 (Washington, D.C.: October 1, 2008).

to generate letters of authorization,²⁵ not all contractor personnel in Iraq, particularly local nationals, need such letters, and agency officials informed us that such personnel were not being entered into SPOT. Similarly, officials at one contracting office in Afghanistan stated that the need for a letter of authorization determined whether someone was entered into SPOT, resulting in Afghans not being entered. Additionally, tracking local nationals in SPOT presents particular challenges because their numbers tend to fluctuate because of the use of day laborers and because local firms do not always keep track of the individuals working on their projects.²⁶

We made several recommendations to DOD, State, and USAID in October 2009 to better ensure consistency in requirements for data entry in SPOT and to ensure that the use and reporting capabilities of SPOT are fulfilling statutory requirements among other things.²⁷ DOD, State, and USAID agreed that coordination among the three agencies is important, but DOD and State disagreed that they needed a new plan to address the issues we identified. They cited their ongoing coordination efforts and anticipated upgrades to SPOT as sufficient. However, we believe continued coordination among the three agencies is important as they attempt to obtain greater visibility into their reliance on contractors, grantees, and cooperative agreement recipients in dynamic and complex environments. Otherwise, the agencies not only risk not collecting the information they need but also risk collecting detailed data they will not use.

Lack of Adequate Numbers of Contract Oversight and Management Personnel in Deployed Locations

One important aspect of operational contract support is the oversight of contracts—which can refer to contract administration functions, quality assurance surveillance, corrective action, property administration, and past performance evaluation. Our work has found, however, that DOD frequently did not have a sufficient number of trained contracting and oversight personnel to effectively manage and oversee its contracts. While

²⁵ A letter of authorization is a document issued by a government contracting officer or designee that authorizes contractor personnel to travel to, from, and within a designated area and identifies any additional authorizations, privileges, or government support the contractor is entitled to under the contract. Contractor personnel need SPOT-generated letters of authorization, among other things, to enter Iraq, receive military identification cards, travel on U.S. military aircraft, or, for security contractors, receive approval to carry weapons.

²⁶ GAO-10-506T.

²⁷ GAO-10-1.

several individual organizations or services within DOD have taken actions to help mitigate the problem of not having enough personnel to oversee and manage contractors in Afghanistan and Iraq, these efforts have been driven by individual services and units and are not part of a systematic approach by DOD.

Ultimately, the responsibility for contract oversight rests with the contracting officer, who has the responsibility for ensuring that contractors meet the requirements as set forth in the contract. Frequently, however, contracting officers are not located in the contingency area or at the installations where the services are being provided. As a result, contracting officers appoint contract monitors, known as CORs, who are responsible for providing much of the day-to-day oversight of a contract during a contingency operation. CORs are typically drawn from units receiving contractor-provided services and are not normally contracting specialists.²⁸ Often their service as CORs is an additional duty. They cannot direct the contractor by making commitments or changes that affect price, quality, quantity, delivery, or other terms and conditions of the contract. Instead, they act as the eyes and ears of the contracting officer and serve as the liaison between the contractor and the contracting officer.

The Defense Federal Acquisition Regulation Supplement requires that CORs be qualified by training and experience commensurate with the responsibilities to be delegated to them; however, we have reported in the past that individuals have been deployed without knowing that they would be assigned as CORs, thus precluding their ability to take COR training prior to deployment. This can be a problem because although the courses are offered online, there is limited Internet connectivity in theater—particularly in Afghanistan. During our recent visits with deployed and recently returned units,²⁹ we found that units continue to deploy to Afghanistan without designating CORs beforehand. As a result, the personnel assigned to serve as CORs have to take the required training after arriving in theater, which provides technical challenges. Several recently returned units told us that it could take days to complete the

²⁸ We recently reported that DOD also makes extensive use of contractors to help perform contract and grant administration functions in Iraq and Afghanistan. See GAO-10-357.

²⁹ We spoke with officials from a variety of military units, including officials at the headquarters element and at the brigade and battalion levels.

2-hour online training because of poor Internet connectivity in Afghanistan.

We also found that although CORs and other oversight personnel are responsible for assisting in the technical monitoring or administration of a contract, these oversight personnel often lack the technical knowledge and training needed to effectively oversee certain contracts. Several units that have recently returned from Afghanistan told us that CORs with no engineering background are often asked to oversee construction projects. These CORs are unable to ensure that the buildings and projects they oversee meet the technical specifications required in the drawing plans. An additional complication is that the plans are not always provided in English for the CORs or in the appropriate local language (Dari or Pashto) for the Afghan contractors.

Some steps have been taken to address these challenges. For example, the Army issued an execution order on CORs in December 2009, in which the Army Chief of Staff directed the commanders of deploying units to coordinate with the units they will replace in theater to determine the number of CORs they will need to designate prior to deployment. The order states that if the commander is unable to determine specific COR requirements, each deploying brigade must identify and train 80 COR candidates. In addition, the Army order directs the Army's Training and Doctrine Command to develop training scenarios and include COR contract oversight scenarios in mission rehearsal exercises by March 30, 2010. The order also directed the Training and Doctrine Command to ensure that contingency contracting responsibilities are included in appropriate professional military education courses.

In addition, a deploying Marine Expeditionary Force has created an operational contracting support cell within the logistics element of its command headquarters. The members of the cell will assist subordinate units with contracting oversight and guidance on policy, and they will act as contracting liaisons to the Joint Contracting Command-Iraq/Afghanistan and as conduits to the regional contracting commands should any issues arise. The Marines were prompted to set up this cell by lessons learned from their deployment to Operation Iraqi Freedom, where problems arose as a result of a lack of expertise and personnel to help oversee and manage contractors. In addition, the Marine Expeditionary Force trained approximately 100 Marines as CORs prior to its deployment to Afghanistan this spring. While not all these personnel have been designated as CORs for the upcoming deployment, all could be called upon to serve as CORs should the need arise.

While we recognize the efforts DOD has under way to develop long-term plans intended to address its personnel shortages, many of the problems we have identified in the past continue. In previous reports we have recommended that DOD develop strategies to address its oversight problems, and noted that unless DOD takes steps to address its current shortages, the department will continue to be at risk with regard to its assurance that contractors are providing their required services in an effective and efficient manner.

Training of Non-Acquisition Personnel to Provide Contract Oversight and Management

Currently, military commanders and other unit leaders are not required to complete operational contract support training prior to deployment.³⁰ We have previously reported on the potential issues that can arise when commanders are unaware of their responsibility toward contractors and are unclear about the difference between command authority and contract authority.

During our December 2009 trip to Afghanistan and in conversations with personnel from recently redeployed units, we continued to find that some commanders had to be advised by contract oversight personnel that they had to provide certain support, such as housing, force protection, and meals to the contractors they were overseeing, and concerns were raised about the potential risk of military commanders directing contractors to perform work outside the scope of the contract—something commanders lack the authority to do.³¹ In addition, officials within several units we spoke with that have just redeployed from Afghanistan told us that lack of knowledge about contracting resulted in the failure to include the right mix of personnel in their manpower planning document. This led to shortfalls in critical oversight areas, such as in the badging and screening office for contractor employees coming on base. Units that had recently returned from Afghanistan whose personnel we spoke with also did not anticipate the sheer volume of contractors and the time and manpower they would need to devote to properly process and oversee these contractor personnel. This led to the use of soldiers and Marines to

³⁰ While DOD does not require military commanders to take operational contract support courses, Joint Forces Command has two operational contract support courses available online and other courses are available through the Defense Acquisition University and the Army.

³¹ GAO-10-551T.

perform contract-related duties such as escort duty, which had not been adequately planned for prior to deployment.

Contractors in contingency operations are integrated into a wide spectrum of activities and support a diverse range of military functions and operations that are not confined to the logistics world, and therefore all military personnel should be aware of contractors and how to work with them. We have previously recommended that DOD develop training standards for the services to integrate basic familiarity with contractor support to deployed forces into their professional military education to ensure that military commanders and other senior leaders who may deploy to locations with contractor support have the knowledge and skills needed to effectively manage contractors. DOD concurred with this recommendation and recognizes the need for broad training for non-acquisition personnel in order for them to understand the basics regarding contractor personnel. However, as DOD reported in November of 2009, the effort to incorporate operational contract support into professional military education was still ongoing. We continue to believe that integrating operational contract support into professional military education is an important step in institutionalizing the concept throughout DOD.

Screening and Providing Badges to Contractors

In Iraq and Afghanistan, military commanders and other military officials have expressed concerns about the security risks that contractor personnel, particularly third-country and local nationals, pose to U.S. forces because of limitations in the background screening process. In 2006, we first reported on the challenges that DOD faced in ensuring that contractor personnel had been thoroughly screened and vetted.³² In July 2009, we reported that DOD had not developed departmentwide procedures to screen local national and third-country national contractor personnel in part because two offices within the department—those of the Under Secretary of Defense for Intelligence and the Under Secretary of Defense for Acquisition, Technology and Logistics—could not agree on the level of detail that should be included in background screening for third-country and local national employees and therefore lacked assurance that

³² GAO, *Military Operations: Background Screenings of Contractor Employees Supporting Deployed Forces May Lack Critical Information, but U.S. Forces Take Steps to Mitigate the Risk Contractors May Pose*, GAO-06-999R (Washington, D.C.: Sept. 22, 2006).

all contractor personnel were properly screened.³³ As a result, we recommended that the Secretary of Defense designate a focal point at a sufficiently senior level and possessing the necessary authority to ensure that the appropriate offices in DOD coordinate, develop, and implement policies and procedures to conduct and adjudicate background screenings in a timely manner. DOD partially concurred with our recommendation and responded that the Office of the Assistant Deputy Under Secretary of Defense (Program Support) has been given responsibility for monitoring the registration, processing, and accounting of private security contractor personnel in the area of contingency operations. We noted that while we did not dispute this office's role, we did not believe it was the correct office to resolve disagreements among the offices responsible for developing DOD's background screening policy. DOD has still not developed a departmentwide policy on how to screen local national and third-country national contractor personnel, and as a result it continues to face challenges in conducting background screening of these personnel. As we reported in July 2009, absent a DOD-wide policy, commanders develop their own standards and processes to ensure that contractor personnel have been screened.

In Iraq, USF-I, the U.S.-led military organization responsible for conducting the war in Iraq, has a commandwide policy for screening and badging contractors. However, in Afghanistan, USFOR-A has not established a commandwide policy for screening and badging contractors. Instead, we found that each base develops its own background screening and base access procedures, resulting in a variety of different procedures. The lack of guidance also affects the ability of force protection officials to determine the sufficiency of their background screening procedures. For example, at one base, force protection officials told us that while they require contractor personnel to provide valid background screenings from their home countries, they had not received guidance on how to interpret those screenings, and did not know whether the screenings they received were valid. Officials stated that they rely on a biometric system, also used in Iraq, to screen local and third-country national contractor personnel. However, as we have previously reported, the name checks and biometric data collection associated with issuing badges rely primarily upon U.S.-based databases of criminal and terrorist information and background

³³ GAO, *Contingency Contract Management: DOD Needs to Develop and Finalize Background Screening and Other Standards for Private Security Contractors*, GAO-09-351 (Washington, D.C.: July 31, 2009).

checks that rely on U.S.-based databases, such as the biometric system used in Iraq and Afghanistan, may not be effective in screening foreign nationals who have not lived or traveled to the United States.³⁴ As we concluded in July 2009, without a coordinated DOD-wide effort to develop and implement standardized policies and procedures to ensure that contractor personnel—particularly local nationals and third-country nationals—have been screened, DOD cannot be assured that it has taken all reasonable steps to thoroughly screen contractor personnel and minimize any risks to the military posed by these personnel.

Collecting and Distributing Lessons Learned

Although DOD has policy requiring the collection and distribution of lessons learned to the maximum extent possible, we found in our previous work that no procedures were in place to ensure that lessons learned are collected and shared. Many issues that we continue to report result from the failure to share lessons learned from previous deployments.

The lack of a lessons learned program means that the knowledge that is gained by a currently or previously deployed unit is not fully leveraged to DOD's advantage. Personnel we spoke to from units that were deployed or had just returned from deployment told us that they left for their deployment not knowing the extent to which they would have to rely on contractors or how to staff their manpower planning document and, as a result, were short handed in several critical oversight areas and had to use troops to perform functions other than their primary duties.

We have previously recommended developing a departmentwide lessons learned program to capture the experiences of military units that have used logistics support contracts and establishing a focal point within the Office of the Under Secretary of Defense for Acquisition, Technology and Logistics, to lead and coordinate the implementation of the departmentwide lessons learned program to collect and distribute the department's institutional knowledge regarding all forms of contractor support to deployed forces. DOD concurred with this recommendation but as of November 2009 these efforts were still ongoing. Implementing these recommendations would facilitate a more effective working relationship between contractors and the military.

³⁴ GAO-06-999R.

Concluding Observations

DOD has acknowledged that operational contract support plays an integral role in contingency operations and that successful execution of operational contract support requires significant planning and management. While some efforts have been made within the department and the individual services to improve the planning for and management of contractors, these efforts do not fully work toward integrating operational contract support throughout DOD. As we have discussed, many of the operational contract support challenges the department continues to face are long-standing and while the department has acknowledged many of these challenges, and taken some actions, it has not systematically addressed them.

Looking toward the future, the challenges we have discussed demonstrate the need for DOD to consider how it currently uses contractors in contingency operations, how it will use contractors to support future operations, and the impact that providing management and oversight of these contractors has on the operational effectiveness of deployed units. These considerations would also help shift the department's culture as it relates to operational contract support. As DOD doctrine recognizes, operational contract support is more than just logistical support. Therefore, it is important that a significant culture change occur, one that emphasizes operational contract support throughout all aspects of the department, including planning, training, and personnel requirements. It is especially important that these concepts be institutionalized among those serving in leadership positions, including officers, noncommissioned officers, and civilians. Only when DOD has established its future vision for the use and role of contractors supporting deployed forces and fully institutionalizes the concepts of operational contract support can it effectively address its long-term capability to oversee and manage those contractors.

Mr. Chairman, this concludes my statement. I would be happy to answer any questions you or other members of the subcommittee may have at this time.

Contacts and Acknowledgments

For further information about this statement, please contact William M. Solis at (202) 512-8365 or solisw@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement. Individuals who made key contributions to this statement are Carole F. Coffey, Assistant Director; James A. Reynolds, Assistant Director; Vincent Balloon; Melissa L. Hermes; Charles Perdue; Michael Shaughnessy; Cheryl Weissman; and Natasha Wilder.

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Mr. TIERNEY. Thank you, Mr. Solis. We appreciate it.
Ms. Ugone.

STATEMENT OF MARY UGONE

Ms. UGONE. Chairman Tierney, Ranking Member Flake, and distinguished members of this subcommittee, thank you for the opportunity to appear on behalf of the Inspector General of the Department of Defense to discuss contracting in combat zones. Specifically, I will highlight a few key deficiencies in contingency contracting and discuss related ongoing actions to help prevent waste, fraud, and abuse.

Since the early 1990's, we have identified contract management as a major challenge for the Department to overcome, and the Government Accountability Office has continued to identify this area as high-risk. The need for expediency in contingency operations, such as in Iraq and Afghanistan, can further increase risks.

In May 2010, we issued our report, "Contingency Contracting: A Framework for Reform." The intent of the report was to provide a useful tool for commanders and contract managers in their efforts to improve contingency contracting practices.

One of the most important areas in contingency contracting is requirements definition, because the pace of contingency operations should compel us to get it right in the beginning. In particular, user requirements need to be appropriately translated into contractor performance expectations and measures.

In February 2010, we and our colleagues at the Department of State Inspector General Office jointly reported that two task orders, valued at \$1 billion, did not meet defense needs in developing the Afghan National Police because the contract did not allow for rapid changes to the requirements as the security situation in Afghanistan changed.

Another important area is adequate administration of the contract. Fundamental steps include having a quality assurance plan and assigning qualified contracting officer representatives. For example, a Special Operations Forces support activity contracting officer did not assign a contracting officer representative to 44 service task orders valued at \$514 million. Only after a test caused damage to a C-130 aircraft did command officials discover that the contractor improperly installed a part that later cost \$219,000 to fix.

Sufficient controls of the payment process to ensure that payments are proper is another important area in contingency contracting. For example, Marine Corps officials did not properly authorize over 9,500 payments, totaling about \$310 million. We found that Marine Corps officials made 32 duplicate payments, totaling \$2½ million. One vendor was paid over \$200,000 when the Marine Corps paid the same invoice three times.

Although the examples I provided today involve the relationship between the Department and prime contractors, the need for effective contract management and oversight also exists when the Department, through its prime contractors, relies on subcontractors.

Subcontracting guidance applies to the phases of the contracting process. For example, during source selection, when required by the

contracting officer, offers must demonstrate the responsibility of their proposed subcontractors.

The contracting officer may also require consent to subcontract to adequately protect the government because of the type of subcontract, its complexity or value, or because special surveillance is needed. Additionally, the Federal Acquisition Regulation emphasizes that government quality assurance on subcontracted supplies or services should only be performed when it is in the government's interest.

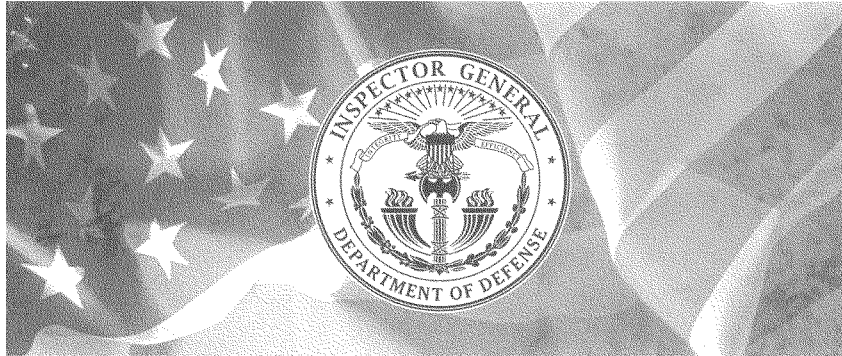
Ultimately, however, the prime contractor is responsible for delivering supplies or services that conform to the contract requirements. Therefore, it is the prime contractor's responsibility to ensure that a proposed subcontract is appropriate for the risks involved and is consistent with sound business judgment.

There remains continuing concern about whether a prime contractor provides value to the contract when a subcontractor is performing most or all of the tasks under the contract. In response to section 852 of the National Defense Authorization Act for fiscal year 2007, the Department of Defense has implemented contract clauses providing the contracting officer with the authority to recover excessive past-due charges for contracts where the prime contractor or a subcontractor adds no or negligible value in accomplishing the work performed under the contract.

The effectiveness of contractor support to expand U.S. operations in Afghanistan and other contingency operations can be improved by applying lessons learned from contingency contracts already executed. Among the steps that can be taken to improve contingency contracting are: define what is needed and how it can be measured; have both program and contracting personnel involved in implementing a well-documented oversight plan; and have required documentary evidence, such as a receipt of goods and services, to support proper payments.

In closing, I would like to add that the top priority of the Office of the Inspector General, Department of Defense, is to provide effective and meaningful oversight in Southwest Asia. We will continue to coordinate and integrate our efforts within the oversight community. And I look forward to answering any questions you may have. Thank you.

[The prepared statement of Ms. Ugone follows:]



United States Department of Defense
Office of Inspector General

Contingency Contracting:
A Framework for Reform

Report No. D-2010-059

May 14, 2010



INSPECTOR GENERAL
DEPARTMENT OF DEFENSE
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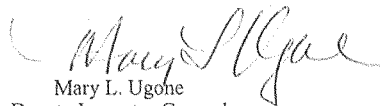
May 14, 2010

MEMORANDUM FOR DISTRIBUTION

SUBJECT: Contingency Contracting: A Framework for Reform (Report
No. D-2010-059)

We are providing this report for your information and use. We did not issue a draft report. This report is based on a body of work performed by the DOD Office of Inspector General related to DOD's contingency contracting that was issued from October 1, 2007 through April 1, 2010. This report contains no recommendations; therefore, we do not require written comments.

Questions should be directed to Bruce Burton at (703) 604-9071.


Mary L. Ugone
Deputy Inspector General
for Auditing



Results in Brief - Contingency Contracting: A Framework for Reform

What We Did

Our overall objective was to provide DOD field commanders and contract managers with information on systemic contracting issues identified in DOD Inspector General products issued from October 1, 2007 through April 1, 2010, that involve high-risk areas of contract management and identify actions that need to be taken to correct these issues for future contracting. We reviewed 34 reports and 19 Defense Criminal Investigative Service investigations related to contracting in contingency operations with the primary focus being work done in Iraq and Afghanistan. Defense Criminal Investigative Service investigations were included separately in Appendix C because the fraud investigations are distinctly different from the auditing process. We also summarized the DOD Response to the Interim Report, "At What Cost-Contingency Contracting in Iraq and Afghanistan," by the Commission on Wartime Contracting in Iraq and Afghanistan. Our summary of the DOD response to the Commission on Wartime Contracting in Iraq and Afghanistan was included to show the progress and focus DOD has on contingency contracting. Their work and ours have a distinct correlation because we both seek to improve program and contract management.

What We Found

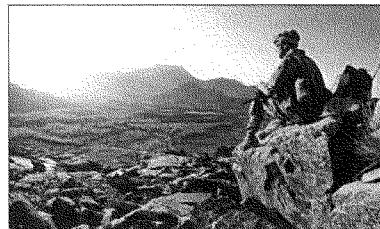
The DOD IG issued 34 reports and completed 19 investigations of fraud from October 1, 2007 through April 1, 2010, that pertain to the contracting process. We reviewed the 34 reports and found 10 systemic issues related to contracting deficiencies with the top 5 issue areas being:

1. Requirements,
2. Contract Pricing,
3. Oversight and Surveillance,
4. Property Accountability, and
5. Financial Management.

Additionally, we reviewed the 19 fraud investigations, shown on page 42, and determined that the criminal offenses occurred during the award and contract administration phases.

The "Key Aspects of the Contracting Process" flowchart on page iii and the "Fraud Indicators and Poor Practices in Relation to the Contracting Process" flowchart on page iv are useful resources to DOD field commanders and contract managers. These flowcharts provide:

- a useful snapshot of key contract issues and fraud indicators related to contingency operations, and
- a visual tool for Commanders and contracting officers to assess the strengths and weaknesses in their contracting approaches and real-time awareness of areas that might be susceptible to fraud and contributors to waste and abuse.



Source: Army Photograph

The “Key Aspects of the Contracting Process” flowchart shows the contracting process in four distinct phases: pre-award, award, contract administration, and contract closeout. Each phase provides actions that should be taken during program and contract management. The red text indicates the systemic issue areas identified in our audits.

The “Fraud Indicators and Poor Practices in Relation to the Contracting Process” flowchart identifies examples of fraud indicators and poor contract administration practices that may occur in the first three contracting process phases (pre-award, award, and contract administration).

Use of this information should lead to immediate improvements in the environment of contingency operations. Commanders and contract managers can use these charts to assess their contracting operations, to identify areas that could be improved, to ensure the best contracting practices are implemented, and to identify vulnerabilities to fraud, waste, and abuse.

What Has Been Done Based On Our Audits

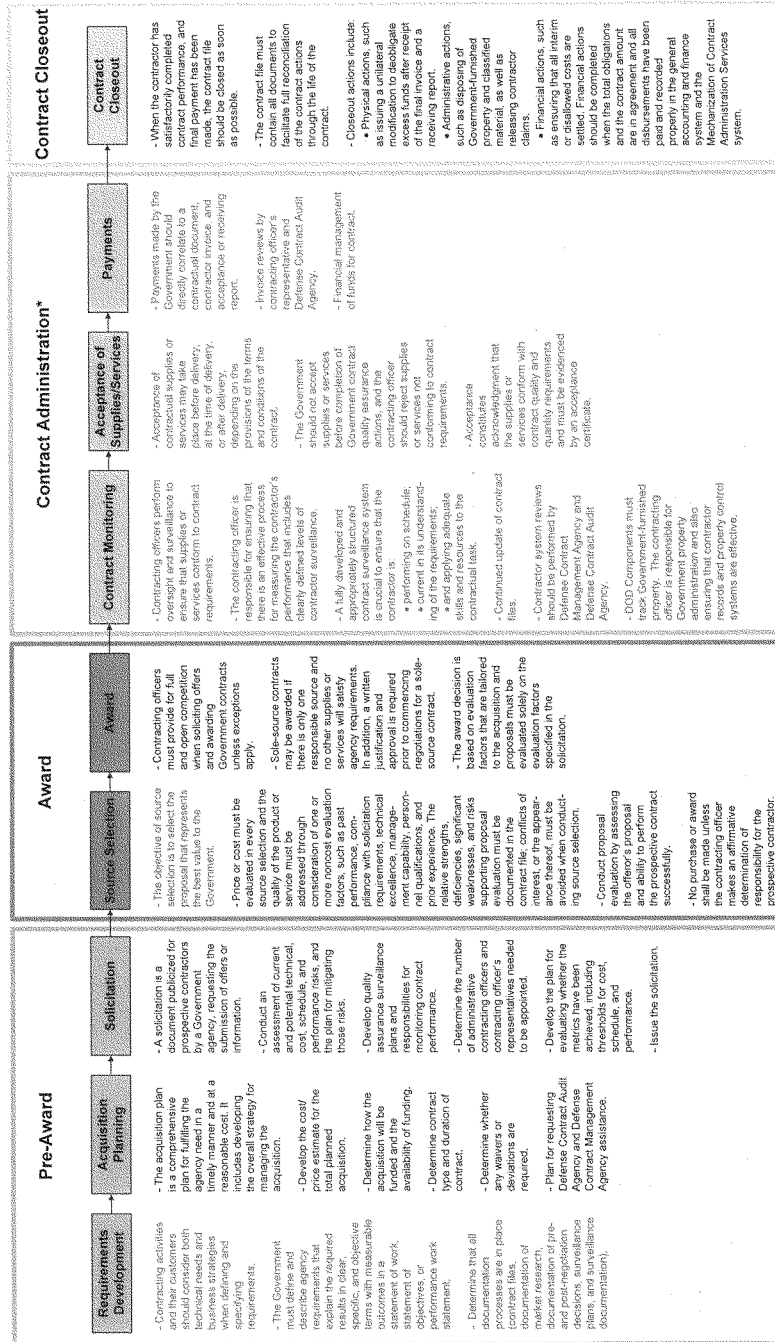
We compiled the recommendations made for each of the 5 top issue areas. Specifically, our recommendations were for management to:

- ensure all requirements are fully defined and properly compete all requirements;
- ensure a fair and reasonable price is received;
- develop a Quality Assurance Surveillance Plan and properly designate a Contracting Officer Representative;
- establish records and maintain accountability for Government property; and
- review all invoices and reconcile the services and products received.

What Needs To Be Done

The effectiveness of contractor support of expanded U.S. operations in Afghanistan and other contingency operations could be compromised by the failure to extract and apply lessons learned from Iraq. As we surge into Afghanistan, it is critical that we review the shortfalls identified and develop a framework to achieve better contracting for contingency operations in Afghanistan and future contingencies. Consequently, we have identified necessary steps to improve contracts in current and future contingency operations, based on our review of the reported deficiencies.

Key Aspects of the Contracting Process



*There are 70 contract administration functions in the Federal Acquisition Regulation.

Fraud Indicators and Poor Practices in Relation to the Contracting Process

Pre-Award		Contract Administration			
Requirements	Contract Documentation	Contract Type	Source Selection	Contract Pricing	Award
<ul style="list-style-type: none"> - The Government requires functional requirements functionally to the maximum extent possible. - Specifications that are vague make it difficult to fairly compare estimates. - The Government defines statements of work in terms of capabilities of a single contractor, which effectively excludes competition. - The Government uses acquisition procedures to use simplified acquisition procedures and approval. - The Government modifying the contract in order to make material changes in the requirements or statement of work. 	<ul style="list-style-type: none"> - A pattern of missing or outdated information in the contract file. - Contract documents that are altered to cover deficiencies. - Contract awards to contractors with inadequate pre-award and award actions. - Invoices that do not have adequate supporting documentation or supporting acquisition procedures and review. - The Government using simplified acquisition procedures and approval. 	<ul style="list-style-type: none"> - The high risk to the Government of cost-reimbursement contracts may provide an opportunity for fraud to occur. - The contracting officer extending the duration of a cost-reimbursement or time-and-materials contract provided a basis for a firm or fixed pricing. - Award/Use of an award/Use of a cost-reimbursement contract. 	<ul style="list-style-type: none"> - Improper relationships between contractor and contractor personnel. - The Government's failure to perform market research to determine if there are commercial items or nondevelopmental items would meet the Government's needs. - The Government restricting procurement to exclude or hamper any qualified contractor. - The Government revealing information to one contractor that is not revealed to another. - The Government accepting proposals from nonresponsible contractors. - The Government improperly disqualifying officers. - The Government exercising favoritism towards a particular contractor during the evaluation process. - The Government awarding contracts to contractors with poor records of performance. - The Government awarding contracts that include items other than those contained in the bid specifications. - The Government's approval of a contractor's proposal on improper reasons or inaccurate facts. 	<ul style="list-style-type: none"> - The Government not preparing estimates after solicitations are requested. - The Government and contractor utilize unqualified personnel to develop cost or pricing data used in estimates. - Government estimates and contract award prices are consistently very close. - The Government approves items that are of lesser value but the contract cost is not reduced. - The contractor issuing an engineering change proposal soon after the award of a contract. 	<ul style="list-style-type: none"> - Increased workloads prohibit ongoing DOD monitoring of each contractor's work. - Contractors confining payments for vendor goods, services, or salaries. - The Government approving modifications. - Contractors failing to meet terms but no effort is made to undertake. - The Government certifying receipt of goods without performing inspections. - The user frequently complaining of poor quality of supplies or services received under a contract. This may indicate that contractors are delivering something less than what you are paying for. - The Government failing to appropriately close out the contracts in a timely manner.
Award		Contract Administration			
Source Selection	Contract Pricing	Source Selection	Contract Pricing	Contract Administration	Financial Management
<ul style="list-style-type: none"> - The Government not preparing estimates after solicitations are requested. - The Government and contractor utilize unqualified personnel to develop cost or pricing data used in estimates. - Government estimates and contract award prices are consistently very close. - The Government approves items that are of lesser value but the contract cost is not reduced. - The contractor issuing an engineering change proposal soon after the award of a contract. 	<ul style="list-style-type: none"> - Increased workloads prohibit ongoing DOD monitoring of each contractor's work. - Contractors confining payments for vendor goods, services, or salaries. - The Government approving modifications. - Contractors failing to meet terms but no effort is made to undertake. - The Government certifying receipt of goods without performing inspections. - The user frequently complaining of poor quality of supplies or services received under a contract. This may indicate that contractors are delivering something less than what you are paying for. - The Government failing to appropriately close out the contracts in a timely manner. 	<ul style="list-style-type: none"> - Increased workloads prohibit ongoing DOD monitoring of each contractor's work. - Contractors confining payments for vendor goods, services, or salaries. - The Government approving modifications. - Contractors failing to meet terms but no effort is made to undertake. - The Government certifying receipt of goods without performing inspections. - The user frequently complaining of poor quality of supplies or services received under a contract. This may indicate that contractors are delivering something less than what you are paying for. - The Government failing to appropriately close out the contracts in a timely manner. 	<ul style="list-style-type: none"> - Increased workloads prohibit ongoing DOD monitoring of each contractor's work. - Contractors confining payments for vendor goods, services, or salaries. - The Government approving modifications. - Contractors failing to meet terms but no effort is made to undertake. - The Government certifying receipt of goods without performing inspections. - The user frequently complaining of poor quality of supplies or services received under a contract. This may indicate that contractors are delivering something less than what you are paying for. - The Government failing to appropriately close out the contracts in a timely manner. 	<ul style="list-style-type: none"> - Increased workloads prohibit ongoing DOD monitoring of each contractor's work. - Contractors confining payments for vendor goods, services, or salaries. - The Government approving modifications. - Contractors failing to meet terms but no effort is made to undertake. - The Government certifying receipt of goods without performing inspections. - The user frequently complaining of poor quality of supplies or services received under a contract. This may indicate that contractors are delivering something less than what you are paying for. - The Government failing to appropriately close out the contracts in a timely manner. 	<ul style="list-style-type: none"> - Increased workloads prohibit ongoing DOD monitoring of each contractor's work. - Contractors confining payments for vendor goods, services, or salaries. - The Government approving modifications. - Contractors failing to meet terms but no effort is made to undertake. - The Government certifying receipt of goods without performing inspections. - The user frequently complaining of poor quality of supplies or services received under a contract. This may indicate that contractors are delivering something less than what you are paying for. - The Government failing to appropriately close out the contracts in a timely manner.

What Has Been Done Based On Our Audits

We reviewed 32 Audit reports and 2 SPO reports that involve high-risk areas of contract management and identify actions that need to be taken to correct future contracting issues. The following encompasses the recommendations made and the actions taken.

Requirements²

We made 16 recommendations addressing inadequate requirements. Nine of the 16 recommendations are closed³ and 7 remain open.⁴ Our recommendations were for management to ensure all requirements are fully defined and properly compete all requirements in accordance with the Competition in Contracting Act. For example, we recommended that the Executive Director, Logistics Civil Augmentation Program, ensure that performance work statements accurately reflect warfighter requirements. According to the Logistics Civil Augmentation Program Project Management Office, to correct this issue they have developed and trained the Iraq, Afghanistan, and Kuwait Deputy Program Directors and their staffs on the Logistics Civil Augmentation Program IV requirements generation process to development appropriate performance work statements.

Contract Documentation

Thirty recommendations were made to correct contract documentation. Seventeen of these are closed; the remaining 13 are open. Generally, we recommended that management develop and maintain a contract file that could reconstruct the history of the contract and provide adequate documentation to support all contractual actions. For example, we recommended that the Commander, U.S. Army Contracting Command, Southwest Asia-Kuwait, comply with FAR Subpart 4.8, "Government Contract Actions," regarding the retention of sufficient contract files that would constitute a complete history for contracts under its purview. The U.S. Army Contracting Command, Southwest Asia-Kuwait office has re-established management control processes to correct and improve contract file maintenance in accordance with FAR Subpart 4.8.

Contract Type⁵

We made 12 recommendations addressing the selection of contract type. Two of the 12 recommendations are closed and 10 remain open. For example, we recommended that the Executive Director, Logistics Civil Augmentation Program, require the procuring contracting officer to establish a plan to identify goods and services within the task orders that could be acquired using firm-fixed-price, and develop firm-fixed-price task order requirements. In response, the Commander, U.S. Army Sustainment Command, stated

² Requirements consist of two subcategories: Unclear/Changing requirements and Out of Scope requirements.

³ A closed recommendation means that the actions taken by management satisfied the intent of the recommendation.

⁴ An open recommendation is a recommendation that we are still tracking to ensure that agreed-upon actions are implemented.

⁵ Contract type consists of three subcategories: firm-fixed-price, cost type, and commercial acquisition.

that for future task order competitions, the contracting will document the rationale for the contract type selected in the competition plan.

Source Selection

We made seven recommendations addressing contract source selection. Three of the seven recommendations are closed and four remain open. For example, we recommended that the Commander, Marine Corps Systems Command, direct the Assistant Commander for Contracts to ensure that future procurements for Mine Resistant Ambush Protected vehicles are properly competed or justified on a sole-source basis. In response, the Marine Corps Systems Command incorporated the recommendation into its acquisition strategies for the Mine Resistant Ambush Protected vehicle Category II and sole-source award Mine Resistant Ambush Protected vehicle Category III procurements.

Contract Pricing

We made 34 recommendations addressing contract pricing. Twenty of the 34 recommendations are closed and 14 remain open. For example, we recommended that the Commanding Officer, Naval Facilities Engineering Command Southeast, request a refund of \$1.4 million from Kellogg, Brown, and Root for the unreasonable lease charge and fees associated with cooking equipment purchase by Commercial Marketing Corporation. As a result of the recommendation, the Naval Facilities Engineering Command Southeast withheld \$1.6 million from invoices for unreasonable lease charges, fees, and applicable overhead costs associated with the subcontract with Commercial Marketing Corporation. On March 5, 2009, DCAA disapproved \$1.6 million of contract costs. On May 1, 2009, the Naval Facilities Engineering Command Southeast issued a Contracting Officer Final Decision to Kellogg, Brown, and Root, demanding payment of \$1.6 million. Additionally, the Naval Facilities Engineering Command Southeast executed two deductive contract modifications to recover the funds.

Oversight and Surveillance⁶

We made 155 recommendations to improve oversight and surveillance. Ninety-five of the 155 recommendations are closed and 60 remain open. Generally, we recommended that management develop a QASP and properly designate and train CORs. For example, we recommended that the Commander, U.S. Army Corps of Engineers, Gulf Region Division, develop and implement a QASP for transportation services, specifically for future contracts, that clearly outlines roles and responsibilities for monitoring contractor performance. As a result of the recommendation, the contracting officer issued a modification to incorporate a QASP into the contract. The QASP identified the roles and responsibilities of quality assurance personnel and specifically requires quality assurance personnel to administer and monitor the contractor's performance for the contracting officer.

⁶ Oversight and surveillance consists of six subcategories: Acceptance, Contracting Officer, COR, DCAA, DCMA, and Written Procedures.

Inherently Governmental Functions

We made 12 recommendations to eliminate the performance of inherently governmental functions by contractors. Four of the 12 recommendations are closed and 8 remain open. For example, we recommended that the Director, Special Operations Forces Support Activity, develop internal controls to ensure that Special Operation Forces Support Activity Business Management Division contractors and Government personnel follow all elements of the FAR regarding inherently governmental activities. To prevent future inherently governmental issues, the Special Operations Forces Support Activity implemented an internal policy that directs all Special Operations Forces Support Activity contractors to clearly identify themselves as contractors in all situations where their contractor status is not obvious. Additionally, the internal policy states that Special Operations Force Support Activity contractors are not authorized to sign or approve contractual documentation, including documentation that defines requirements.

Property Accountability

We made 66 recommendations to improve property accountability. Forty-two of the 66 recommendations are closed and 24 remain open. For example, we recommended that the Director, Gulf Region Division Contracting Division, reconcile and resolve inventory discrepancies with the contractor. As a result, Gulf Region Division Internal Review evaluators compared December 2008 inventory reports and found a difference of 10 vehicles, or 1.5 percent, because different counting methods were used to create the reports.

Award Fee

We made eight recommendations addressing the award fee process. Two of the eight recommendations are closed and six remain open. For example, we recommended that the Commander Officer, Naval Facilities Engineering Command Atlantic, establish procedures to verify that award fee assessments made by the contracting officer and technical representatives are reconciled against each other and ensure that written statements matched the performance ratings. In response to the recommendation, the Global Contingency Construction Standard Operating Procedures Users Guide was revised to address the award fee process. Specifically, the Global Contingency Construction Standard Operating Procedures Users Guide requires the contracting officer to collect the award fee evaluation from the technical representatives, but allows the contracting officer to provide input.

Financial Management⁷

We made 49 recommendations addressing financial management. Eighteen of the 49 recommendations are closed and 31 remain open. For example, we recommended that the Director, Gulf Region Division Contracting Division, review all prior invoices and reconcile the services received and services billed with the contractor. To address this

⁷ Financial Management consists of three subcategories: Billing, Payments, and Potential Antideficiency Act Violations.

issue, all elements of the task order will be reviewed by the U.S. Army Corps of Engineers and the Army Audit Agency, including invoice reconciliation, as part of the closeout process.

What Needs To Be Done

The effectiveness of contractor support for expanded U.S. operations in Afghanistan could be compromised by the failure to extract and apply lessons learned from Iraq. As we surge into Afghanistan, it is critical that we review the shortfalls identified and develop a framework to achieve better contracting for contingency operations in Afghanistan and future contingencies. Based on our review of the reported deficiencies, we believe the following steps need to be taken to improve the contracting process in current and future contingency operations. These steps are not all-inclusive in a contingency contracting environment and should be considered in unison with Federal and DOD guidance and the contracting process flow chart (See page iii).

- **Contract Documentation**

Complete and detailed documentation is essential to all phases of the contracting process. The contracting officer should ensure that a complete and well-documented contracting file, to include pre-award consideration on requirements, acquisition strategy, pre-award pricing, the basic contract, and all the modifications or task orders, exists for the life of the contract. The contracting officer should ensure appropriate financial management occurs for the life of the contract to include the type and amount of funds being obligated to the contract.

- **Requirements**

Program personnel must ensure that clear, complete, well-defined requirements exist for the entire contract. When conditions do not allow for clearly defined requirements for the entire contract, the contracting officer should use a type of contract structure that allows well-defined requirements to be developed for segments of work, such as task orders or basic ordering agreements.

- **Acquisition Strategy**

Contracting officers must prepare an acquisition strategy that considers the contract type, a source selection strategy, a pricing strategy, and funding. When preparing the acquisition strategy, program personnel should document market research to assist in establishing a source selection strategy and must develop a detailed, specific solicitation.

- **Contract Type**

When determining whether the contract should be fixed price or a cost-type, the contracting officer should consider the procurement history and, if applicable, evaluate prior work to support the contract type decision. Contracts should be structured to allow for fixed price and cost-type line items when appropriate. Contract type is important to future surveillance considerations. The more cost-type work that is included, the more surveillance assets will be required.

- **Source Selection**

The contracting officer must have well-defined and measurable source selection criteria and well-documented selection decisions that appropriately discuss price and technical tradeoffs for competitive procurements. For negotiated procurements, prices must be properly supported and documented.

- **Contract Pricing**

The contracting officer should have robust pre-award pricing support. As a general rule, DCAA is used to provide pricing support for pre-award proposals for contract cost support and DCMA is used to provide technical support for labor hours, labor mix, and procurement quantities. To the extent available, DCAA and DCMA should be brought into the process early and used throughout the life of the contract. In addition, for cost-type contracts, DCAA should review the accounting and business system of the proposed contractors. Contractors must be able to account for and properly record costs. If DCAA and DCMA are not used, suitable pricing and technical expertise or both should be used. Furthermore, pricing and technical support decisions should be detailed and documented.

All aspects of the negotiation, specifically the price negotiation memorandum, should be documented in detail to allow an independent party to understand the conclusions negotiated. The contracting officer must have certified cost or pricing data for sole-source procurements unless an exception applies. If certified cost or pricing data are used in negotiation, the contracting officer should document that he or she relied on the data. If an exception applies, other cost or pricing data should be obtained to the extent necessary. Comparison of independent government cost estimates to proposed price should normally not be the primary or only basis for establishing price reasonableness. Independent government cost estimates, when used, should be detailed and well-documented as to the basis for the supporting documentation. Use of prior price history for other contracts should be closely scrutinized. Relying on prior prices without knowing how those prices were established or the scope of the other awards relative to the anticipated procurements does not provide an appropriate comparison. As an example, prior prices on a contract action for \$200,000 likely could not be relied on to establish price reasonableness for a newly proposed contract for \$3 million.

- **Oversight and Surveillance**

Both program and contracting personnel must ensure a well-documented surveillance approach is in place. QASPs and surveillance logs should be measurable and documented to show the quality and quantity of actual surveillance performed. Because of the magnitude of surveillance issues found in our audit work, a robust surveillance system is essential. Program and contracting personnel must ensure that sufficient contract oversight occurs and that oversight personnel are adequately trained.

When evaluating the amount of oversight needed for a contract, the following should be considered:

- contract type,
- products versus services,
- criticality of product and service, and
- number of locations.

For example, a cost-type service contract with contract performance at multiple locations will require a much more robust oversight staff. Contracts that allow for award fee should be well documented with measurable criteria, and award fee decisions must be well documented. Contract oversight personnel should perform realistic and measurable reviews and ratings of contractor performance. It is crucial that contractors do not perform inherently governmental functions such as oversight and surveillance, especially for cost-type contracts.

- **Acceptance and Payment**

The contracting officer should ensure that the Government is accepting the supplies and services being provided by the contractor and that acceptance and inspection are adequately documented. Additionally, the contracting officer should ensure that a documented process is in place for the review and approval of interim vouchers including requirements for detailed supporting documentation to be included with the payment voucher. DCAA should be included in the interim voucher review process whenever possible.

There is a critical shortage of qualified contract management personnel in theater and those who are there are stretched too thin. In particular, the process for designating and training CORs to check contractor performance in theater is broken. DOD should accelerate its plans to establish a contracting command in Afghanistan. The troop surge in Afghanistan demands that contracting oversight be conducted in country rather than from Iraq, which is currently the case.

Mr. TIERNEY. Thank you very much, Ms. Ugone.
Mr. Bowen.

STATEMENT OF STUART BOWEN, JR.

Mr. BOWEN. Good morning, Chairman Tierney, Ranking Member Flake, distinguished members. Thank you for inviting me again to appear before the committee to address the challenges of contracting in combat zones, and specifically to address the issue of “who are our subcontractors.”

Permit me to provide three premises that frame my remarks at the outset. First, the Iraq experience underscores the truism that contracting in a war zone is uniquely challenging and vulnerable to fraud, waste, and abuse. Second, fraud, waste, and abuse will metastasize unless a well-managed oversight regime is implemented that balances the principle of effective financial stewardship with the goal of mission accomplishment. Third, a weakly resourced contracting corps, such as we have seen in Iraq and Afghanistan, will vitiate oversight severely and, as you pointed out, Chairman Tierney, potentially undermine mission accomplishment.

Since we have been studying the problems arising from Iraq contracting for the last 6 years, we have issued 230 reports, chiefly looking at primes, because that is what the FAR tells us about. But we have gotten into some of the subcontracting issues, and, in those cases, we have seen that the primes frequently don’t know who their subcontractors are either. I think part of the reason that Chairman Towns sent his letter to Secretary Gates last November was to get at this issue, to find out what knowledge the Defense Department had about their primes, about the subcontractors, and, thus, this hearing.

Two paramount lessons learned arise from our reporting that I think still need to be addressed to grapple with this issue. One, as we pointed out 4 years ago in our contracting lessons learned report, the U.S. Government should develop and implement contingency Federal acquisition regulations, that are specifically shaped and defined for contingency operations.

Two, as part of an overall reform and a recognition that there is a lack of unity of command and, thus, a lack of unity of effort in Iraq and Afghanistan, a new institution should be established, a U.S. Office for Contingency Operations, that grasps contracting, personnel, IT, all the elements essential to success. And that new institution should be given responsibility.

Right now, we have a contingency contracting corps in GSA, but it is not really functioning. The Coordinator for Reconstruction and Stabilization at State has the personnel responsibilities—not really engaged in Iraq at all, very limited in Afghanistan. And DOD, meanwhile, is pushing forward with its significant stabilization entities, but they are not effectively integrated. That reform, that challenge, that problem stands before the Congress and the country to fix.

Finding out and understanding who our subcontractors are and who our contractors are in Iraq and Afghanistan should be studied through three lenses: policy, transparency, and accountability.

In Iraq, two policies shaped the overall contracting effort: the heavy use of contractors to begin with, unprecedented in the his-

tory of contingency operations, in 2008 reaching upwards of 190,000 contractors in-country, with the contracting corps simply not sufficient, not capable of keeping track of them. Thus, you get waste, the real issue in Iraq, and I think the real issue in Afghanistan. Severe waste ensued, billions of dollars wasted needlessly, because of poor quality assurance programs, which are intended to ensure there are quality control programs, which primes are supposed to implement to cover subcontractors. Didn't get done enough. And, as a result, this serious waste occurred.

Second, the movement toward using local contractors, understandably from a policy perspective to build capital, to improve employment. But, in Iraq, we don't know who those contractors are. We don't have a data base. It's difficult to track. And, thus, there certainly was waste and corruption that ensued.

On the transparency front, I think that if the Congress wants to know who our subcontractors are, amending the FAR is a good way to do it. Right now, the only way that the contracts that Chairman Towns requested from DOD will reveal who the subcontractors are is if the terms of the contract required it. However, if you so chose, you could amend the law to require a minimal disclosure of subcontracting. I think that's a step in the right direction toward transparency.

And on the accountability front, rebuilding the contracting corps is an essential element to ensuring not just the oversight of primes, but also the oversight of subcontractors.

So, in summary, I think there are four recommendations that we put forward for the committee and for the Congress to consider. First, implement the Contingency Federal Acquisition Regulation and develop the U.S. Office for Contingency Operations to manage these methods, this new way forward for protecting our national security interests abroad.

Second, reexamine the heavy use of contractors in contingencies and explore whether some inherently governmental functions are, in fact, being incorrectly outsourced.

Third, rebuild the contracting corps. It's ongoing at DOD, but I think it's a governmentwide issue. And, certainly, with respect to contingencies, when you have 190,000 contractors in-country, you have to have a contracting corps that is capable. We don't have it today.

And, finally, amend the FAR as you see fit to give you the transparency, the information you need and want about who our subcontractors are.

And, with that, Mr. Chairman and Members, I look forward to your questions. Thank you.

[The prepared statement of Mr. Bowen follows:]

Testimony of

Stuart W. Bowen, Jr.

Inspector General

Office of the Special Inspector General for Iraq Reconstruction

At a Hearing on

“Subcontracting in Combat Zones: Who Are Our Subcontractors?”

Before the

Subcommittee on National Security and Foreign Affairs

Committee on Oversight and Government Reform

House of Representatives

June 29, 2010

Chairman Tierney, Ranking Member Flake, and distinguished members of the subcommittee, thank you for inviting me to discuss the oversight of subcontractors in combat zones. This is a complex issue and one that deserves serious examination. I have been the Special Inspector General for Iraq Reconstruction (SIGIR) for more than six years and have traveled to Iraq 27 times. My statement will draw extensively on my personal observations as well as the specific work of my office.

In that spirit, Mr. Chairman, let me begin by observing that in a world where much of our stabilization and reconstruction effort is carried out by contractors, we must consider how we can keep subcontractors and those tiered below them from undermining national objectives as they attempt to carry out contracts. This is, of course, largely a matter of transparency and oversight — but it also requires hard thinking about the design of contracts before the operation starts.

Defense Department guidance now mandates that a detailed projection of contracting requirements be prepared as part of operational planning. Military and civilian planners must, however, also consider at the outset how the contracting that an operation pre-supposes might, in

fact, *undermine* national objectives, and how the downside of contracting and subcontracting can be controlled. Moreover, during the course of the operation, senior leadership, program officers, and acquisition personnel must understand the larger context of what the United States government is trying to achieve, and they must convey this as best they can to contractors. Government leaders must, in particular, remain alert to the fact that changing circumstances may require that contracting arrangements be re-evaluated and restructured. We need to be ready to act on what we learn.

Managers considering how to oversee contractors and subcontractors supporting U.S. operations and objectives in Iraq, Afghanistan, and other countries must balance the risks of operating in an unstable security environment, on the one hand, against the benefits of providing greater stewardship over taxpayer dollars, on the other. My testimony today discusses achieving that balance from three perspectives: policies, transparency, and accountability.

Before I address these specific issues, I want to make four overall points. First, the Iraq experience has shown that contracting in a hostile/combat environment is much more difficult and far more vulnerable to fraud and waste than is contracting in a benign environment. Second, the risks associated with contracting in an environment such as Iraq or Afghanistan can be mitigated through appropriate checks and balances, but those risks cannot be eliminated. Third, contracting and procurement practices have long been a focus of SIGIR's work; in July 2006, for example, we issued a lessons learned report aimed at improving those practices.¹ That report can be found at http://www.sigir.mil/files/lessonslearned/Lessons_Learned_July21.pdf, and I ask that it be incorporated into my testimony by reference. Fourth, SIGIR's past work has shown that contractor oversight problems affect all executive agencies operating in war zones.

To address these problems, SIGIR has made two key recommendations.

First, SIGIR has recommended that a working group led by the Department of Defense (DoD) explore the creation of an enhanced Contingency Federal Acquisition Regulation (Contingency FAR). The need for a Contingency FAR was reinforced during our discussions with the Commanding General of Multi-National Forces-Iraq (MNF-I) when he observed that there was a compelling need for a single, simplified, and uniform contracting process for use during contingency operations.

Second, SIGIR has proposed the creation of a new integrated office to manage stabilization and reconstruction operations, which would significantly enhance planning and execution. Developing policies and procedures for managing contractors in contingency operations is one of the issues that office would address (although it would not directly address actions taken in direct

¹ *Iraq Reconstruction: Lessons in Contracting and Procurement, Report Number 2, 7/2006.*

support of combat operations, such as the Host Nation Trucking contract addressed in the Subcommittee Majority Staff's recent report).²

POLICY CHOICES SET THE OVERALL FRAMEWORK FOR OVERSIGHT

U.S. policies for using contractors in war zones significantly affect the U.S. government's ability to accomplish oversight. Questions such as the extent to which contractors will be used, the types of services that will be performed, and the extent to which host- and third-country contractors will be used all affect the U.S. government's ability to provide oversight of contractors. The size and qualifications of the acquisition workforce available in a combat zone, and the ability of program managers to understand the contracting process and their role in it, are also important factors. Senior leaders must strike the proper balance on all of these questions, taking into account the need for proper stewardship of resources.

To illustrate these points, I want to focus on two policies implemented in Iraq. These policies, although designed to meet program goals and objectives, created a greater oversight risk for the U.S. government.

First, as a matter of policy, DoD relies heavily on contractors for services that were previously provided by troops — services such as site security and logistical support for U.S. installations. The civil reconstruction of Iraq has largely been accomplished by contractors. Our reporting on reconstruction contracts has demonstrated significant shortfalls in most aspects of contractor oversight: there are simply not enough qualified contracting and program personnel available to secure the government's interests even at the prime contractor level.

A second policy that increases oversight risk is specifying that local contractors receive priority consideration for contracts. The Iraqi First program, developed by DoD in 2006 to stimulate and expand Iraqi employment and skills, encouraged the use of Iraqi contractors and personnel and resulted in greater subcontracting. DoD reported that during fiscal year 2008 it awarded more than \$2.34 billion in contracts to Iraqi vendors, an increase of \$300 million over fiscal year 2007. As of March 2010, DoD reported about 4,400 contractors were participating in the program.

Contracting with host-country firms has several benefits: it creates jobs, stimulates the local economy, and supports counterinsurgency efforts. However, in Iraq and other countries where there are no reliable databases with information on contractors, the vetting process presents a very real and difficult problem, especially at the subcontractor level. Often, records on personnel and companies either do not exist or are very limited. Therefore, oversight risks increase because it is difficult to determine the reliability, integrity, and allegiance of companies and individuals. I believe there needs to be a thorough examination of the policy implications of using contractors, especially from the host country and from third countries.

² *Applying Iraq's Hard Lesson to the Reform of Stabilization and Reconstruction Operations, 2/2010.*

It should be noted that government activities sometimes work at cross-purposes for reasons that may be totally unrelated to the fact that some activities may be contracted. For example, the DoD's Commander's Emergency Response Program (CERP) and the Department of State/U.S. Agency for International Development's (USAID) Economic Support Fund programs in the Iraqi countryside often negated one another's effects; but this had little to do with the contracted elements and everything to do with the government's inability to achieve unity of effort.

TRANSPARENCY IN CONTRACTS CAN BE DIFFICULT TO ACHIEVE

The FAR provides contracting agencies with considerable flexibility in requiring prime contractors to identify subcontractors and their qualifications to perform on the contract. However, the need or desire for greater information on subcontractors must be balanced with the reality that the information may not be available in all cases and that such information comes at a cost. Moreover, the desire for more specificity in contracts to hold contractors accountable for their actions must be balanced against the reality that the government may have little practical recourse when faced with poor performance by a contractor in a combat zone.

SIGIR believes that the provision of more information on contractors and subcontractors would provide greater transparency in contracts and could give agencies the opportunity to determine the acceptability of subcontractors. However, even prime contractors may have difficulty identifying all of their subcontractors.

For example, in July 2007 SIGIR issued a report that discussed the difficulties in identifying subcontractors involved in Iraq reconstruction work.³ The study looked at USAID's Phase II design-build construction contract awarded to Bechtel. The contract was awarded for \$680 million on April 17, 2003, but was later modified and increased to approximately \$1.03 billion. The contract ended on February 28, 2006.

The Bechtel Phase II contract was geared toward the use of subcontractors according to its USAID-approved subcontracting plan, which stated that Bechtel would subcontract approximately 90% of the direct reconstruction costs. Bechtel awarded 66 subcontracts—64 fixed-price and 2 cost-plus fixed-fee. Of the 66 subcontractors, 11 further subcontracted to 102 lower-tier subcontractors. Thus, we were able to identify a total of 168 subcontractors. Bechtel officials also told us that there were probably other subcontractors that were not specifically identified. This lack of information creates oversight risks for the U.S. government.

The FAR also provides agencies considerable flexibility to incorporate requirements into contracts that "flow down" from prime contractors to their subcontractors. Greater specificity in contract requirements achieves a number of objectives such as putting subcontractors on notice of government requirements, providing contract managers with firm criteria to evaluate

³ *Review of Bechtel's Spending under Its Phase II Iraq Reconstruction Contract (SIGIR-07-009), 7/24/2007.*

contractor performance, and providing the government a sound basis to pursue adverse actions against contractors who do not perform to those requirements.

I believe a Contingency FAR would better position agencies to identify requirements that should be incorporated in contracts. To help ensure that contractors and subcontractors do not undermine national policy, the Contingency FAR could require appropriate terms along these lines in contracts. I also believe there is a necessary balance that needs to be struck between the need and desire for greater transparency about subcontractors with the lack of reliable information about them, in some cases.

ACCOUNTABILITY CANNOT ALWAYS BE ENSURED

Government agencies need to hold contractors accountable for the satisfactory performance of their contracts and for their actions in the performance of that work. However, again, there is a need to balance carefully risks against benefits. There are instances where the ability to perform oversight is reduced due to security concerns or the nature of the program being implemented. Those factors need to be considered in the government's plans, and they were not considered, or were inadequately considered, in the case of Iraq's reconstruction.

SIGIR's work has identified a number of factors that have affected government oversight and accountability with respect to reconstruction efforts in Iraq. One of our 2008 reports summarizes the key issues.⁴ For example, we state that staffing issues—not having enough people with the right skills and the rapid turnover of personnel—reduced the U.S. government's ability to effectively manage contracts and programs and contributed to a perception that government officials were inexperienced. We cite a specific contract where the contractor estimated it was overseen by 17 different contracting officers between March 2004 and April 2006, the two years of the contract.

With regard to security concerns, the same report states that the U.S. government did not fully anticipate or plan for working in the unstable security environment that confronted U.S. managers.

Programs involving host-country companies and direct payments to local nationals also can present accountability challenges. While evidence of problems with such programs is not widespread, SIGIR and the USAID Inspector General have identified several instances of problems in this area.

In an audit currently being conducted by SIGIR, preliminary findings show accountability problems with the MNF-I Sons of Iraq program. The Sons of Iraq were local nongovernmental security forces that worked with the MNF-I and, in some cases, the Iraqi government, to protect their local communities.

⁴ *Key Recurring Management Issues Identified in Audits of Iraq Reconstruction Efforts*, SIGIR 08-020, 7/27/2008.

SIGIR's preliminary work has identified accountability problems. Some of the problems include ghost employees and poor controls over the distribution of cash payments to local leaders who were responsible for paying their men. No rosters or receipts were provided to the U.S. military's fund managers.

The vulnerability of these types of programs was demonstrated when Captain Michael Dung Nguyen pled guilty in December 2009 to the crimes of theft of government property and structuring financial transactions. Nguyen admitted that while deployed to Iraq, he stole approximately \$690,000 in currency from the CERP program, which funded both the Sons of Iraq program and local relief and reconstruction. Nguyen gained access to the currency in his capacity as a project purchasing officer.

In March 2008, the USAID Inspector General reported that funds from its Community Stabilization Program (CSP) were "being extorted by at least one known militia leader," with adverse consequences for U.S. military personnel.⁵ USAID's CSP program is a \$544 million program intended to complement military security efforts and civilian local government development with economic and social stabilization efforts such as community cleanup campaigns and trash collection, rehabilitation of roads and schools, and larger-scale engineering projects to improve water and sewage services.

In this instance, USAID received a letter from a USAID Provincial Reconstruction Team representative embedded with the U.S. military stating that there were "compelling indications" that funds from CSP projects in his area were being extorted. In response, the USAID Inspector General gathered detailed evidence concerning the extortion of funds from CSP projects and their possible diversion to militia activities.

The major factors contributing to the program's vulnerability to fraud were the lack of regular, independent site monitoring and the inadequate vetting of CSP contractors. Estimates of potential fraud in this case ranged from \$6.7 to \$8.4 million. Evidence in USAID's report suggested that similar problems may exist elsewhere in Iraq.

In summary, I have presented a need to reach a balance between achieving program objectives and fulfilling the responsibility to safeguard taxpayer funds that arises when using contractors in a combat zone. To address concerns raised about current practices, I believe a Contingency FAR would be useful in the short term to help agencies identify requirements that should be incorporated in contracts. I also believe there is a longer-term need for a thorough examination of the policy implications of using contractors, especially local or third-country firms and

⁵ *Audit of USAID/Iraq's Community Stabilization Program*, USAID-E-267-08-001, 3/18/2008.

employees. Lastly, and most importantly, I believe that a new integrated office to manage stabilization and reconstruction operations could significantly enhance the U.S. government's ability to plan and execute these operations, including the use and oversight of contractors.

That concludes my testimony. Thank you for your attention, and I am happy to answer any questions you may have.



Special Inspector General
for Iraq Reconstruction

IRAQ RECONSTRUCTION

LESSONS IN CONTRACTING AND PROCUREMENT

2

[July 2006]

Lessons Learned and Recommendations

LESSONS IN CONTRACTING FROM IRAQ RECONSTRUCTION

KEY LESSONS LEARNED: STRATEGY AND PLANNING

- **Include contracting and procurement personnel in all planning stages for post-conflict reconstruction operations.** The pre-deployment interagency working groups for Iraq reconstruction did not adequately include contracting and procurement personnel.
- **Clearly define, properly allocate, and effectively communicate essential contracting and procurement roles and responsibilities to all participating agencies.** The failure to define contracting and procurement roles and responsibilities at the outset of the Iraq endeavor resulted in a subsequently fragmented system, thus foreclosing opportunities for collaboration and coordination on contracting and procurement strategies.
- **Emphasize contracting methods that support smaller projects in the early phases of a contingency reconstruction effort.** The Commander's Emergency Response Program (CERP) and similar initiatives in Iraq proved the value of relatively small, rapidly executable projects that meet immediate local needs and thereby have the salutary effect of enhancing relations with local communities.
- **Generally avoid using sole-source and limited-competition contracting actions.** These exceptional contracting actions should be used as necessary, but the emphasis must always be on full transparency in contracting and procurement. The use of sole-source and limited competition contracting in Iraq should have virtually ceased after hostilities ended (and previously

sole-sourced limited competition contracts should have been promptly re-bid).

KEY LESSONS LEARNED: POLICIES AND PROCESS

- **Establish a single set of simple contracting regulations and procedures that provide uniform direction to all contracting personnel in contingency environments.** The contracting process in Iraq reconstruction suffered from the variety of regulations applied by diverse agencies, which caused inconsistencies and inefficiencies that inhibited management and oversight. CPA contracting developed CPA Memorandum 4 for contracts funded by the Development Fund for Iraq (DFI). Other agencies used the Federal Acquisition Regulation²⁷⁴ (FAR) and its supplements. Certain agencies used departmental regulations to modify their application of the FAR for contracting in Iraq. USAID used its own statutory authority for contingency contracting (within the FAR).
- **Develop deployable contracting and procurement systems before mobilizing for post-conflict efforts and test them to ensure that they can be effectively implemented in contingency situations.** After reconstruction operations began in Iraq, contracting entities developed *ad hoc* operating systems and procedures for monitoring contracts and maintaining contracting and procurement histories; this limited contracting efficiency and led to inconsistent documentation of contracting actions.²⁷⁵
- **Designate a single unified contracting entity to coordinate all contracting activity in theater.** A unified contract review and approval point would help secure the maintenance of accurate

information on all contracts, thereby enhancing management and oversight.

- **Ensure sufficient data collection and integration before developing contract or task order requirements.** The lack of good requirements data slowed progress early in the reconstruction program.
- **Avoid using expensive design-build contracts to execute small scale projects.** While the use of large construction consortia may be appropriate for very extensive projects, most projects in Iraq were smaller and could have been executed through fixed-price direct contracting.
- **Use operational assessment teams and audit teams to evaluate and provide suggested improvements to post-conflict reconstruction contracting processes and systems.** Oversight entities should play a consultative role (along with their evaluative role), because the rapid pace of reconstruction contingency programs cannot easily accommodate the recommendations of long-term assessments or audits.

RECOMMENDATIONS

RECOMMENDATION 1:

Explore the creation of an enhanced Contingency FAR (CFAR).

When the SIGIR met with the Commanding General of the Multi-National Forces-Iraq and told him of the contracting Lessons Learned Initiative, he observed that there was a compelling need for a single, simplified, and uniform contracting process for use during contingency operations. Although the existing FAR provides avenues for rapid contracting activity, the Iraq reconstruction experience suggests that the FAR lacks ease of use. Moreover, promoting greater uniformity through a single interagency CFAR could improve contracting and procurement practices in multi-agency contingency operations. An interagency working group led by DoD should explore developing a single set of simple and accessible contracting procedures for universal use in post-conflict reconstruction situations. Congress should take appropriate legislative action to implement the CFAR, once it is developed by the interagency working group.

RECOMMENDATION 2:

Pursue the institutionalization of special contracting programs.

In Iraq, smaller scale contracting programs, like the Commander's Emergency Response Program (CERP) and the Commanders Humanitarian Relief and Reconstruction Program (CHRRP), achieved great success. Commanders used these programs to accomplish projects that immediately met the needs of a post-war population in distress. Given the positive performance of CERP and CHRRP in Iraq, the Congress should legislatively institutionalize such programs for easy implementation in future contingency operations.

RECOMMENDATION 3:

Include contracting staff at all phases of planning for contingency operations. Contracting plays a central role in the execution of contingency operations, and thus it must be part of the pre-deployment planning process. Whether for stabilization or reconstruction operations, contracting officials help provide an accurate picture of the resources necessary to carry out the mission.

RECOMMENDATION 4:

Create a deployable reserve corps of contracting personnel who are trained to execute rapid relief and reconstruction contracting during contingency operations. This contracting reserve corps could be coordinated by the DoS Office of the Coordinator for Reconstruction and Stabilization as part of its civilian ready reserve corps. An existing contingent of contracting professionals, trained in the use of the CFAR and other aspects of contingency contracting, could maximize contracting efficiency in a contingency environment.

RECOMMENDATION 5:

Develop and implement information systems for managing contracting and procurement in contingency operations. The interagency working group that explores the CFAR should also review current contracting and procurement information systems and develop guidelines and processes for enhancing these existing systems or, if necessary, creating new ones to meet unique contingency operational needs.

RECOMMENDATION 6:

Pre-compete and pre-qualify a diverse pool of contractors with expertise in specialized reconstruction areas. These contractors should receive initial reconstruction contracts during the start-up phase of a post-conflict reconstruction event.

Mr. TIERNEY. Thank you very much.
Mr. Fontaine.

STATEMENT OF RICHARD FONTAINE

Mr. FONTAINE. Mr. Chairman, Ranking Member Flake, and members of the subcommittee, thank you very much for granting me the opportunity to testify today, and I'm honored to take part in this hearing.

My testimony today is based on a report entitled, "Contracting in Conflicts: The Path to Reform," released by the Center for a New American Security earlier this month.

In this report, my CNAS colleague John Nagl and I discuss possible solutions to many of the problems that have plagued the expeditionary contracting process. The entire report is available for download on the CNAS Web site.

Our report proceeds from the realization that, when our Nation goes to war, contractors go with it. The 2001 invasion of Afghanistan, together with the March 2003 invasion of Iraq, saw an increase in the size and scope of contracted support on the battlefield that is unprecedented in U.S. history.

Yet the system within which this contracting takes place has not caught up with the new reality. As America's dependence on expeditionary contractors in conflicts or stabilization or reconstruction efforts is likely to continue, the need for reform is pressing.

My written testimony details the many recommendations we have made to move down the path of reform. I would like to highlight just a few that we believe are particularly important.

First, expand the work force. As the volume and scale of contracts has exploded in recent years, the number of government workers qualified to oversee them has remained stable or even fallen. It's critical to grow the work force, both in Washington and overseas. Only by expanding the quantity and quality of the government's human infrastructure will the majority of other necessary reforms be possible.

Second, increase transparency and scrutiny. The post-invasion reconstruction environments in Iraq and Afghanistan represent the largest-ever markets for private contracting firms, which has led to opacity and inconsistent data. DOD, State, and USAID should establish uniform standards across agencies and contract type for consistency and consolidation of data. They should improve the transparency of subcontractors and establish a permanent Inspector General and include clauses in contracts that require firms to enforce rules governing behavior that impacts the overall U.S. mission.

Third, establish a coordination mechanism within the executive branch. The approach to contingency contracting remains fragmented and ad hoc. We propose establishing a formal but relatively simple interagency coordination mechanism in which State, DOD, and USAID would designate one individual and bureau to focus on contingency contracting and then ensure that these individuals meet on a regular basis with OMB and the NSC in order to harmonize policies and standards.

Fourth, deal better with the military implications. The unprecedented number of private contractors on the battlefield and the

vast scope of their activities pose special dilemmas in command coordination and discipline for the U.S. military. The Department of Defense needs to give much more strategic thought to the role that private contractors play. They should consult with contractors during the military's mission planning process, include the expected roles of contractors in operational plans and predeployment training, and incorporate contracting issues in professional military education courses.

Fifth, clarify laws and regulations. The legal framework governing expeditionary contractors in wartime is complicated, it features overlapping jurisdictions, and it's somewhat ambiguous. The Department of Defense, together with Department of Justice, should clarify how the various laws that potentially apply to contractors in-theater interact to create obligations for, or jurisdiction over, private contractors. We believe that Congress should amend the Military Extraterritorial Jurisdiction Act to unambiguously cover all expeditionary contractors and streamline acquisition regulations that govern U.S. service contracting in hostile environments.

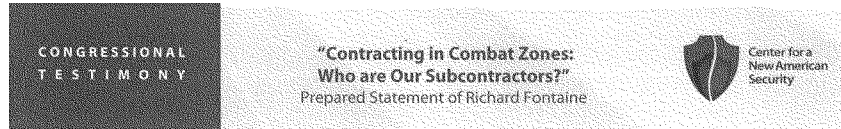
Sixth, and finally, resolve the inherently governmental conundrum. U.S. law has long aimed to protect the core functions of government by prohibiting anyone other than Federal employees from performing such tasks, yet today there is little consensus about what those functions are. The government should define as "inherently governmental" those areas in which there is some consensus and move toward a core-competencies approach in areas where there is not. Such an approach would focus on the functions the U.S. Government should possess and maintain, rather than debate internally over which are inherently governmental.

To close, I would note that the U.S. Government and its contract employees have been thrust together as partners in a shared endeavor, the scale, cost, and duration of which have taken nearly all observers by surprise. The reality is that America's reliance on private contractors is not likely to fade, and it's time for the United States to adapt.

As a result, the government, the military, the contracting community, and, ultimately, the American people will benefit from sweeping reform of the contracting system, reform that ensures the private sector's role in American engagements aligns firmly with our Nation's interests and values.

Thank you very much, and I look forward to your questions.

[The prepared statement of Mr. Fontaine follows:]



June 29, 2010

**Testimony before the House Committee on Oversight and Government Reform
Subcommittee on National Security and Foreign Affairs**

Prepared Statement of Richard Fontaine

Senior Fellow, Center for a New American Security

Mr. Chairman and members of the subcommittee, thank you very much for granting me the opportunity to testify today. I am honored to take part in this session.

It is, I believe, particularly appropriate that this subcommittee address the issues surrounding American contractors in conflict zones. As my testimony will indicate, contracting issues have for too long been consigned to those who handle contracting per se – whether in the executive branch, on Capitol Hill, or elsewhere – rather than by those who manage the foreign policy and military operations that drive it. Hearings by this subcommittee, which focuses not just on government contracting but also on broad areas of American foreign policy, represent a step forward.

My testimony today is based on a report entitled “Contracting in Conflicts: The Path to Reform,” released by the Center for a New American Security earlier this month. In this report, my CNAS colleague John Nagl and I discuss possible solutions to many of the problems that have plagued the expeditionary contracting process, particularly during our wars in Iraq and Afghanistan. The entire report is available for download on the CNAS website.

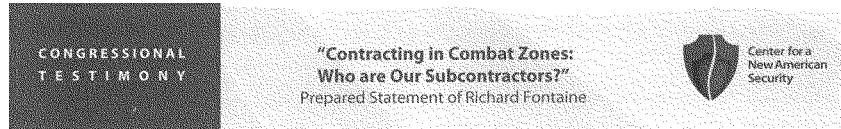
Introduction

Our report proceeds from the realization that when our nation goes to war, contractors go with it. In both Iraq and Afghanistan today, there are more private contractors than U.S. troops on the ground.¹ This state of affairs is likely to endure. Now, and for the foreseeable future, the United States will be unable to engage in conflicts or reconstruction and stabilization operations of any significant size without private contractors. Changes in business practices, the provision of government services and the character of modern conflict, together with limits on the size of the American military, diplomatic and development corps, are driving the size and scope of expeditionary contracting to unprecedented proportions. Absent a significant reduction in America's international commitments and perceived global interests, the employment of private contractors in future American conflicts is here to stay.

Yet the system within which this contracting takes place has not caught up with the new reality. Tens of billions of taxpayer dollars committed to contracts in Iraq and Afghanistan have been implemented with little oversight. Contracting companies themselves crave clearer guidelines. The roles of contractors remain incompletely integrated into the conduct of American operations. The legal framework within which contractors work remains cloudy. And there have been serious allegations of harm to both local civilians and U.S. personnel as a result of contractor malfeasance.

To adapt, the U.S. government must embark on a path of ambitious reform that will require new laws

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and regulations; an expansion of the government's contracting workforce; a coordination mechanism within the executive branch; greater scrutiny, more transparency and clearer standards; a strategic view of the roles of contractors in American operations; and a change in culture within the government.

As an initial step, the U.S. government must understand and then rethink how contractors are employed in contingency environments. The vast majority of contractors work for the Department of Defense (DOD), the State Department and the U.S. Agency for International Development (USAID), and they perform widely varied tasks, including in such areas as logistics, transport, linguistic support, security, weapons systems maintenance, construction, intelligence analysis, local security force training and agricultural technical assistance.

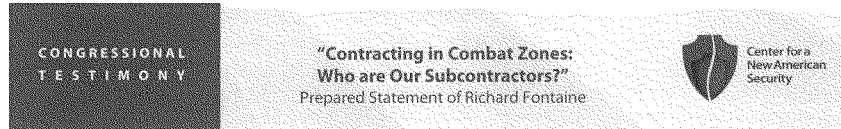
This testimony looks beyond security providers, which have received the bulk of attention from Congress and the media, to address the great majority of service contractors that handle duties other than security. While less controversial, service contracts yield their own set of problems – including insufficient oversight and management, inadequate integration into operational planning and ambiguous legal status. The United States must establish new policies and rules of the road – not only for armed security contractors but also for the 85 to 90 percent of contractors that carry out a wide array of other tasks.

This testimony outlines a range of issues raised by expeditionary contracting and offers recommendations for how the United States – both the government and the community of private contracting firms – can strike a balance among the greater efficiency and effectiveness necessary to support American missions overseas; the versatility and flexibility required in a rapidly evolving strategic environment; and the proper oversight, accountability and transparency expected by American taxpayers. Since America's dependence on contractors is likely to continue, the need for reform is pressing. The time to act is now.

ES&R Contracting

We have proposed a new term, Expeditionary Stabilization and Reconstruction (ES&R) contractors, to capture the universe of companies and industries working in support of expeditionary operations (both during and after combat operations) by providing logistical and many other kinds of support. Stability operations contracting represents the transitional work that contracting industries carry out in order to establish and maintain stability in all or part of a nation-state, usually in support of military operations. Reconstruction contracting represents the work of private firms in building and rebuilding physical infrastructure as well as political, social and economic infrastructure – in some cases for years after the end of hostilities.

American reliance on such contractors has never been greater. The post-invasion reconstruction environments in both countries represent the largest-ever markets for private firms providing ES&R services. By 2007, the Congressional Budget Office estimated that at least 190,000 contractors were



working in the Iraqi theater on U.S.-funded contracts in support of the war effort.² Today there are more contractors in Iraq and Afghanistan - 100,000 and 107,000, respectively - than American troops.³ Between 2003 and 2007, U.S. agencies awarded some \$85 billion in contracts for services, predominantly for contracts in Iraq.⁴ The Department of Defense alone spent upward of \$30 billion in FY 2007 and the first half of FY 2008 on contractors in both theaters, in addition to significant sums spent on contractors by the State Department (\$1.9 billion) and USAID (\$1.7 billion).⁵ Through March 2010 Congress had appropriated a staggering \$53 billion for reconstruction in Iraq and \$51 billion for reconstruction in Afghanistan, and President Obama has since requested an additional \$20 billion to fund reconstruction in Afghanistan.⁶

Many factors have contributed to America's unprecedented dependence on ES&R contracting. The global rise in outsourcing, changes in the nature of warfare, the shift to an all-volunteer force, the statutory limit on the overall size of U.S. military forces, the decline in USAID personnel numbers, a desire to reduce government costs during peacetime and the probable character of future U.S. engagements are trends unlikely to change significantly in the foreseeable future.

Yet while the government's reliance on contractors has increased, the size of the government workforce dedicated to overseeing those contracts has diminished. At DOD, USAID and other government agencies, individual contracting officers (COs) have overseen a steadily increasing volume of contracts while the number of contracting officers and contracting officer representatives (individuals appointed by the contracting officer to monitor the day-to-day administration of a contract, abbreviated as CORs) has held constant or even declined.

Today, the U.S. military can fight nothing but the most limited engagements without the extensive use of contractors, and the State Department and USAID will continue to rely on contractors to carry out a great deal of reconstruction work. Since it is unlikely that the (statutorily limited) U.S. force structure will increase dramatically in the years ahead, and it is likely that American commitments overseas will remain great or even increase, U.S. reliance on private ES&R contractors is here to stay. But accepting this reality makes reform imperative.

The U.S. government's increased dependence on contractors has provoked a number of concerns, investigations and calls for reform. Five issues merit particular attention:

- Fraud, waste and abuse
- Cost
- Military implications
- Foreign policy implications
- Legal and regulatory implications

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Prepared Statement of Richard Fontaine**Fraud, Waste and Abuse**

One area of particular concern among public officials and concerned citizens has been the degree of fraud, waste and abuse linked to reconstruction operations and contractor-provided services in Iraq and Afghanistan. The combined \$104 billion Congress has appropriated thus far for reconstruction in Iraq and Afghanistan (which excludes an additional \$20 billion Afghan reconstruction request), represents an extremely large, complex, and swiftly changing set of contracted activities. The great amounts of money disbursed, the speed with which the government demanded the reconstruction projects move forward and the lack of oversight – particularly in the early stages of reconstruction efforts in each country – has invited a significant degree of waste and corruption.

Cost

One of the fiercest debates over the role of private contractors in contingency operations concerns the issue of cost. Are contractors less or more expensive than using federal employees? The answer is much more complicated than it would appear at first glance and remains highly disputed. Most experts agree that contracting out logistics and construction activities tends to result in significant cost savings to the government, while more skilled labor – and private security functions in particular – tends toward parity with, or even exceeds, the cost of using federal employees. Hiring unskilled locals or third-country nationals can save the taxpayer substantial costs. As the required skills increase, however, the picture changes. Per-day salary for an American contractor, for instance, can easily exceed the per-day salary for a member of the military carrying out the same duty.

Among military personnel, pay is just one element of total compensation. The other elements – which constitute a significant portion of the compensation package – include retirement pay, services at military installations (e.g., housing and food) and health care, which may continue for life. CBO has estimated that, in calculating wartime costs alone, the Army could fulfill logistics functions (under the LOGCAP contract) for roughly the same cost as private contractors. At the same time, it estimated that, over a 20-year period (in both wartime and peacetime), obtaining logistics support from a private contractor would cost approximately \$41 billion, while obtaining the same services from Army units would cost around \$78 billion, nearly double the cost of the contracted services.⁷

The government has had, however, extraordinary difficulties in making comprehensive cost comparisons between government workers and private contractors carrying out the same functions. For example, the U.S. Comptroller General recently initiated a review of costs to DOD and the State Department of using private security contractors versus using federal employees for the same functions. As a March 2010 report of the Government Accountability Office (GAO) indicates, the Pentagon was unable to provide the information necessary for GAO to make such a comparison; it lacked information about the number of military personnel that would be needed to meet contract requirements or the cost of training personnel to carry out security functions. This occurred nearly five years after GAO issued a report calling on DOD to improve its transparency and data collection of active duty compensation.⁸

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The clearest benefits of using contractors tend to center more on readiness issues such as flexibility and speed of deployment and less on cost savings. As CBO has pointed out, "Because contractors need not make long-term commitments to their employees, they are in a better position to 'surge' to meet a short-term demand for workers and then rapidly downsize later."⁹

Military Implications

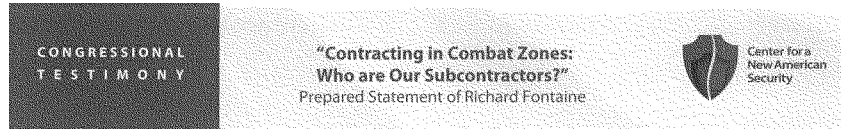
The unprecedented numbers of private contractors on the battlefield and the vast scope of their activities pose new challenges for the U.S. military. Despite efforts to align the conduct of contractors with that of military personnel, these relationships remain poorly defined. Incorporating the role of contractors in operational planning, predeployment training, and wargames remains ad hoc at best, and the presence of large numbers of contractors poses new challenges for command and control and discipline in theater. Today and in the future, properly marshalling the collective activities of private contractors will be critical to a commander's ability to accomplish his mission. This will require knowing the basics: how many contractors are in a particular battlespace, who and where they are, and what they are doing; how their responsibilities mesh with the authorities and responsibilities of American government personnel; and how operational plans incorporate contractors into the array of forces in play.

Foreign Policy Implications

How America deals with ES&R contractors carries broad foreign policy implications. This is true most obviously in the wars in which the United States is engaged. The testimony of military personnel and contractors alike suggests that local populations draw little or no distinction between American troops and the contractors they employ; an act committed by one can have the same effect on local or national opinion as an act carried out by the other. In the midst of two counterinsurgency campaigns, contractor conduct directly affects U.S. authority and legitimacy on the ground in Afghanistan and Iraq. In an effort premised on a strategy of "clear, hold and build," and in which much of the "build" mission will be executed by contractors, each of their actions impacts the effectiveness of American policies and information operations on the ground.

The great reliance on contractors in wartime raises foreign policy questions that go well beyond the domain of DOD. As the number of contract personnel increases, for instance, so too does the reliance on host-nation and third-country nationals. In one example, the U.S. government has requested that a contracting firm deploy into Afghanistan some 5,000 support contractors as soon as possible. The vast majority of these will be Indian nationals – irrespective of Pakistan's acute sensitivity to the perception of Indian encroachment in Afghanistan. There appears to be insufficient deliberation within the State Department about the foreign policy implications of contracting decisions made at the corporate level, both on State/USAID funded contracts and on DOD contracts.

Finally, and at perhaps the most overarching level, the role of private contractors may imply changes in the rules-based international society that the United States has endeavored mightily to construct and protect since 1945. Through legal precedents and norms of behavior established in the course of current wars, U.S. employment of contractors could shape the way that current and rising powers



conduct future wars. Washington has long been in the norm-setting and norm-enforcing business, and as a result it should expect that many others will follow America's lead.

Legal Implications

The legal framework governing ES&R contractors in wartime is complicated, features overlapping jurisdictions and is somewhat ambiguous. Contractors working for the United States can be held accountable for crimes committed overseas under at least two domestic American laws, the Military Extra-Territorial Jurisdiction Act (MEJA) and the Uniform Code of Military Justice (UCMJ).

Each has potential drawbacks. Serious constitutional questions surround the concept of trying civilian contractors by courts-martial under the UCMJ, questions that may eventually require answers from the U.S. Supreme Court.¹⁰ MEJA, on the other hand, presents a constitutionally solid basis for trying contractors but the scope of its jurisdiction is ambiguous and the practical difficulties associated with its application are significant.

Further complicating the legal picture, ES&R contractors may also be subject to foreign and international law, including the Geneva Conventions. The legal status of contractors varies by country, depending on the jurisdiction and any agreements in place between the United States and the host government. In sum, the status of contractors does not fall neatly into any one legal category. Thus U.S. actions, particularly in the legal arena, will establish precedents that will likely be cited by other countries and the international community as a whole as they employ their own contractors in similar situations.

The "Inherently Governmental" Conundrum

U.S. law has long aimed to protect the core functions of government by prohibiting anyone other than federal employees from performing "inherently governmental" tasks. Today, while there appears to be a rough consensus that there are some functions so intrinsic to the nature of American government that they should never be outsourced, there is little or no consensus about precisely what those functions are. The Office of Management and Budget released a draft policy letter on 31 March 2010 that aims to clarify "when work performed for the Federal government must be carried out, in whole, or in part, by Federal employees," and to have the U.S. government speak with one voice on the issue. The letter adopts the definition contained in the 1998 FAIR Act: an inherently governmental function is one that is "so intimately related to the public interest as to require performance by federal government employees."¹¹ While the letter provides examples of such activities, the draft guidance does not comment directly on some of the most contentious functions that have been contracted out, including the provision of security services, interrogation of enemy combatants and coordination of federal contractors.¹²

We believe that a better alternative is to focus on a "core competencies" approach. While Congress should deem inherently governmental any acts it can agree should never be outsourced under any circumstances, a core competencies approach would apply to all of those activities that do not fall

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under that rubric. It would focus on those functions the government should develop, maintain and enforce, rather than trying to enumerate a list of specific activities for which it is impermissible, under law and in any circumstance, to ever contract out.¹³ By eschewing contracting in specific areas as a matter of policy, the federal government would leave the option legally open to afford itself the flexibility to employ contractors in times of crisis or other extreme circumstances. Moreover, the core competencies approach would give commanders and others in the field the access to surge capacity and swiftness often necessary in an unpredictable contingency environment, while moving the U.S. government away from dependence on certain forms of contractors as a more general principle. It would also hold the promise of cutting through continued debates about what does or does not constitute an “inherently governmental” activity and instead concentrate on what the government should be doing and how it will ensure its competency to do so.

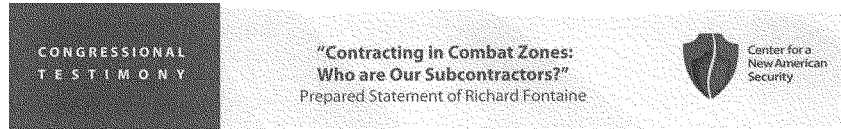
The Path to Reform

If the United States is facing an era of persistent engagement, it is also facing an era of persistent contractors. It is time for a new, strategic approach to the role played by ES&R contractors in conflicts, one that seeks to build upon past disparate attempts to reform unique elements of the contracting process. It is past time to rationalize, modernize and improve the system of contingency contracting. The Department of Defense, the Department of State, the U.S. Agency for International Development and their bureaus and offices must continue to seek reform in all phases of the contracting process: policy, planning, formation and management.

Improve U.S. Government Management of ES&R Contracting

Coordination is key to everything the United States seeks to achieve via ES&R contracting. Despite the years – and tens of billions of dollars – spent on ES&R contracting since 2001, the approach to contingency contracting remains fragmented and ad hoc. Insufficient interagency coordination before and during operations has been combined with an unprecedented degree of dependence by the agencies on contracted support. The result too often has been inefficiency, lack of transparency and insufficient unity of effort. Yet the problem goes beyond this: even expert contract managers (and, ultimately, contractors themselves) will be unable to adequately contribute to the overall mission if they receive incomplete, vague or contradictory instructions from policymakers and program officers. Policy must drive contracting, not the other way around.

The Department of Defense has taken steps to remedy poor coordination within DOD¹⁴ but the State Department and USAID appear to have made fewer improvements in their own internal systems. In addition, interagency coordination has tended to be informal and incomplete; disjunctions between policymakers and contract managers have emerged. (The one exception is a Memorandum of Understanding agreed upon by the three agencies to manage private security contractors.) As a result, it is imperative to improve coordination among policymakers, program officers and federal contracting personnel, and also among the agencies. The best course is to increase the contracting capacity at DOD, State and USAID and establish a formal (but relatively simple) interagency coordination mechanism.



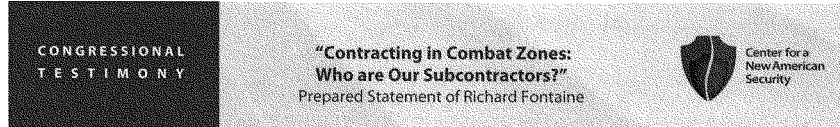
This effort should include expanding the current DOD Office of Program Support, which is located in the Office of the Undersecretary of Defense for Acquisition, Technology and Logistics. This expanded office, which would be renamed the Office of Contingency Contracting (OCC), should be led by a Senate-confirmed Assistant Secretary of Defense for Contingency Contracting. It should be the unambiguous Department locus for planning, funding, staffing and managing DOD's ES&R and private security contracting.

Similarly, the State Department should expand its Office of Logistics Management into a new Bureau of Contingency Contracting located under the Undersecretary for Management. The bureau should be led by a Senate-confirmed Assistant Secretary (the current office is directed by a Deputy Assistant Secretary). USAID should either direct that its Bureau of Democracy, Conflict and Humanitarian Assistance develop a specific expertise in ES&R contracting (including adding contract specialist personnel to the bureau) and provide guidance to USAID regional bureaus as they manage their own contracts or it should establish a separate contracting bureau headed by an Assistant Administrator-level official.

The objectives in making these changes are to expand the capacity within the agencies to handle ES&R contracting, to ensure that the offices are directed by officials whose rank is commensurate with the great importance of such contracting and to equalize within the agencies the ranks of responsible officials in order to harmonize the coordination mechanism described below.

As part of this effort, and to establish quickly a cadre of well-trained contract professionals, the three offices should recruit not only government civilians, active duty military and other direct hires, but should also seek to modify the laws governing civil service retirements in order to induce former federal contracting professionals to return to service without losing their pensions. This would permit the government to quickly hire retired federal contract managers on a temporary basis when needed. In addition, such a step would allow retirees to enlist in the contingency contracting reserve corps (described below) and deploy for temporary duty – thus providing to the government a potentially substantial pool of skilled personnel. The directors of the offices described above should encourage their employees to accept temporary detailing to the corresponding offices in the other two agencies and to contracting positions in theaters abroad in order to broaden their experience and expertise.

We propose a mechanism by which the three officials named above would take responsibility for coordinating contingency contracting in future operations. They should meet on a regular basis to develop general guidance for contract managers (including translating policy and mission objectives into specific guidance for contracting personnel), propose any needed changes to the FAR (or to other statutes, regulations and procedures), ensure understanding across agencies, coordinate contracting processes and plans and identify problems that can be resolved or referred to policymakers. This basic structure should include a representative from the Office of Management and Budget (from either its national security budget section or its Office of Federal Procurement Policy) and should be chaired by a new National Security Council Senior Director for Reconstruction and Stabilization Operations (for whom handling contracting issues would comprise just one of several responsibilities). In addition, to



preserve institutional knowledge and enhance the stability of the three expanded offices, the agencies should consider nominating career officers to head them or, at a minimum, direct that each political appointee filling one of the three positions have support from a professional Deputy Assistant Secretary (or Deputy Assistant Administrator).

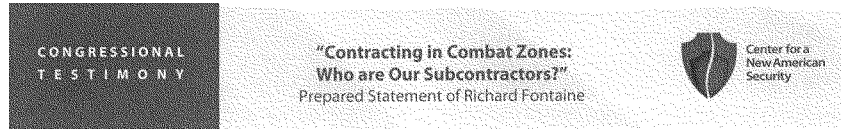
Replacing an ad hoc process with this more formal mechanism would help ensure that the government possesses the ability to articulate and carry out synchronized, efficient and effective strategies to support contingency operations. Before the government initiates a contingency operation, the officials named above and their staffs should coordinate with combatant commands, chiefs of mission, contracting firms and others as appropriate in order to inform operational plans and develop contracting-specific plans. They should also support policymakers in coordinating efforts with foreign governments, non-governmental organizations and international organizations.

Rebuild, Expand and Improve the Ranks of Contracting Personnel

Given the explosion in the number of contracts in recent years, and the degree to which American operations have become dependent on outside contractors, growing the government contract workforce has become the necessary but not sufficient condition for fixing the problems that continue to plague the ES&R contracting process. The departments also must actively work to improve the skills and elevate the rank of personnel involved in contract management and oversight. There is a dire need for increased numbers of other government personnel involved in the contracting process, including contracting officer representatives, auditors and investigators. Reforming the ES&R contracting process also requires that government personnel not directly tasked with overseeing contracts – including commanders, other military personnel, diplomats and policymakers – are educated in basic contracting issues and procedures.

The Secretary of Defense should:

- Continue to significantly increase the number of qualified contract personnel responsible for ES&R contracting.¹⁵ The boost in personnel should include filling the remaining flag officer billets for acquisition authorized in the FY 2009 NDAA and increasing the number of CORs and other government personnel responsible for quality assurance and contract oversight.
- Continue to provide incentives for enlisted personnel, officers and civilians to pursue a career track in contract management or auditing.
- Issue a directive that prioritizes the education, training and assigning of ES&R contracting personnel, as well as other relevant personnel outside the acquisition staff. This directive should:
 - Direct that CORs should not have other duties that conflict with their contract responsibilities.



- Add basic contracting issues to professional military education and flag officer training and education. The aim should be to ensure that officers are qualified to assess compliance with contracting regulations and are familiar with the role of contractors in hostile environments.

The Secretary of State and the USAID Administrator should:

- Significantly increase the number of qualified contracting officers and CORs responsible for ES&R contracting, including in current operational theaters.
- Provide incentives for foreign service officers and civil servants to pursue a career track in contract management.
- Add basic contracting issues to education and training courses for senior Foreign Service Officers and senior USAID personnel.

Establish a Contingency Contracting Reserve Corps

The FY 2009 National Defense Authorization Act created a government-wide Contingency Contracting Corps – a pool of individuals currently working in the federal acquisition workforce who agree to make themselves available for deployment in response to an emergency, major disaster or contingency operation. The Corps is authorized to deploy either within or outside the United States, and voluntary membership is open to all military and federal employees working in federal acquisition.

While the creation of this corps is a welcome development and provides an attractive model for dealing with the problems associated with the lack of qualified contract managers in theater, it is somewhat peculiarly housed at the General Services Administration (GSA). A better model would move the GSA-based contingency contracting reserve corps to an expanded DOD Office of Contingency Contracting, with deployment authority resting with the Secretary of Defense. In addition, deploying such a corps to manage ES&R contracts in a contingency environment should serve as the beginning, rather than the end, of the government's efforts to deal with a future mismatch between the requirements for skilled contract managers and the pool of such managers available for deployment. The contingency contracting reserve corps should serve as a surge capacity when needed, but the government should aim to transition to non-reserve corps federal contract managers within a relatively fixed period of time (e.g., one year). This time could be used to hire and deploy skilled contract specialists as temporary federal employees, ensuring both that the U.S. government has the necessary capacity and that the necessary personnel are federal employees (i.e., not themselves contractors).

Increase Transparency and Accountability

A standard complaint voiced by Congress, inspectors general, the press and the Commission on Wartime Contracting revolves around the lack of transparency and accountability in the ES&R contracting process. This opacity has led to poor management and glaring inefficiencies: as of December 2009, federal auditors had identified nearly a billion dollars in wasteful spending in

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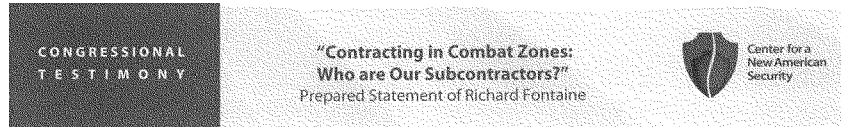
Afghanistan contracts.¹⁶ Various factors exacerbate the difficulties of monitoring contract performance, including the multitude of contracts awarded, the relatively small staff that monitors them and the fact that contracting officers are often located far away from the area in which services are actually provided.

A number of measures have been taken in recent years to address this problem. DOD now provides Congress with periodic reports on the contractors and subcontractors it employs. The Army trains and deploys CORs to sites where contractors are providing services in order to ensure on-the-ground monitoring.¹⁷ The U.S. government has also attempted to centralize responsibility for contractor oversight at the country level. In Afghanistan, for example, the Coordinating Director for Development and Economic Assistance in Kabul is tasked with reviewing each contract and ensuring its compliance with U.S. standards and strategy.¹⁸

Another major step forward was the establishment of the Synchronized Pre-deployment and Operational Tracker (SPOT) system in January 2007. SPOT was designed to serve as a unified database for contingency contractor and contract services information. Although SPOT plays a useful role in aggregating information for better contractor management and oversight, there are still areas in which it falls short. GAO continues to report that many information fields in SPOT are left unfilled because agencies differ in their interpretations regarding which contractor and subcontractor personnel must be entered into the system, leading to important knowledge gaps.¹⁹ In addition, wide discrepancies have emerged between the counts offered by SPOT and by the CENTCOM Quarterly Census. DOD, which conducts a manual count to track contractor personnel, regards the census as more accurate than SPOT, while GAO has found shortcomings in both systems. In one recent example, a 19 April 2010 SPOT report identified 32,000 contractors working for DOD in Afghanistan; meanwhile, the Quarterly Census found 107,000.²⁰ Agencies continue to use a variety of other systems – many of which are ad hoc – to obtain information on contractor personnel and contracts, undermining the utility of SPOT as a centralized database. This patchwork of practices must be integrated in order to establish SPOT as a fully effective contractor monitoring tool.

The Secretary of Defense, in coordination with the Secretary of State and the USAID Administrator, should:

- Establish uniform standards across agencies and ES&R contract type for consistency and consolidation of data. This standardization should include finalizing and standardizing the SPOT system and issuing identical directives to DOD, State and USAID regarding the information each must input into the system. To bolster the fidelity of this data, COs should rely not simply on firms' reported employment figures but also confirm such reports in site visits.
- Further integrate auditors into the contracting process by making wider use of co-located auditors at large ES&R contracting firms.



- Improve accountability and monitoring of subcontractors, which account for 70 percent of the contracting workload, by revising regulations to allow government contracting personnel to demand more transparency in subcontracted projects.
- Establish enhanced mechanisms for planning, executing and monitoring Commander's Emergency Response Program projects.
- Establish a future baseline ratio of government contracting personnel (e.g., investigators, COs and CORs) to contractors to help ensure adequate oversight in future contingencies.
- Include clauses in ES&R contracts that require contracting firms to enforce rules governing behavior that impacts the overall U.S. mission, beyond the narrowly construed completion of their contracted activities.

The Secretary of State and the USAID Administrator should:

- Develop a quarterly census to track the number of contractors in contingency operations, similar to the one used currently by U.S. Central Command, until the SPOT system proves a reliable source of contractor information.

The Administration, together with Congress, should:

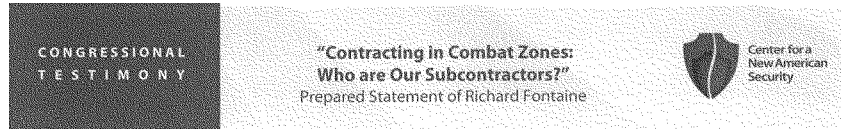
- Establish a permanent, independent inspector general that would (as SIGIR and SIGAR do today in Iraq and Afghanistan, respectively) provide audit, inspection and investigation services for ES&R contracting in contingency environments. This inspector general should possess the authorities enumerated in the Inspector General Act of 1978.

Increase Scrutiny of ES&R Contractors

Congress, the press, government watchdog groups and others have focused to a large degree on the actions of private security contractors. Though they comprise the vast majority of U.S. contractors in hostile environments, and receive the bulk of taxpayer dollars expended on contingency contracting, ES&R contractors have received much less scrutiny. This phenomenon adds to the perceived lack of transparency in dealing with contractors on the battlefield and should be altered in order to enhance transparency and accountability; illuminate contractor wrongdoing; uncover further instances of fraud, waste and abuse; and highlight those firms and contractors that perform at a high level.

Congress, the media, government watchdog groups and the Commission on Wartime Contracting should:

- Increase the amount of attention, time and resources dedicated to examining ES&R contractor conduct in America's overseas engagements. In so doing, these groups might draw on the effective



example set by the Special Inspector General for Iraq Reconstruction. Such examinations should focus on, among other factors, contractor misconduct; fraud, waste and abuse in the contracting process (both on the governmental and contractor sides); and whistleblower allegations. At the same time as they point out these negative factors, they should highlight those contracting firms that are properly and efficiently performing a variety of tasks for the United States.

Improve the Legal and Regulatory Framework

Nine years after the commencement of hostilities in Afghanistan, and seven years after the war in Iraq began, the legal framework governing the use of ES&R contractors in hostile environments remains patchy and even ambiguous in some areas. One reason for this is the generally improvised approach Congress and two administrations have taken to codifying law in this area, coupled with a belief in some quarters that the role of contractors in future contingencies will be – or can be forced to be – seriously diminished. Because, as explained above, this is unlikely, it is vitally important to establish a clear statutory and regulatory framework in which contractors operate and are subject to stronger oversight. Such a framework should resolve jurisdictional issues for all contractors working for the U.S. government, including American citizens, host-nation citizens and third country contractors. In addition, it is essential to educate contractors and government workers about their legal rights and obligations and to provide the government personnel necessary both to ensure compliance and handle violations.

The Department of Defense General Counsel, together with the Department of Justice, should:

- Clarify how the various laws that potentially apply to ES&R contractors in theater – including the Military Extraterritorial Jurisdiction Act, the Uniform Code of Military Justice, the Special Maritime and Territorial Jurisdiction (SMTJ), host-nation law (including any Status of Forces Agreements) and international law – interact to create obligations for or jurisdiction over private contractors.
 - This should include clarifying the laws and jurisdiction relevant to third-country nationals employed by both contracting firms and subcontractors.
 - It should also include engaging with America's partners, and with NATO allies in particular, to ensure a common coalition view of the ways in which host-nation law and international law apply to private contractors.

The White House, the Secretary of Defense and the Attorney General, together with Congress, should:

- Amend MEJA to unambiguously cover all ES&R contractors working for the U.S. government in theater and remove the provision limiting MEJA jurisdiction to only those contractors working in support of the "mission of the Department of Defense" overseas.



- Increase the number of Defense Criminal Investigative Service (DCIS) special agents in Iraq and Afghanistan in order to enhance DOD's ability to investigate wrongdoing by contractor personnel.
- Establish in the Department of Justice a unit – a portion of which could be located in theater – dedicated to investigating and prosecuting any crimes committed by contractors in violation of MEJA, the Foreign Corrupt Practices Act or other relevant laws. This unit should work, when appropriate, in cooperation with DCIS.
- Establish a new, streamlined contingency Federal Acquisition Regulation that reduces the enormous amount of regulations contained in the current FAR and its laborious requirements before a contract can be cancelled. The contingency FAR should include an automatic waivers process and should attempt to achieve a better balance between preventing fraud, waste and abuse and providing the flexibility and speed necessary to carry out contracting in a hostile environment.
 - The contingency FAR should establish protocols for coordinating among agencies on decisions related to ES&R contracting in theater.
 - The contingency FAR should establish a framework that actively encourages the sharing of contractor information among agencies and U.S. government personnel (including ground commanders) in theater.

ES&R contracting firms should:

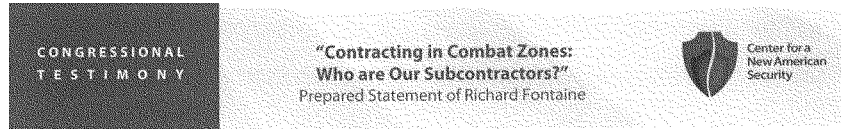
- Ensure that senior managers and in-theater supervisors are familiar with relevant U.S. and local law, Status of Forces Agreements, the law of armed conflict and the applicable rules of engagement.
- Precisely define the way in which legal obligations and rules of engagement apply to their contract employees, including local nationals.

The U.S. government should:

- Press for wider international adoption of the Montreux Document and initiate other efforts to clarify the status of private contractors under the law of armed conflict.

Raise Standards Among Contractors

Just as the government must reform the way it handles ES&R contracts, so too should contracting firms and individual contractors bear responsibility for effecting change. Contractors working in the service of the U.S. government must be pressed to eliminate waste, fraud and abuse; hold their employees to the highest ethical and professional standards; and ensure that their employees are



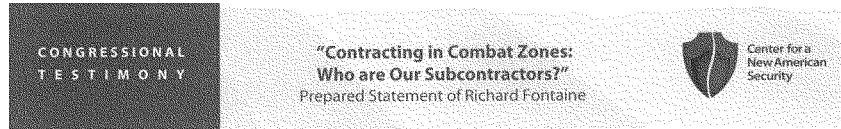
adequately trained and prepared for the unique demands of ES&R contracting in hostile environments. Where contracting firms are reluctant to carry out these responsibilities individually or in concert, the government should demand reasonable efforts to fulfill them as a condition of U.S.-issued contracts.

ES&R contracting firms should:

- Enforce existing rules that require key employees (such as those who will carry weapons or are likely to see hostile fire) to have basic training in the law of armed conflict (e.g., the Geneva Conventions) and the rules of engagement for a particular theater of operations.
- Institute enhanced vetting procedures for third-country and local contractors to ensure that those with criminal pasts, a history of human rights violations or connections to enemy forces are prevented from obtaining employment.
- Establish a trade association that includes as members firms specifically engaged in ES&R contracting (as opposed to private security contracting). Such an association should:
 - Establish an accreditation program and licensing standards for firms.
 - Serve as an interlocutor with the government on ES&R contracting issues.
 - Establish a database of contractors working for licensed firms and put into place a process for receiving and investigating complaints.
 - Promulgate education and training guidance for contractors working for member firms.
 - Encourage the development of, and participate in the design of, an international code of conduct to which firms, both American and foreign, may voluntarily commit and which spells out specific repercussions for severe violations.
- Work with Congress, the Secretary of Defense, the Secretary of State and the USAID Administrator to establish and mandate compensation mechanisms for victims of contractor abuse.

Clarify the Proper Roles of Contractors in Conflicts

One of the most passionate debates in the area of contingency contracting revolves around what activities are, or are not, "inherently governmental." The term seeks to draw a stark line between tasks and behaviors that can be legitimately contracted out and those that cannot. In reality, such a clear delineation is often difficult to establish. There currently exist various instances of contractors carrying out precisely the sorts of tasks that many would deem to be "inherently governmental," including providing security, conducting interrogations of enemy prisoners, maintaining weapons and coordinating the efforts of other contractors. An alternative approach would have the government



determine, in advance, those areas it seeks to avoid contracting out as a matter of policy but also leave open the possibility of legally employing contractors in the same positions during times of crisis. This report proposes a hybrid to resolve the “inherently governmental” conundrum: the government should define as “inherently governmental” those areas in which there is some consensus and move toward a “core competencies” approach in areas where there is not.

Congress should:

- State in law any specific activities that it deems “inherently governmental.” It has already designated offensive combat operations and direct contractual oversight as such, and should expand the list to the degree that Congress can agree on enumerated activities.²¹

The Office of Management and Budget should work with Congress to:

- Move toward a “core capabilities” approach to activities not specifically deemed by Congress to be inherently governmental. Such an approach would focus on the functions the U.S. government should possess and maintain, rather than debate internally over which are inherently governmental.
- Address structural and institutional factors that make hiring temporary federal workers (e.g., contracting officers as part of a surge capacity during a contingency operation) more difficult. The factors addressed should include existing disincentives that discourage qualified contracting personnel who have left government to return to it, such as prohibitions against retaining government pension payments while returning to temporary government service.

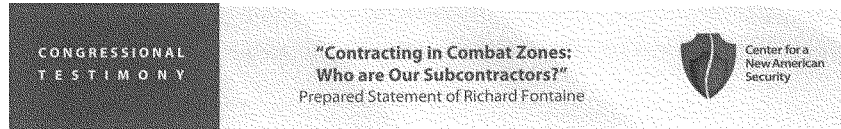
Congress should:

- Require the executive branch to carry out comprehensive cost analyses that compare the costs of contracted services with the costs of the same services provided by government personnel.

Integrate the Role of Contractors into Policy and Strategy

Until now, discussions on the role of contractors in conflict have emerged in a largely ad hoc fashion, often in reaction to news stories highlighting their mistakes. While numerous statements and reports have noted the indispensable nature of contractors in future U.S. engagements, this has not directly translated into a policy discussion of the optimal features of a contracting force working alongside the military, diplomatic corps or USAID officials. As described above, the increasing use of private contractors has deep and widespread implications for American foreign and defense policy. The U.S. government must adopt a strategic view of the role of contractors and actively integrate them into planning mechanisms to ensure their systematic, effective and lawful deployment in future conflicts.

The Secretaries of Defense and State, together with the USAID Administrator, should:



- Establish an interagency process to determine the possible foreign policy implications of contracting with particular third-country nationals (e.g., employing contractors whose nationality and presence in a combat zone would provoke political sensitivities).
- Increase contracting coordination among International Security Assistance Force partners in Afghanistan and ensure that the role of contractors is considered in NATO policy decision making.
- Further integrate the role of contractors in strategic-level guidance, military doctrine and diplomatic strategy. Such efforts should include:
 - Ensuring that all aspects of ES&R contracting are considered in the formulation of the National Defense Strategy, the next QDR and future field manuals and joint publications, as well as other relevant tactical and operational level manuals.
 - Ensuring that all aspects of ES&R contracting are considered in the development of the Quadrennial Diplomacy and Development Review (QDDR).

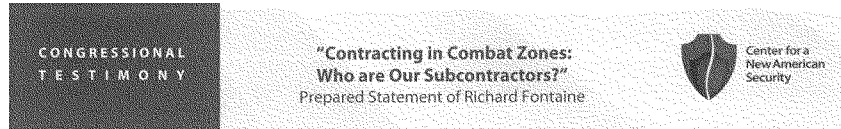
Integrate Contractors into Command and Control

Various hurdles have prevented the fully effective integration of contractors into existing command and control structures. Commanders and officers have reported not knowing even basic facts about the contractors operating in their areas of responsibility, such as their numbers and their missions. Knowledge of the rules governing these contractors can be equally scarce. Private security contractors generally operate outside the chain of command and the relationship between commander and contractor is sometimes unclear. Communication failures between commanders and contractors sharing an area of responsibility compound the problem; in Fallujah in 2004, for example, the Marine unit based just outside the city did not find out about the attack that killed four Blackwater contractors until it was reported by journalists.²¹

In addition, both pre-deployment training and the development of operational and contingency plans generally take place without adequate appreciation for the role of contractors on the battlefield. Training often includes individuals playing every role but contractors, and operational plans – while they now take into account the role of contractors – still tend to be developed without adequate consultation with contractors or with fully developed plans for their use on the battlefield.

The Secretary of Defense should:

- Ensure that operational and contingency plans take into account every aspect of contractor support by:



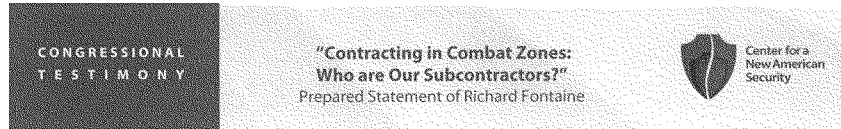
- Expanding Annex W, which contains information on the numbers of contractors required for a military operation and the tasks they will perform, and ensuring that it contains relevant and adequate detail.
- Requiring that other functional annexes identify contracted support requirements.
- Identifying probable transition points at which government employees will cede functions to private contractors or vice versa.
- Consult with contractors during the military's mission planning process, to the extent that the mission will rely on contractor support. This process should include ensuring that commanders know – before they deploy – the number of contractors they will encounter in an area of operations and the services these contractors will provide.
- Require military staffs to establish contracting planning cells to:
 - Determine the precise roles contractors will play in a given operation.
 - Develop contingency plans for the possibility that a contractor either fails or is not permitted to perform a service as specified in a contract.
- Integrate contractor roles into pre-deployment training and war games. This should include issuing the joint policy document mandated by Congress in 2008 and ensuring that it includes guidance for the inclusion of contractor roles in all facets of training.

Change the U.S. Government's Culture of Contracting

A change in the culture of DOD, State and USAID with respect to contracting is long overdue. As one report noted, the Department of Defense has demonstrated an "inability to institutionalize operational contract support by accepting contractors as an integral part of the total force."²² Yet DOD may be the agency that has become the most comfortable with contracting out functions that until recently were performed largely by government personnel. In the State Department in particular, familiarity with contractors is sparse and there are few incentives for skilled personnel to move into contracting roles. Only a continued cultural shift in the way the three agencies view ES&R contracting – a shift that leads to changes in training, education, doctrine and planning – can lead to necessary change.

The Secretaries of Defense and State, together with the USAID Administrator, should:

- Provide clear incentives, including financial bonuses and promotions, to skilled employees who take on key contracting duties.
- Encourage employees in the field to become familiar with managing and communicating with private contractors. This should include promoting communication between military personnel



and contractors on the battlefield and interaction between relevant State Department and USAID personnel (e.g., officials serving on Provincial Reconstruction Teams) and contractors.

Harvest And Apply Lessons Learned

The lessons learned in Iraq and Afghanistan constitute one of the most expensive educations in American history. Only over a number of years has the United States begun to get a handle on the broad implications of its reliance on great numbers of contractors to carry out missions in hostile environments. As this report attests, that work is hardly done. The United States should not compound its problems and mistakes by forgetting these lessons learned in their wake.

The Secretaries of Defense and State, together with the USAID Administrator, should:

- Establish a contingency contracting lessons-learned center to collect, process and disseminate a history of past contracting experiences and the lessons that can be drawn from them. This center should attempt to capture lessons learned that apply not only to the employment of contractors by the Department of Defense but also by the Department of State and USAID.

Conclusion

The U.S. government and its contract employees have been thrust together as partners in a shared endeavor, the scale, cost and duration have taken nearly all observers by surprise. Private contractors now represent an enduring feature of American conflicts, stabilization operations and reconstruction efforts. In light of changes in business practices, the provision of government service and the character of modern warfare, this surprising circumstance is unlikely to change. The reality is that America's reliance on private contractors is not likely to fade, and it is time for the United States to adapt to this new way of war.

Nine years after America's initial engagement in Afghanistan, and seven years after the U.S. invasion of Iraq – and with continuing American commitments and interests across the globe – action is long overdue. America's national security policy demands new ways of organizing, managing and overseeing the use of private contractors in overseas engagements. It requires new standards and new levels of oversight at home. It means thinking hard about what tasks should be outsourced and which should not. And it entails a greater understanding by policymakers and the American public of the role that the private sector has come to play in current and future engagements.

This testimony aims to draw together the most salient issues surrounding the use of contractors in American conflicts and chart a path forward. Taken together, the recommendations outlined above would reform, rationalize and improve the process of employing private contractors in ES&R roles. The government, the military, the contracting community and ultimately the American people will benefit from reform of the ES&R contracting system that ensures the private sector's role in American engagements aligns firmly with our nation's interests and values.

CONGRESSIONAL
TESTIMONY**"Contracting in Combat Zones:
Who are Our Subcontractors?"**
Prepared Statement of Richard Fontaine

¹ This figure is based on three sources: Department of Defense, Contractor Support of U.S. Operations in USCENTCOM AOR, Iraq, and Afghanistan, USCENTCOM Quarterly Census 1st Quarter FY2010, http://www.acq.osd.mil/log/PS/hot_topics.html; General Ray Odierno interview with Fox News Sunday (18 April 2010) stating that there are currently 95,000 U.S. troops in Iraq; and John J. Kruzel, "Afghanistan Troop Level to Eclipse Iraq by Midyear," identifying 83,000 U.S. military personnel in Afghanistan (24 March 2010), <http://www.defense.gov/news/newsarticle.aspx?id=58461>.

² Congressional Budget Office, Contractors' Support of U.S. Operations in Iraq (August 2008): 12.

³ Ibid: 1.

⁴ Ibid. From 2003-2007, the Department of Defense awarded contracts totaling \$76 billion, whereas the U.S. Agency for International Development and the Department of State obligated \$5 billion and \$4 billion, respectively. During this period, 75 percent of DOD contracts were obligated through the Army.

⁵ Government Accountability Office, Contingency Contracting: DOD, State, and USAID Contracts and Contractor Personnel in Iraq and Afghanistan (October 2008): 20, 29, 34.

⁶ James Glanz, "New Fraud Cases Point to Lapses in Iraq Projects," New York Times (13 March 2010), <http://www.nytimes.com/2010/03/14/world/middleeast/14reconstruct.html>; Special Inspector General for Afghanistan Reconstruction, Quarterly Report to the United States Congress (30 April 2010).

⁷ Congressional Budget Office, Logistics Support for Deployed Military Forces (October 2005): xiii, 38.

⁸ Government Accountability Office, Military Personnel: DOD Needs to Improve the Transparency and Reassess the Reasonableness, Appropriateness, Affordability, and Sustainability of its Military Compensation System, GAO-05-798 (July 2005).

⁹ Congressional Budget Office, Logistics Support for Deployed Military Forces: xi-xii.

¹⁰ A conversation one of the authors had with a U.S. senator suggests that, at least among supporters of the provision in Congress, there exists confidence that its constitutionality will be upheld.

¹¹ Office of Management and Budget, "Work Reserved for Performance by Federal Government Employees," Federal Register (31 March 2010).

¹² Ibid: 16196-16197.

¹³ Several observers have offered two potentially useful principles that might underlie any determination of what activities should be considered core competencies. Under these principles, core competencies are those activities which, if removed, would clearly lead to mission failure, and those which if performed by contractors would pose significant legal complications. An additional consideration is the desire to avoid lost skill sets; if the U.S. government outsources a function, it may risk losing the capacity to carry out the activity at any point without contractors.

¹⁴ Among other steps, DOD has issued doctrine in the 31 March 2010 "Operational Contract Support Concept of Operations" establishing an Army Contracting Command and establishing a Joint Theater Support Contracting Command for contingency-specific contracts in Iraq and Afghanistan.

¹⁵ Secretary of Defense Robert Gates stated that DOD intends to hire an additional 9,000 defense procurement professionals by 2015, including 2,500 auditors at the DCAA. This cadre will have responsibility, however, for procurement across the spectrum, not only for ES&R contracting. See DOD News Briefing by Secretary of Defense Robert Gates (6 April 2009).

¹⁶ Opening statement by Senator Claire McCaskill before the Subcommittee on Contracting Oversight, U.S. Senate Committee on Homeland Security and Governmental Affairs (17 December 2009).

¹⁷ Edward M. Harrington and Jeffrey P. Parsons, Statement before the Subcommittee on Contracting Oversight (17 December 2009).

¹⁸ Dan Feldman, Remarks before the Subcommittee on Contracting Oversight, U.S. Senate Committee on Homeland Security and Governmental Affairs (17 December 2009).

¹⁹ Government Accountability Office, Warfighter Support: Continued Actions Needed by DOD to Improve and Institutionalize Contractor Support in Contingency Operations GAO 10-551T: 17.

²⁰ Department of Defense, Contractor Support of U.S. Operations in USCENTCOM AOR, Iraq, and Afghanistan, USCENTCOM Quarterly Census 1st Quarter FY2010 and Synchronized Predeployment and Operational Tracker (SPOT), "Weekly SPOT numbers for DOD, DOS, USAID, and Other" (19 April 2010).

²¹ Peter Singer, Can't Win with 'Em, Can't Win Without 'Em: Private Military Contractors and Counterinsurgency, (Washington: The Brookings Institution, September 2007): 13-14.

²² Government Accountability Office, Warfighter Support: Continued Actions Needed by DOD to Improve and Institutionalize Contractor Support in Contingency Operations GAO 10-551T (17 March 2010): 26-7.



EXECUTIVE SUMMARY

JUNE 2010

Contracting in Conflicts: The Path to Reform

"This report could not be timelier. Contractors and contracting have become serious policy issues in both Iraq and Afghanistan, and they will continue to be so wherever American power is projected abroad."

— Allison Stanger, Russell Leng '60 Professor of International Politics and Economics at Middlebury College and the author of *One Iron Under Contract: The Sourcing of American Power and the Future of Foreign Policy* (Iale, 2009)

AUTHORS:

RICHARD FONTAINE
WHI NAGL

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Introduction

When our nation goes to war, contractors go with it. The 2001 invasion of Afghanistan, together with the March 2003 invasion of Iraq, saw an increase in the size and scope of contracted support on the battlefield that is, as the Congressional Budget Office (CBO) has stated, "unprecedented in U.S. history." In both Iraq and Afghanistan today, there are more private contractors than U.S. troops on the ground. Yet the system within which this contracting takes place has not caught up with the new reality. As America's dependence on expeditionary contractors in conflicts or stabilization and reconstruction efforts is likely to continue, the need for reform is pressing. The time to act is now.

A new report by the Center for a New American Security (CNAS) looks closely at what we call Expeditionary, Stabilization and Reconstruction (ES&R) contractors – those service contractors, most of whom are employed by the Defense Department, the State Department, or USAID, who are working in hostile environments. To adapt to the new reality, the U.S. government must embark on a path of ambitious reform that will require an expansion of the government's contracting workforce; a coordination mechanism within the executive branch; greater scrutiny of contractors, more transparency and clearer standards; a strategic view of the roles of contractors in American operations; a change in culture within the government; and new laws and regulations under which contractors will operate.

Expanding the Workforce

Given the explosion in the volume and scale of contracts in recent years, and the degree to which American operations have become dependent on them, it is critical to grow the government contract workforce. The need for increased numbers of able government personnel familiar with contracting issues, including contracting officer representatives, auditors and investigators, goes well beyond simply increasing the number of contracting officers based in Washington and overseas. The departments must actively work to improve the skills and elevate the rank of personnel involved in contract management and oversight. The Department of Defense, State Department and U.S. Agency for International Development should significantly increase the number of qualified contracting personnel responsible for ES&R contracting, including in current operational theaters. Only by expanding the quantity and quality of the government's human infrastructure will the majority of other necessary reforms be possible.

Coordination Mechanism within the Executive Branch

Coordination is key to everything the United States seeks to achieve via contingency contracting. Despite the years – and tens of billions of dollars – spent, the approach to contingency contracting remains fragmented and ad hoc. As a result, it is imperative to improve coordination among policymakers, program officers and federal contracting personnel, and also among

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“It’s time for this waste and inefficiency to end. It’s time for a government that only invests in what works. And what’s encouraging is, is that there is broad bipartisan consensus on behalf of reform, and we are committed to taking swift action that changes our system of contracting to save taxpayers’ money.”

— President Barack Obama, Remarks by the President on Procurement, (March 4, 2009)

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the agencies. The best course involves increasing the contracting capacity at DOD, State and USAID and establishing a formal (but relatively simple) interagency coordination mechanism. This effort should include expanding the current DOD Office of Program Support, which is located in the Office of the Undersecretary of Defense for Acquisition, Technology and Logistics. Similarly, the State Department should expand its Office of Logistics Management into a new Bureau of Contingency Contracting located under the Undersecretary for Management and USAID should either direct that its Bureau of Democracy, Conflict and Humanitarian Assistance develop a specific expertise in ES&R contracting and provide guidance to regional bureaus or establish a separate contracting-focused bureau. All three offices should be led by a Senate-confirmed Assistant Secretary-level official who coordinate regularly on contracting policy.

Greater Scrutiny, More Transparency and Clearer Standards

An area of particular concern among public officials and concerned citizens has been the degree of fraud, waste and abuse linked to reconstruction operations and contractor-provided services in Iraq and Afghanistan. The post-invasion reconstruction environments in both countries represent the largest-ever markets for private contracting firms; through March 2010 Congress had appropriated 53 billion dollars for



Mike Dees (left), lot supervisor, Marine Corps Logistics Command (Forward) Retrograde Lot, tells a Marine where he should park his tactical vehicle during a transfer of equipment at the MCLC (Fwd) Retrograde Lot in Camp Al Taqaddum, Iraq, March 2009.

(GUNNERY SGT. KATESHA WASHINGTON /U.S. Marine Corps)

reconstruction in Iraq and 51 billion dollars for reconstruction in Afghanistan (President Obama has since requested an additional 20 billion dollars to fund reconstruction in Afghanistan). The Secretary of Defense, the Secretary of State and the USAID Administrator should establish uniform standards across agencies and ES&R contract type for consistency and consolidation of data, improve transparency of subcontractors, establish a permanent inspector general, and include clauses in ES&R contracts that require firms to enforce rules governing behavior that impacts the overall U.S. mission.



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“I think that the use of contractors was done with good intentions so that we could limit the number of military. I think in some cases we thought it would save money. We have created in ourselves a dependency on contractors that I think is greater than it ought to be.”

General Stanley McChrystal, U.S. and NATO Commander in Afghanistan, Remarks at the French National Defense Academy, l’Institut des Hautes Etudes de Défense Nationale, (NEDN) 16 April 2010

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Military Implications

The unprecedented numbers of private contractors on the battlefield and the vast scope of their activities pose special dilemmas in command, coordination and discipline for the U.S. military. Despite efforts to align the conduct of contractors with that of military personnel, these relationships remain poorly defined. Contractors are not in the chain of command; they are now, however, subject to the Uniform Code of Military Justice (UCMJ), albeit only under certain circumstances and not to the entire Code. Today and in the future, properly marshalling the collective activities of private contractors will be critical to a commander’s ability to accomplish his or her mission. For an institution that relies on private contractors to an unprecedented degree for its operational success, DOD should give their role much more strategic thought. The Secretary of Defense should consult with contractors during the military’s mission planning process, to the extent that the mission will rely on contractor support. The military should include the expected roles of contractors in operational plans and predeployment training, and incorporate contracting issues into professional military education courses.

Foreign Policy Implications

How America deals with ES&R contractors carries broad foreign policy implications. This is true most obviously in the wars in which the United States is engaged. Yet there appears to be insufficient deliberation within the State

Department about the foreign policy implications of contracting decisions made at the corporate level, both on State/USAID funded contracts and on DOD contracts. Through legal precedents and norms of behavior established in the course of current wars, U.S. employment of contractors could shape the way that current and rising powers conduct future wars. The U.S. should encourage the development of an international code of conduct for contractors, clarify the ways in which international law applies to contractors, and coordinate with coalition partners on legal and policy decisions regarding contracting.

Laws and Regulations

The legal framework governing ES&R contractors in wartime is complicated, features overlapping jurisdictions and is somewhat ambiguous. Contractors working for the United States can be held accountable for crimes committed overseas under at least two domestic American laws. Further complicating the legal picture, ES&R contractors may also be subject to foreign law. The legal status of contractors varies by country, depending on the jurisdiction and any agreements in place between the United States and the host-nation government. The Department of Defense, together with the Department of Justice, should clarify how the various laws that potentially apply to ES&R contractors in theater – including the Military Extraterritorial Jurisdiction Act (MEJA), the Uniform Code of Military Justice (UCMJ), the Special Maritime and



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Territorial Jurisdiction (SMTJ), host-nation law (including any Status of Forces Agreements) and international law – interact to create obligations for or jurisdiction over private contractors. The Congress should amend MEJA to unambiguously cover all ES&R contractors working for the U.S. government in theater and streamline acquisition regulations that govern U.S. service contracting in hostile environments.

The “Inherently Governmental” Conundrum

U.S. law has long aimed to protect the core functions of government by prohibiting anyone other than federal employees from performing such tasks. Today, while there appears to be a rough consensus that there are some functions so intrinsic to the nature of American government that they should never be outsourced, there is little or no consensus about precisely what those functions are. The government should define as “inherently governmental” those areas in which there is some consensus and move toward a “core competencies” approach in areas where there is not. Such an approach would focus on the functions the U.S. government should possess and maintain, rather than debate internally over which are inherently governmental.

Conclusion

The U.S. government and its contract employees have been thrust together as partners in a shared endeavor, the scale, cost and duration of which have taken nearly all observers by surprise. The reality is that America's reliance on private contractors is not likely to fade, and it is time for the United States to adapt to this new way of war. This report aims to draw together the most salient issues surrounding the use of contractors in American conflicts and chart a path forward. Taken together, the recommendations contained in this new CNAS report would reform, rationalize and improve the process of employing private contractors in ES&R roles. The government, the military, the contracting community and ultimately the American people will benefit from sweeping reform of the ES&R contracting system that ensures the private sector's role in American engagements aligns firmly with our nation's interests and values.

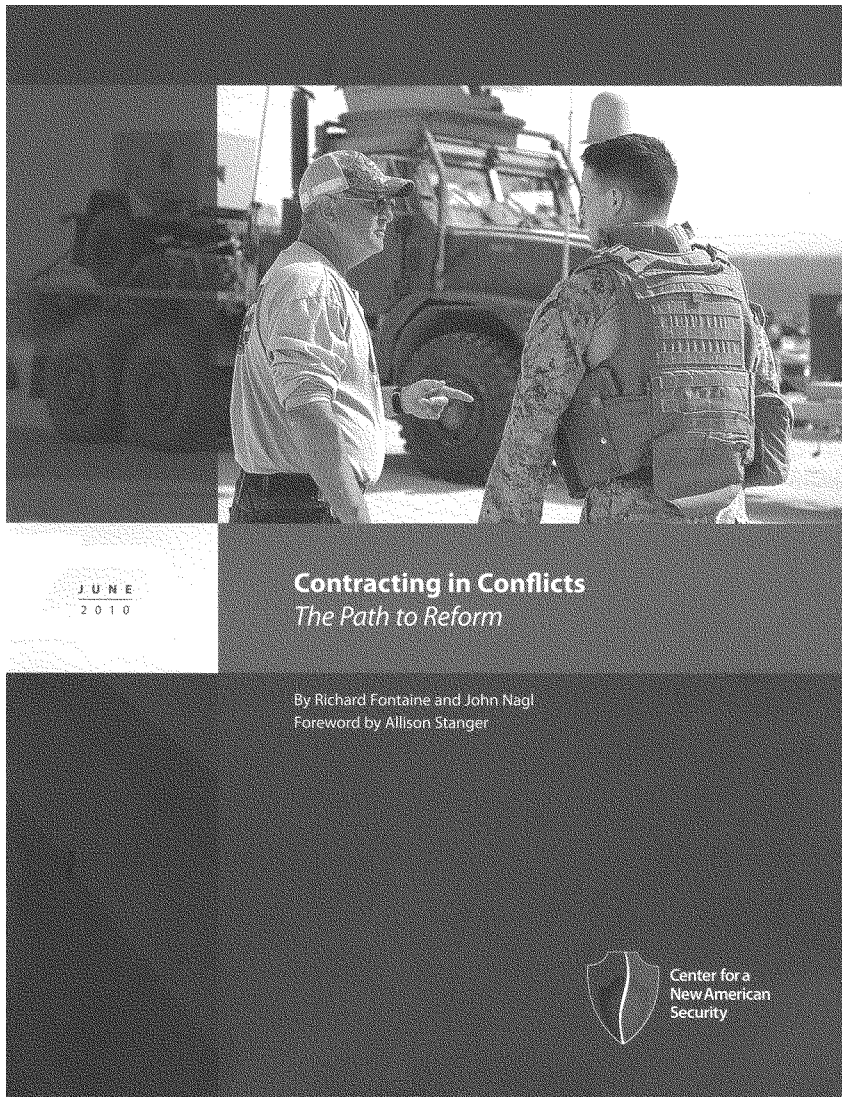
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Acknowledgments and Methodology

Contracting in Conflicts benefited from many consultations and working group meetings with key stakeholders in the field. We would like to thank those individuals for their candid assessments and deep knowledge, which together informed our conclusion that serious reform of the contracting process is necessary.

The report relies on scores of consultations with officials from the Department of Defense, the Department of State and the U.S. Agency for International Development; employees from private contracting firms; active-duty and retired military officers; congressional staff; trade association officials; independent journalists; officials from the International Committee of the Red Cross; academics; staff from the Congressional Research Service and the Government Accountability Office; personnel from the Geneva Centre for the Democratic Control of Armed Forces; officials from the offices of the Special Inspector General for Iraq and Afghanistan Reconstruction; staff serving on the Commission on Wartime Contracting; and think tank experts. A full list of working group participants is located in Appendix B. The participation of government officials does not imply that the final report reflects U.S. policy.

We express our gratitude to our colleagues at the Center for a New American Security for their assistance. Kyle Flynn provided truly exceptional research and drafting support throughout the writing process. Ross Brown made major contributions in research and in providing ideas and input. Kristin Lord provided extraordinary assistance in editing and shaping the report from start to finish. In addition, we owe a great debt to the external reviewers who dedicated their time, energy and expertise to improving this report, including Deborah Avant, Anne-Marie Buzatu, Carole Coffey, Ginger Cruz, Jacques Gansler, David Morris, Gary Motsek, Moshe Schwartz, and Allison Stanger, as well as other anonymous reviewers.

Readers should note that some working group participants are affiliated with organizations that support CNAS financially. CNAS maintains a broad and diverse group of more than one hundred funders including private foundations, government agencies, corporations, and private individuals, and retains sole editorial control over its ideas, projects and products. A complete list of our financial supporters can be found on our website at www.cnas.org/support.

The authors of this report are solely responsible for the analysis and recommendations contained herein.

Cover Image

Mike Deas (left), 1st supervisor, Marine Corps Logistics Command (Forward) Retrograde Lot, tells a Marine where he should park his tactical vehicle during a transfer of equipment at the MCLC (Fwd) Retrograde Lot in Camp Al Tapadom, Iraq, March 2009.
 JOHNNY SGT. KATESHA WASHINGTON (U.S. Marine Corps)

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Contracting in Conflicts

The Path to Reform

By Richard Fontaine and John Nagl
Foreword by Allison Stanger

J U N E 2 0 1 0

Contracting in Conflicts
The Path to Reform

About the Authors

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Dr. John Nagl is the President of the Center for a New American Security.

I. FOREWORD



By Allison Stanger

This report could not be timelier. Contractors and contracting have become serious policy issues in both Iraq and Afghanistan, and they will continue to be so wherever American power is projected abroad. In clear prose, the report's authors identify a host of important policy challenges generated by America's current contracting practices that demand our immediate attention and offer many creative recommendations for confronting those challenges head on.

The explosion of what the authors call Expeditionary, Stabilization and Reconstruction (ES&R) contracting – contracting in conflict environments – is a piece of a much larger puzzle that amounts to a stealthy whole-scale paradigm shift in the core business of American foreign policy. As I have chronicled elsewhere, contractors quietly have become prominent across the so-called three Ds of defense, diplomacy, and development, as well as in homeland security. In all of these realms, the majority of what used to be the exclusive work of government has been outsourced to private actors, both for-profit and not-for-profit. Contractors today outnumber American men and women in Iraq and Afghanistan. In the development realm, contracts and grants have become the principal vehicle for American efforts to help others help themselves. These changes are not the result of partisan politics; Democrats and Republicans alike embraced the privatization imperative. Thus, while no one consciously planned it, much of the envisioning and execution of American objectives is today in private hands.

The reinvention of government business has not been confined to U.S. foreign policy institutions. To cite just one telling statistic, the federal government had the same number of full-time employees in 2008 as it had in 1963. Yet the federal budget, in real terms, more than tripled in that same period. That gap reflects the increased prominence of contractors. The longstanding debate over the size of government thus takes on different dimensions;

government can be big in terms of the amount of money it spends but small in terms of the number of people it directly employs to manage that spending. In such a world, to quote President Obama's inaugural address, "the question... is not whether our government is too big or too small, but whether it works." The employment of large numbers of contractors carries benefits. For instance, by circumventing the downsides of bureaucracy, contracting can facilitate innovation, efficiency, and flexibility in government operations.

But all of the potential problems that can accompany privatization are exacerbated when the work must be done beyond America's borders. Fraud, waste and abuse are more difficult to contain in a war zone. Legal and regulatory challenges loom large. Despite these risks, the new normal for policy will continue to involve a multi-sector workforce of public and private actors. The challenge is to ensure that this blended workforce serves the interests of the American people rather than the self-interest of special interests.

While the need to expand government capacity in the right places is a recurrent theme in the pages that follow, it bears mention that simply in-sourcing whatever is easiest to in-source will not address the serious problems identified in this report. Just as it matters what tasks government chooses to out-source, it matters what tasks government chooses to bring back in-house. We do not need in-sourcing; we need smart-sourcing that can restore proper government oversight while harnessing the energy and initiative of the private sector for the public good.

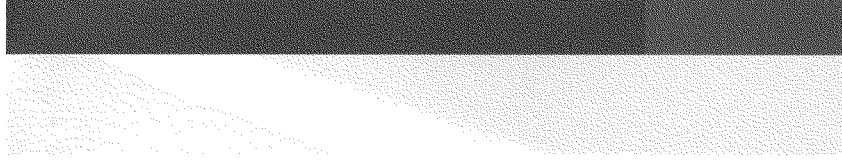
"Contractors in Conflicts" ably presents a smart-sourcing approach for contractors in conflicts and maps the reforms we need to get ES&R contracting right. Those reforms all require striking a balance between the innovation, energy, and efficiency that private sector involvement can bring and the requisite oversight to ensure that market energy is properly harnessed to American interests. Smart-

sourcing means building government capacity for effective management of the multi-sector workforce. Smart-sourcing also means identifying tasks that should never have been outsourced and bringing those back in-house through what the authors call a "core competencies approach."

A key ingredient in improving performance across the board will be unprecedented transparency. OMB efforts to improve contracts and grants data quality, as well as the further development of USAspending.gov to include subcontracts and subgrants are steps in the right direction, as is the administration's Open Government Initiative. Transparency and accountability are critical values in a smart-sourcing orientation, and U.S. anti-corruption efforts abroad will have enhanced credibility when the United States is perceived to be upholding the same values at home. When so much of government is outsourced, whole of government approaches grow only all the more imperative, and the information-sharing that increased transparency delivers encourages unity of effort.

In the past, contracting has been perceived and treated as a peripheral issue, yet as the authors make eminently clear, this perception and practice must not continue. No less than the very effectiveness of American foreign policy and our military operations are at stake in getting ES&R contracting right. I applaud CNAS for tackling this weighty issue in such an insightful way and hope that this report generates the serious debate it deserves.

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II. INTRODUCTION

By Richard Fontaine and John Nagl

When our nation goes to war, contractors go with it. In both Iraq and Afghanistan today, there are more private contractors than U.S. troops on the ground.¹ This state of affairs is likely to endure. Now, and for the foreseeable future, the United States will be unable to engage in conflicts or reconstruction and stabilization operations of any significant size without private contractors. Changes in business practices, the provision of government services and the character of modern conflict, together with limits on the size of the American military, diplomatic and development corps, are driving the size and scope of expeditionary contracting to unprecedented proportions. Absent a significant reduction in America's international commitments and perceived global interests, the employment of private contractors in future American conflicts is here to stay.

The system within which this contracting takes place has not caught up with the new reality. Tens of billions of taxpayer dollars committed to contracts in Iraq and Afghanistan have been implemented with little oversight. Contracting companies themselves crave clearer guidelines. The roles of contractors remain incompletely integrated into the conduct of American operations. The legal framework within which contractors work remains cloudy. And there have been serious allegations of harm to both local civilians and U.S. personnel as a result of contractor malfeasance.

To adapt, the U.S. government must embark on a path of ambitious reform that will require new laws and regulations; an expansion of the government's contracting workforce; a coordination mechanism within the executive branch; greater scrutiny, more transparency and clearer standards; a strategic view of the roles of contractors in American operations; and a change in culture within the government.

As an initial step, the U.S. government must understand and then rethink how contractors are

employed in contingency environments. The vast majority of contractors work for the Department of Defense (DOD), the State Department and the U.S. Agency for International Development (USAID), and they perform a host of key tasks critical to U.S. efforts overseas. These tasks vary widely and include such areas as logistics, transport, linguistic support, security, weapons systems maintenance, construction, intelligence analysis, local security force training and agricultural technical assistance.

Thus far, efforts to understand the contracting phenomenon have been limited in two crucial ways. First, most media, congressional and public attention focuses on the activities of private security contractor (PSC) firms such as Blackwater (now known as Xe Services) that employ armed personnel to protect private property, assets and individuals.² Yet while the activities of such PSCs have sometimes led to flashpoints in American conflicts – as when the killing of four contractors in Fallujah, Iraq, in 2004 sparked a U.S. offensive into the city, and in 2007 when contract workers allegedly shot Iraqi civilians in Baghdad's Nisour Square – these episodes and others like them tell just a small part of the bigger story of contracting on the battlefield.³ Private security contractors comprise roughly 11 percent of all contractors in hostile environments.⁴ In Iraq and Afghanistan today, for example, DOD employs 100,000 and 107,000 contractors, respectively, of whom only 23,148 are armed security contractors.⁵ Similarly, the State Department and USAID employ thousands of contractors, only a fraction of whom handle security duties.

This report looks beyond the security providers to address the great majority of service contractors that handle duties other than security. While less controversial, service contracts yield their own set of problems – including insufficient oversight and management, inadequate integration into operational planning and ambiguous legal status. Thus, in order for the United States to succeed in current and

future engagements, it must establish new policies and rules of the road – not only for armed security contractors but also for the 85 to 90 percent of contractors that carry out a wide array of other tasks.

The second limitation is the almost exclusive focus of Congress, government watchdog groups and other observers on fraud, waste and abuse in Iraq and Afghanistan, and on the government's failure to properly manage contracts. The focus is absolutely necessary; ensuring the proper stewardship of American taxpayer dollars represents a critical aspect of such investigations. But it is insufficient. Other facets of the rise of contracting also require action. The extensive use of contracting has deep implications not just for federal expenditures but also for the ways in which the United States accomplishes its missions in theater. In addition, there are broader strategic foreign policy considerations at play, many of which have received only scant consideration thus far. The very existence of private contractors inserts a profit motive onto the battlefield; their primary responsibility is not the national interest but rather fulfilling the terms of their contracts.⁶ In light of this, the United States has a keen interest in properly marshalling the activities of contractors in America's combat, stabilization and reconstruction operations.

This report outlines a fuller range of issues raised by expeditionary contracting and offers recommendations for how the United States – both the government and the community of private contracting firms – can strike a balance among the greater efficiency and effectiveness necessary to support American missions overseas; the versatility and flexibility required in a rapidly evolving strategic environment; and the proper oversight, accountability and transparency expected by American taxpayers. To put the phenomenon of contracting in context, this report offers a brief history of such contracting and examines the emergence of its unprecedented scope and scale today. It discusses fraud, waste and abuse in

Expeditionary Stabilization and Reconstruction (ES&R)

Given the vast array of functions carried out by the private sector during and after conflicts, contractors have often been grouped into three broad categories:

- Military provider firms that provide armed security assistance.
- Military consulting firms that provide training, assessment and analysis.
- Military support firms that conduct logistics, intelligence and maintenance services.⁷

To describe companies in these three categories, observers have offered various terms, including "expeditionary contractors," "private military companies" and "contingency contractors." Yet such terms are often either arbitrarily limiting or insufficient to convey the tremendous scope of activities in which contractors are now engaged, including their stabilization and reconstruction roles.

For the purposes of this report, we therefore propose a new term: Expeditionary Stabilization and Reconstruction (ES&R) contractors.⁸ This term captures the universe of companies and industries working in support of expeditionary operations (both during and after combat operations) by providing logistical and many other kinds of support. Stability operations contracting represents the transitional work that contracting industries carry out in order to establish and maintain stability in all or part of a nation-state, usually in support of military operations. Reconstruction contracting represents the work of private firms in building and rebuilding physical infrastructure as well as political, social and economic infrastructure – in some cases for years after the end of hostilities. The three chief U.S. government agencies that employ ES&R contractors are the Departments of Defense and State and the U.S. Agency for International Development.

ES&R contracting involves a vast number of diverse activities in theaters around the globe. In Iraq and Afghanistan, for instance, private contractors construct buildings, serve food, drive convoys, deliver mail, advise government ministries, train police and provide translators. And these two theaters do not represent the total of ES&R contracting taking place today. The United States continues to employ private contractors in Colombia, the Balkans and other locations to provide support similar to those tasks required in Iraq and Afghanistan. In employing these unprecedented numbers of ES&R contractors, the United States is also spending an unprecedented amount of money to procure their services. And while much, if not most, of the work these contractors have carried out has been vital to the success of American missions, it has also provoked high visibility problems, ranging from misspent funds to individual criminal behavior.

contracting and the costs associated with employing contractors, as well as military, foreign policy and legal implications. It concludes by offering a series of specific recommendations for reform.

The recommendations in this report will, if implemented, go a long way toward reforming America's

use of private contractors in hostile environments. The United States government now relies on contractors in its overseas engagements but its regulation, management and oversight of these contractors has not kept pace. Since America's dependence on contractors is likely to continue, the need for reform is pressing. The time to act is now.

III. A BRIEF HISTORY OF ES&R CONTRACTING

While the current use of private contractors in hostile environments may be unprecedented in magnitude, the provision of ES&R-type functions by contractors on the battlefield is not a modern phenomenon. During the Revolutionary War, the Continental Congress sought support from various individuals and commercial enterprises for engineering, food, transportation, medical and carpentry services. General George Washington's army, for example, employed contractors to assist with the Delaware River defense in 1777 and to help dig siege fortifications in Savannah, Ga., two years later.⁸ Similarly, the Quartermaster General contracted teamsters to transport supplies and private citizens ferried soldiers across the Chesapeake Bay in preparation for the Yorktown Campaign.⁹ Due to the limited number of soldiers employed to fight the British, Congress encouraged the use of contractors for tasks deemed too menial for soldiers (e.g., transporting supplies) or overly specialized (such as surgeons and other specialized medical personnel).¹¹

Following the war, Congress adopted rules that awarded low-bid contracts to provide supplies and equipment to distant military posts.¹² Contractor neglect often led to operational failures during the Indian Wars and the War of 1812; as a result, military commanders advanced the idea of subjecting private contractors on the battlefield to military law.¹³ Secretary of War John Calhoun attempted to replace service contractors with commissary officers to provide logistical support, but the ratio of contractors to soldiers remained approximately 1:6 in both the Seminole and Mexican Wars.¹⁴

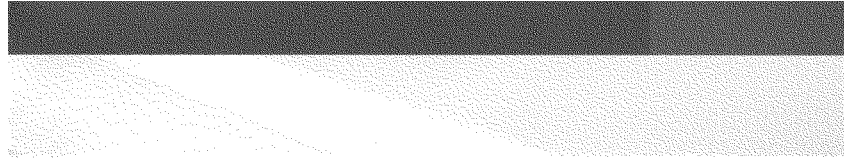
During the Civil War the logistics capacity of both Union and Confederate forces proved inadequate for sustaining troops in the field. As a result, private contractors served alongside soldiers as cooks, medical officers, teamsters, blacksmiths and

in other support roles. To improve the intelligence collection capabilities of the Army of the Potomac, General George McClellan hired the Allan Pinkerton detective agency, while U.S. Military Telegraphs employed thousands of operators and linesmen to help sustain the Union war effort.¹⁵ The first aviation element, the U.S. Army Balloon Corps, was completely contracted.

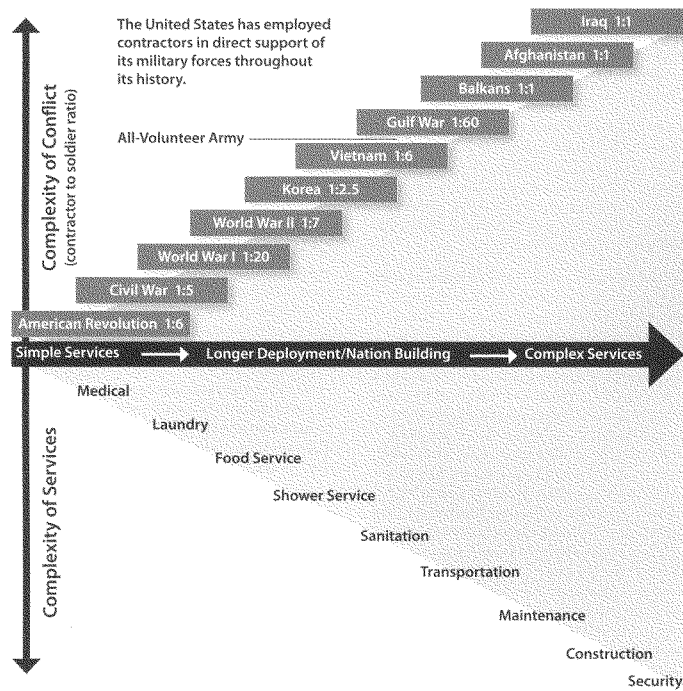
The Spanish-American War gave birth to a new era of expeditionary conflict. To coincide with America's ascendancy as a global power, the military underwent a series of structural changes intended to professionalize the force. To this end, the military began to transform previously outsourced logistical functions into core competencies performed by government personnel. The expansion of the Quartermaster Corps signaled a growing trend of internalizing logistical training and oversight.

The outbreak of World War I saw a tremendous expansion in the use of private contractors for military support. Despite a massive mobilization of private industry, the task of transporting and supplying the American Expeditionary Forces (AEF) across Europe proved overwhelming for military support services. American and foreign contractors filled the void by crewing ships, constructing railroads, administering post offices and providing other general logistical support. In total, the AEF employed over 85,000 contractors during the war.¹⁶

The mid- to late-20th century witnessed a significant transition toward modern contracted functional support in American operations. By the time the United States entered the Second World War, a technological revolution in military hardware had altered the role of contractors on the battlefield and the U.S. military found itself without the requisite human capital to maintain newly designed military aircraft and technologically advanced weapons systems. In addition, the demand for labor outstripped the uniformed



Importance of Contracting: A Historical Perspective



Source: Center for Military History (CMH), The Commission on Wartime Contracting in Iraq and Afghanistan, Interim Report, June 2009.

supply; during the war, U.S. corporations manned ammunition depots and expanded ports in North Africa and the Middle East and built airfields and forward operating bases in the Pacific. Through the course of the war, some 730,000 civilians, all but 25,000 of whom were foreigners, supported the roughly 5.4 million American soldiers deployed overseas.¹⁷

From this point forward, operational success was inextricably linked to contractor performance and competence. The reconstruction of Japan and postwar Europe under the Marshall Plan necessitated America's largest reconstruction efforts until 2003 in Iraq. Yet it was in Korea and Vietnam that ES&R contracting was truly born.

During the Korean War, 156,000 Korean, Japanese and American contractors, mostly in construction and engineering roles, supported 393,000 U.S. military personnel on the battlefield.¹⁸ The extensive use of contractor support, both in dollar amounts (12 billion in current dollars) and personnel (with a 2.5:1 military-to-contractor ratio), was due in large part to the mass demobilization of the U.S. military after World War II.¹⁹ Similarly, President Lyndon Johnson's decision not to mobilize reserve units during the Vietnam War led to the increased use of contractors in theater.²⁰ U.S. military operations in Vietnam, branded the "War by Contract" by *Business Week* in 1966, created a vast demand for physical infrastructure construction, and the Army awarded support contracts to a number of large American firms.²¹ From 1965-1972 the United States disbursed over 2 billion dollars in fees to contractors and involved them in building everything from roads and bridges to power plants, fuel storage depots and jet airfields.²² In addition, the military's demand for skilled technicians grew with the first extensive use of helicopters in combat. Throughout the conflict, an estimated 130,000-150,000 contractors worked in support of U.S. military operations in Vietnam.²³

The end of the Vietnam War marked a hiatus in this type of work abroad, due primarily to a lack of extended U.S. contingency operations. Drawing upon lessons learned in Vietnam, however, the Pentagon attempted to streamline the process of expeditionary contracting. The chief result was the establishment of the Army's Logistics Civil Augmentation Program (LOGCAP) in 1985 and its activation in 1992. This program, created to "preplan for the use of civilian contractors to perform selected services in wartime to augment Army forces," is now also used for logistics support in post-war stabilization and reconstruction phases.²⁴ The first LOGCAP award, valued at an estimated 815 million dollars, allowed the Army to employ one company in support of all of its field operations in places such as the Balkans, Haiti, Italy, Rwanda, Saudi Arabia and Somalia.²⁵ This initial agreement set an important precedent, as the military would now depend on contractor support for a wide range of services and products in-theater in future conflicts. To date, four LOGCAP contracts have been awarded – the most recent of which, LOGCAP IV, allows the Army to award a total annual maximum value of 15 billion dollars to three competing contractors for a lifetime maximum value of 150 billion dollars.²⁶

U.S. operations in the Balkans in the 1990s spurred another evolution in the emergence of modern ES&R contracting. The Balkans Support Contract called for the provision of a huge array of logistics and other services to U.S. forces in the Balkans and remains in force today under a different name. The Balkans experience foreshadowed the enormous use of contractors in current wars: For the first time, the ratio of contractors to military personnel was approximately 1:1.²⁷

During the first Gulf War, the Army employed just 9,200 contractors in support of U.S. combat units.²⁸ In the 1990s, following the collapse of the Soviet Union and the end of the Cold War, the U.S.

slashed the size and budget of the armed forces. By the end of FY 2000, the U.S. military's active component had been reduced by one-third and the budget of the Department of Defense was 22 percent smaller than it had been at the end of the Cold War.²⁹ As America's international engagements increased in the following years, employing private contractors became an unavoidable reality of any sizable expeditionary operation.

The 2001 invasion of Afghanistan, together with the March 2003 invasion of Iraq, saw an increase in the size and scope of contracted support on the battlefield that was, as the Congressional Budget Office (CBO) stated, "unprecedented in U.S. history."³⁰ By 2007, CBO estimated that at least 190,000 contractors were working in the Iraqi theater on U.S.-funded contracts, pushing the ratio of contractors to members of the U.S. military to greater than 1:1.³¹ It also noted that U.S. agencies awarded some 85 billion dollars in contracts for services between 2003 and 2007, predominantly for contracts in Iraq.³² DOD spent upward of 30 billion dollars in FY 2007 and the first half of FY 2008 on contractors in Iraq and Afghanistan, in addition to significant sums spent on contractors by the Department of State (1.9 billion dollars) and USAID (1.7 billion dollars).³³ These contractors engaged in activities as diverse as transportation, security, engineering and construction, maintenance, weapons maintenance, base operations and police and army training. For those contractors operating in the field, this spike in activity was accompanied by an equally high level of uncertainty and danger.

IV. ES&R CONTRACTING TODAY

The rise of large-scale ES&R contracting reflects a more basic shift in the way the U.S. government – and particularly the military – conducts its business. As anyone who has followed the debates over “outsourcing” will recognize, the use of contractors has increased across the spectrum of government activities and within the business community. The transition to a more service-oriented economy and increased outsourcing has spurred change even in the functioning of DOD, long thought to be among the most hardware-intensive of all government agencies. Approximately 60 percent of DOD contractors in Iraq and Afghanistan currently perform logistical functions such as maintenance, dining and laundry services; 11 percent protect personnel and property; and the remainder carry out other forms of support (see Figure 1).³⁴ State Department contractors fulfill a number of roles, including a major police training effort in Iraq, and USAID contractors engage in reconstruction and development projects in both theaters. In addition, contractors provide support for other contractors, including food services, base security and transportation.

The U.S. contracting cadre is truly multinational. It has become common, for example, to see in battlefield dining facilities cooks from one country working with servers from another to dispense food to citizens of a third – perhaps in a facility partially constructed by locals and guarded by foreigners. In this sense, then, the United States has achieved with its contractors precisely the kind of multinational coalition effort that has at times eluded it when it comes to actual combat operations. In Iraq today, third-country nationals comprise the largest share of U.S. contractor personnel (see Figure 2).

Privatization Grows

This large-scale U.S. reliance on contractors in expeditionary operations is likely to remain an

Figure 1: Iraq DOD Contractor Personnel
by Type of Service Provided (as of December 31, 2009)

CURRENT CONTRACTOR PERSONNEL IN IRAQ	
TYPE OF SERVICE	NUMBER OF CONTRACTORS
Base support	61,725
Security	11,095
Translator/Interpreter	8,414
Logistics/Maintenance	6,085
Construction	3,385
Other	3,384
Communications support	2,429
Transportation	2,060
Training	1,458
TOTAL	100,035

Source: DOD; USCENTCOM 1st Quarter Contractor Census Report, FY 2010.

enduring feature of future contingencies. Many factors contributed to this circumstance. The global rise in outsourcing, changes in the nature of warfare, the shift to an all-volunteer force, the statutory limit on the overall size of U.S. military forces, the decline in USAID personnel numbers, a desire to reduce government costs during peacetime and the probable character of future U.S. engagements are trends unlikely to change significantly in the foreseeable future. Meanwhile, the globalization of business – and the attendant ease with which information, individuals and investment travel the world – has transformed nearly every aspect of the world's economy. Today, few enterprises are exclusively American, French or Japanese, and businesses have increasingly turned

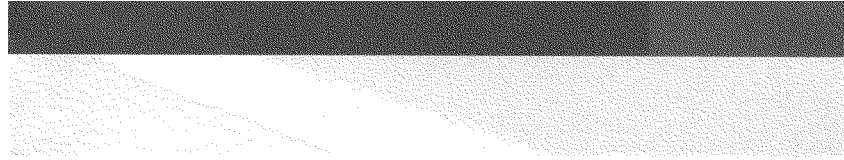


Figure 2: DOD Contractor Personnel in the USCENTCOM Area of Responsibility

DOD CONTRACTOR PERSONNEL				
	TOTAL CONTRACTORS	U.S. CITIZENS	THIRD COUNTRY NATIONALS	LOCAL/HOST COUNTRY NATIONALS
Iraq only	100,035	27,843	51,990	20,202
Afghanistan only	107,292	10,016	16,551	80,725
Other USCENTCOM locations	32,124	6,681	19,690	5,753
USCENTCOM Area of Responsibility	239,451	44,540	88,231	106,680

Source: DOD; USCENTCOM 1st Quarter Contractor Census Report, FY 2010

to outside contractors to carry out all but their core functions for reasons of speed, cost, expertise and efficiency.

The U.S. government under several presidential administrations actively encouraged the shift to contracting. In 1983, the Reagan administration stated that "... it has been and continues to be the general policy of the government to rely on commercial sources to supply the products and services government needs."³⁵ Similarly, Vice President Al Gore's famous pledge to "reinvent government" led to new regulations encouraging an expansion of outsourcing. The government explicitly expanded the contracting-out of functions that had previously been performed by government workers by revising the A-76 process of the Office of Management and Budget (OMB) and passing the Federal Activities Inventory Reform (FAIR) Act of 1998.³⁶ This privatization was aimed mostly at domestic activities; as the roles of contractors

expanded and they began to operate in expeditionary environments, changes in the legal and policy framework governing them lagged significantly behind. Nevertheless, the trends accelerated following the end of the Clinton administration; between 2001 and 2008, federal spending on contracted services more than doubled.³⁷

The trajectory of USAID, the agency to which Americans might naturally look to carry out many reconstruction activities, is emblematic of these changes. Created to separate development aid from foreign military and other security-type assistance, the history of USAID highlights the shift toward privatization. In 1968, at the acme of U.S. involvement in Vietnam, USAID had 17,500 direct hire employees, many of whom were active on the battlefield. By 1980, the number was 6,000; it fell to roughly 3,300 by 1990 and to less than 2,000 a decade later.³⁸ Today, when America's significant stabilization and reconstruction responsibilities

would suggest the need for a substantially larger USAID, the total stands at approximately 2,700.³⁹ Professor Allison Stanger, in an incisive book chapter entitled "The Slow Death of USAID," remarks that the agency "at the end of the Bush era was little more than a contract clearinghouse," a "fund-dispensing agency that provided only a marginal management role and relied almost exclusively on contractors and grantees to do the work."⁴⁰

As the volume and complexity of contracts has increased, a commensurate deficit of government skill in overseeing those contracts has emerged.

As Contracting Rose, Oversight Declined

Yet, while the government downsized itself and increased its reliance on contractors, it also reduced the size of the government workforce dedicated to overseeing those contracts. At DOD, USAID and other government agencies, individual contracting officers (COs) have overseen a steadily increasing volume of contracts while the number of contracting officers and contracting officer representatives (individuals appointed by the contracting officer to monitor the day-to-day administration of a contract, abbreviated as CORs) has held constant or even declined.

In addition, as the volume and complexity of contracts has increased, a commensurate deficit of government skill in overseeing those contracts has emerged. In the Army, for example, while the overall number of individuals working in contracting held

steady from 1996 to 2005 at approximately 5,500, the same time span saw a 331 percent increase in the dollar value of contracts and a 654 percent increase in actions.⁴¹ Between 1990 and 2006, the Defense Contract Management Agency's civilian workforce fell 60 percent, from roughly 24,000 personnel to just shy of 10,000.⁴² DOD has taken steps to address its personnel deficits over the past year by boosting the numbers of COs and CORs – in Iraq and Afghanistan, in particular – but serious gaps in contracting personnel remain.⁴³ USAID saw similar trends: the number of employees overseeing contracts dropped significantly from 1997-2007. By the end of 2007 the agency had just 109 employees managing more than 8.9 billion dollars in contracts – 81 million dollars per employee.⁴⁴ Those contracting officers and program managers who remain with the government have often lacked a familiarity with the specialized characteristics of ES&R contracting and tend to be located in the United States, thousands of miles away from the sites at which contracts are executed. The result, in Iraq and elsewhere, was that the government has actually had to hire contractors to coordinate the activities of other contractors.

The Changing Nature of Conflict

Changes in the character of warfare are accelerating the growing reliance on contractors on the battlefield. Contractors often help to maintain technically sophisticated weaponry and to construct and sustain large, enduring base camps or logistical nodes from which to operate. Long-term nation-building efforts like those in Iraq and Afghanistan require an array of functions – from advising and training foreign security forces to constructing and maintaining power plants and waterworks – that the U.S. government is not manned to carry out on its own. And the speed with which commanders require support in the field, particularly in Iraq and Afghanistan, places a premium on extending quick requests for bids from outside contractors.

To the extent that future conflicts involve messy insurgencies and attempts to boost host-government legitimacy rather than conventional battles

between massed armies, contractors will continue to play a large and prominent role. Even in more conventional conflicts and postwar reconstruction activities, contractors are likely to be numerous. To extinguish support for insurgencies, build the security forces of host nation governments, expand the capacity to provide services to local populations, create jobs, train civil services and construct (or reconstruct) infrastructure, the U.S. government will rely to an enormous extent on the use of private contractors, including local hires.

Indeed, many experts believe that American military conflicts in the future will resemble U.S. operations in the Balkans, Colombia (via "Plan Colombia"), Iraq and Afghanistan more than conventional conflicts like Operation Desert Storm. Military force has tended toward complex and protracted affairs, seeking not rapid battlefield results such as the ejection of the Iraqi army from Kuwait but rather establishing the conditions under which political and economic development can take hold. Sir Rupert Smith, a retired British general renowned for his analysis of modern warfare, wrote, "We intervene in . . . a conflict in order to establish a condition in which the political objective can be achieved by other means and in other ways. We seek to create a conceptual space for diplomacy, economic incentives, political pressure and other measures to create a desired political outcome of stability, and if possible democracy."⁴⁵ Following hostilities, the United States may play a reconstruction role for years (in creating or recreating physical, economic, social and political infrastructure); indeed, the Balkans Support Contract is still in force today.

Numbers

Simple math illuminates a major reason for the rise of contractors: The U.S. military simply is not large enough to handle all of the missions assigned to it. By employing contractors, the United States has been able to maintain a much smaller standing Army than would otherwise be required, quickly draw on pools of expertise and manpower in the face of unexpected events and attempt to reduce the cost to government

The statutory limit on the armed forces constrains the size and surge capacity of the U.S. military, leading DOD to focus increasingly on building a force that generates combat power.

between times of war, since the government does not need to retain contractors on its payroll after a conflict ends. The statutory limit on the armed forces constrains the size and surge capacity of the U.S. military, leading DOD to focus increasingly on building a force that generates combat power. This emphasis on combat forces has come at the expense of those who support the effort: "KP" ("Kitchen Patrol," logistical support provided by soldiers temporarily reassigned from combat units as recently as Operation Desert Storm), for example, is largely a thing of the past. To cite a contemporary example, before the surge of American troops to Afghanistan was announced in December 2009, defense officials developed plans to replace military support units with contractors. By employing private contractors to fulfill duties previously carried out by military personnel, defense planners hoped to add as many as 14,000 combat troops in Afghanistan while leaving the overall number of U.S. forces in the country unchanged.⁴⁶ Similarly, the State Department and USAID do not possess the human infrastructure required to carry out the tasks for which they are responsible.

President Barack Obama entered office intent on reforming the way that government conducts business. "It starts," he said, "with reforming our broken system of government contracting."⁴⁷ To achieve

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Contracting in Conflicts The Path to Reform

this goal, the president set out to reduce the number of contractors working for the federal government, including ES&R contractors operating in hostile environments. "In Iraq," he said, "too much money has been paid out for services that were never performed, buildings that were never completed, [and] companies that skimmed off the top . . . We will stop outsourcing services that should be performed by the government."⁴⁸ While the most recent Quadrennial Defense Review (QDR) echoes the president's position and talks of finding a more appropriate balance between contractors and federal employees in carrying out necessary tasks, it fails to outline how DOD would establish such a balance among military, federal civilian and contractor personnel, or what exactly that balance would look like.⁴⁹ Even if efforts to in-source some functions are successful, they are unlikely to significantly reduce U.S. dependence on contractors. It has become a new reality both of overseas engagements and of American foreign policy.

Political Costs and Commitments

The use of private contractors has reduced the political costs associated with U.S. deployments and global commitments. American politicians and policymakers routinely make reference to the number of troops deployed in Iraq and Afghanistan but almost never to the over 200,000 contractors currently on the U.S. government payroll. American troops, diplomats and other government workers killed in combat zones are listed in casualty totals and featured in "faces of the fallen" tributes; American contractors killed in the same zones barely register – to say nothing of local or third-country nationals. (Through 2009, an estimated 1,757 contractors have died in Iraq and Afghanistan, and nearly 40,000 wounded.)⁵⁰ Had U.S. presidents been required to deploy only American troops and federal employees to carry out all duties in recent conflicts, it seems likely that these operations would have garnered less public support.

There is another way in which the United States could reduce its employment of private contractors

in combat and in stabilization and reconstruction operations: limit the number, scope and duration of such operations. While there is a growing body of opinion suggesting that the United States will not carry out major, multiyear operations on the scale of Iraq and Afghanistan again in the near to middle term, it is exceedingly unlikely that the number of even much more limited operations will drop to zero. Post-Cold War U.S. presidents, both Republican and Democratic, have engaged in dozens of overseas contingency operations; the current U.S. president, like his predecessors, continues to define American security interests as global in scope.

Challenges

The U.S. military can fight nothing but the most limited engagements without the extensive use of contractors, and the State Department and USAID will continue to rely on contractors to carry out a great deal of reconstruction work. Since it is unlikely that the (statutorily limited) U.S. force structure will increase dramatically in the years ahead, and it is likely that American commitments overseas will remain great or even increase, U.S. reliance on private ES&R contractors is here to stay. But accepting this reality makes reform imperative. As *New York Times* journalist Thomas Friedman put it in a recent column, "We're also building a contractor-industrial-complex in Washington that has an economic interest in foreign expeditions. Doesn't make it wrong; does make you want to be watchful."⁵¹

The U.S. government's increased dependence on contractors has provoked a number of concerns, investigations and calls for reform. Five issues merit particular attention:

- Fraud, waste and abuse
- Cost
- Military implications
- Foreign policy implications
- Legal and regulatory implications

V. FRAUD, WASTE AND ABUSE

One area of particular concern among public officials and concerned citizens has been the degree of fraud, waste and abuse linked to reconstruction operations and contractor-provided services in Iraq and Afghanistan. The post-invasion reconstruction environments in both countries represent the largest-ever markets for private firms providing ES&R services; through March 2010 Congress had appropriated 53 billion dollars for reconstruction in Iraq and 51 billion dollars for reconstruction in Afghanistan (President Obama has since requested an additional 20 billion dollars to fund reconstruction in Afghanistan).⁵² The great amounts of money disbursed, the speed with which the government demanded the reconstruction projects move forward and the lack of oversight – particularly in the early stages of reconstruction efforts in each country – invited a significant degree of waste and corruption.

To increase oversight of reconstruction efforts, Congress mandated the creation of the Special Inspector General for Iraq Reconstruction (SIGIR) in 2004. Originally known as the Inspector General for the Coalition Provisional Authority, it was tasked with examining how billions of dollars were spent on contracts in theater – a significant amount of which was believed to have been lost to fraud, waste or abuse.⁵³ While it is impossible to accurately gauge the level of this loss, SIGIR Inspector General Stuart Bowen has suggested that poor contract management in Iraq has left billions of taxpayer dollars vulnerable to waste and fraud.⁵⁴

In light of SIGIR's aggressive investigations into contracting in Iraq, and the large and rising amounts spent on contracting in Afghanistan, Congress mandated a counterpart inspector general for Afghanistan (SIGAR) in 2008 – after nearly seven years and 38 billion dollars had been committed to rebuilding the war-torn nation.⁵⁵ Among their many functions, these offices have conducted audits and investigations into maximizing efficiency in contract oversight and resource management.

Figure 3: Status of Investigative Activities of U.S. Agencies other than SIGIR, as of March 31, 2010

FRAUD INVESTIGATIONS IN IRAQ*	
AGENCY CASES**	OPEN/ONGOING
Defense Criminal Investigative Service	223
U.S. Army Criminal Investigation Command, Major Procurement Fraud Unit	105
Federal Bureau of Investigation	92
Department of State, Office of the Inspector General	17
USAID	11
U.S. Air Force Office of Special Investigations	7
Naval Criminal Investigative Service	3
TOTAL	458

* Does not include cases under investigation by the Special Inspector General for Iraq Reconstruction (SIGIR).

**Numbers include pending cases worked with other agencies within the Joint Operations Center.

Source: SIGIR, "Quarterly Report to the United States Congress," April 30, 2010.

To date, SIGIR investigations have led to 39 indictments for fraud and 30 convictions, not counting investigations and indictments by other government agencies.⁵⁶ When these are included, the total number of convictions for fraud stands at more than 60 (as of March 2010). In addition, the government has opened an additional 52 cases, at least

45 of which derived from information gathered by the Treasury Department's Financial Crimes Enforcement Network, an office that tracks suspicious financial transactions.⁵⁷ Similarly, SIGAR is expanding its operations to provide better oversight of reconstruction efforts and to increase its efforts to deter corruption. SIGAR is currently engaged in 12 ongoing audits of U.S. reconstruction efforts, including four which involve contracts related to building the Afghan National Security Forces.⁵⁸

Regulations aimed at preventing fraud, waste and abuse while ensuring proper contracting practices are enshrined in the Federal Acquisition Regulation (FAR). The FAR, however, is not written for contracting in contingency environments, contains an enormous number of regulations and involves laborious requirements before a contract can be cancelled. In addition, relatively few acquisition personnel are familiar with its use in hostile theaters. As retired Air Force Major General Darryl Scott, former head of Joint Contracting Command Iraq/Afghanistan, put it in 2006, "Our contracting officers are mostly trained in the use of the Federal Acquisition Regulation (FAR) and experienced in its application in non-contingency environments. We need to increase training for contingency operations."⁵⁹ Other officials and observers go further, saying that the FAR represents regulations designed for peacetime acquisition and that only very selected waivers to FAR rules have thus far been permitted, even for contracting in contingency areas. This system, they argue, results in a rigid and time-consuming route to fulfilling contracts, one that limits the military's authority and flexibility on the battlefield. "The real issue," one DOD official stated, "is whether we can have an abbreviated Contingency FAR authorized so we can plan, train and execute off an acquisition rule book that is responsive to the needs of the operation, not peacetime processes, and for which we can be held reasonably accountable."⁶⁰

VI. COST

One of the fiercest debates over the role of private contractors in contingency operations concerns the issue of cost. Are contractors less or more expensive than using federal employees? The answer is much more complicated than it would appear at first glance and remains highly disputed.

Most experts agree that contracting out logistics and construction activities tends to result in significant cost savings to the government, while more skilled labor – and private security functions in particular – tends toward parity with the cost of using federal employees. Hiring unskilled locals or third-country nationals can save the taxpayer substantial costs. It is generally much less expensive to hire citizens from low-wage environments to carry out a variety of ES&R tasks (e.g., serving food, constructing barracks, etc.) than it would be to have uniformed personnel, federal civilian employees or American civilian contractors perform the same functions. As the required skills increase, however, the picture changes. Per-day salary for an American contractor, for instance, can easily exceed the per-day salary for a member of the military carrying out the same duty. Many factors influence the cost of hiring contractors for a particular function, including the type of skilled labor required, the background of the contractor (e.g., whether or not a given individual served in the U.S. military and collects benefits; the previous U.S. training provided), the task itself, the length of deployment and the benefits incurred by the contractor or by the U.S. government (e.g., housing, medical care in theater, armed protection).

One set of costs that is not always apparent in comparative calculations is the "brain drain" aspect to contracting when military personnel who have been trained by the United States, and who may receive a pension and lifetime health care, depart military service or other federal employment in order to take higher-paying jobs working for private contractors.

Among military personnel, as a 2005 CBO report points out, pay is just one element of total compensation. The other elements – which constitute a significant portion of the compensation package – include retirement pay, services at military installations (e.g., housing and food) and health care, which may continue for life. While CBO attempted to convert the elements of military compensation into present-value terms, this calculation proved nearly impossible for other federal employees or contractors. In addition, there are substantial differences in cost to the government depending on whether the calculation involves both wartime and peacetime costs, or wartime costs alone. CBO has estimated that, in calculating wartime costs alone, the Army could fulfill LOGCAP functions for roughly the same cost as private contractors. At the same time, it estimated that, over a 20-year period (in both wartime and peacetime), obtaining logistics support from a private contractor would cost approximately 41 billion dollars, while obtaining the same services from Army units would cost around 78 billion dollars, nearly double the cost of the contracted services.⁶¹

This and other reports demonstrate, however, the extraordinary difficulties the government has had in making comprehensive cost comparisons between government workers and private contractors carrying out the same functions. For example, the U.S. Comptroller General recently initiated a review of costs to DOD and the State Department of using private security contractors versus using federal employees for the same functions. As the March 2010 report of the Government Accountability Office (GAO) indicates, the Pentagon was unable to provide the information necessary for GAO to make such a comparison; it lacked information about the number of military personnel that would be needed to meet contract requirements or the cost of training personnel to carry out security functions. This occurred nearly five years after GAO issued a report calling

The clearest benefits of using contractors center more on readiness issues such as flexibility and speed of deployment and less on cost savings.

on DOD to improve its transparency and data collection of active duty compensation.⁶² The GAO instead focused its 2010 report on State Department security contractors.⁶³

The clearest benefits of using contractors center more on readiness issues such as flexibility and speed of deployment and less on cost savings. As CBO points out, "Because contractors need not make long-term commitments to their employees, they are in a better position to 'surge' to meet a short-term demand for workers and then rapidly downsize later."⁶⁴ To cite one example, the U.S. government in Iraq shed over 40,000 contractors in a matter of months as part of the redeployment of American forces there.⁶⁵ In addition, CBO has said, contractors may "be able to deploy to the wartime theater more rapidly than could support units from the Army Guard and Reserve . . . which contain two-thirds of the Army's logistics personnel."⁶⁶ At the same time, the report notes, "A disadvantage of using contractors is that the contracts themselves may be inflexible, requiring military commanders to issue change orders to support contracts for even minor shifts in tasks."⁶⁷

VII. MILITARY IMPLICATIONS

The unprecedented numbers of private contractors on the battlefield and the vast scope of their activities pose new challenges for the U.S. military. In a recent address, General Stanley McChrystal, the top U.S. and NATO commander in Afghanistan, expressed concern about the military's dependence on private contractors. "I think we've gone too far," McChrystal said. "I think that the use of contractors was done with good intentions so that we could limit the number of military. I think in some cases we thought it would save money...We have created in ourselves a dependency on contractors that I think is greater than it ought to be."⁶⁸

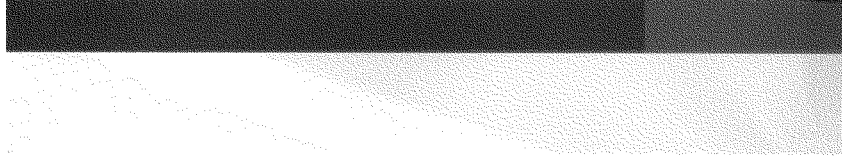
McChrystal's comments reflect the military's ongoing effort to grapple with the new issues raised by America's unprecedented dependence on private contractors. Despite efforts to align the conduct of contractors with that of military personnel, these relationships remain poorly defined. For example, operational plans have only recently taken the role of contractors into account. Beginning in 2006, DOD has required operational planners to include in their operations orders an annex – Annex W – that details the numbers of contractors required for a military operation and the tasks they will perform. The Department has moved ahead in developing Annex W content in operational plans, but the quality of those plans often comes up short.⁶⁹ Beyond Annex W, DOD guidance encourages operational planners to include contract requirements in other sections of their plans. Yet detailed information about these requirements or the role contractors will play is often minimal or even nonexistent in other parts and annexes.⁷⁰

GAO has reported that most operational plan annexes drafted thus far simply restate broad language from existing guidance on contractors, rather than precise details about the kinds and numbers of contractors necessary to carry out an operation.⁷¹ By providing less detail than expected

by Department leadership, GAO reports that current plans are "limiting the utility of the Annex W as a planning tool to assess and address contract support requirements."⁷² GAO indicates that this lack of detail "can hinder the ability of combatant commanders to understand the extent to which their plans are reliant on contractors" and that "senior decision makers may incorrectly assume that operations plans have adequately addressed contractor requirements."⁷³

In addition, training courses for U.S. soldiers preparing to deploy to Afghanistan or Iraq rarely address the role of contractors, even though half of all those employed by the United States in theater are contractors. In light of this fact, Congress in 2008 directed DOD to develop a joint policy document on contingency program management to ensure the Department provides training to relevant non-acquisition workforce personnel (including operational field commanders and their key staff) in contracting issues. Congress mandated that this training be "sufficient to ensure that the military personnel ... understand the scope and scale of contractor support they will experience in contingency operations and are prepared for their roles and responsibilities."⁷⁴ As of April 2010, DOD had not issued the joint policy document.⁷⁵ The same deficit appears with respect to pre-deployment war games. In 2008, Congress mandated that DOD provide for the incorporation of both contractors and contract operations in mission readiness exercises.⁷⁶ Yet war games and role-playing exercises (which, somewhat ironically, are themselves often staffed by contractors) rarely incorporate the role of contractors. In such exercises, contractors often play every role *except* contractors.

The extensive use of ES&R contractors – and their presence on the battlefield along with American troops – poses special dilemmas in command, coordination and discipline. Contractors are not in the chain of command; they are now, however, subject to the Uniform Code of Military Justice



Contracting the Iraq Drawdown

Recent experience in Iraq demonstrates DOD's continued difficulty in integrating the role of contracting into military planning. While U.S. Forces-Iraq has identified the LOGCAP support that will be necessary for the coming drawdown of American troops, it has failed to identify other contractor support needed to meet the stated U.S. objective of a 50,000-troop ceiling by August 2010.⁸⁰

DOD doctrine requires operational personnel, rather than contracting officials, to determine the numbers of contractors that will be necessary to carry out a mission and the functions they must carry out. According to GAO, however, the Iraq drawdown plan delegated this responsibility to contracting agencies such as the Joint Contracting Command (JCC).⁸¹

JCC stated that it could not determine the appropriate level of in-theater contract support required without relying on commanders to provide the necessary information, information it did not receive. Remarkably, instead of employing operationally driven requirements to determine contracted services, the Iraq drawdown plan is based on historical ratios of contractors to military personnel in Iraq.⁸²

(UCMJ), albeit only under certain circumstances and not to the entire Code. All DOD contracts now require contractors to follow relevant rules and regulations, including fragmentary orders issued by commanding officers in contingency areas.⁷⁷ At the same time, failure to follow orders can result in criminal prosecution for military personnel, but this is not true of civilian contractors. The contractors, rather than commanders in the field, are responsible for ensuring that their employees comply with laws and orders, and commanders on the ground have in the past expressed repeated

frustration with their own lack of knowledge regarding contractor activities – or even presence – in the battlespace.⁷⁸ Although DOD has designated certain civilian employees as “emergency-essential” personnel who may be sent overseas during a crisis, even involuntarily, and State Department and USAID Foreign Service Officers must agree to worldwide availability and can be subject to directed (i.e., involuntary) assignments in some cases, this is not the case with private contractors. Federal employees who refuse may face administrative penalties, including termination of employment.⁷⁹

Today and in the future, properly marshalling the collective activities of private contractors will be critical to a commander's ability to accomplish his or her mission. This will require knowing the basics: how many contractors are in a particular battlespace, who and where they are, and what they are doing; how their responsibilities mesh with the authorities and responsibilities of American government personnel; and how operational plans incorporate contractors into the array of forces in play.

Despite the enormous role now played by contractors on the battlefield, defense planners still pay them inadequate attention. It is striking, for instance, that the QDR failed to discuss the role of contractors on the battlefield and in stabilization operations, how military commanders can better integrate contractors into planning, training and operations, or a vision for the relationship between contractors and government personnel (other than that there will be fewer of the former and more of the latter). Given the QDR's assurance that an increasingly complex security environment will demand U.S. military involvement in a broad range of contingencies in the future, the QDR represents a missed opportunity to outline a framework within which contractors and military personnel can partner. Apart from stating that DOD intends to hire or convert 20,000 new acquisition positions

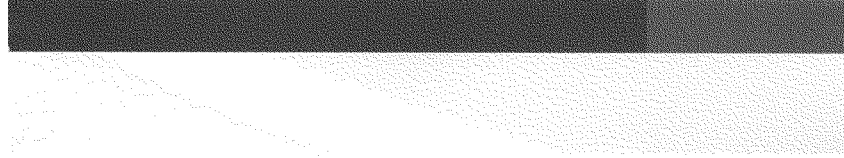
by 2015, the 2010 QDR, while acknowledging that the future force includes contractors, failed to lay the groundwork for significant institutional and cultural change within the Department.⁸³ Although Secretary of Defense Robert Gates ordered his department to grow the Army contracting civilian workforce by 1,600 new positions by FY 2015, the 2010 QDR devotes just a few short paragraphs to the issue, noting simply, "Over the next five years, the Department will reduce the number of support service contractors to their pre-2001 level of 26 percent of the workforce (from the current level of 39 percent) and replace them, if needed, with full-time government employees."⁸⁴ This drive to in-source not only appears to be based on an arbitrary target percentage, but it also fails to distinguish between types of contractors – some of whose functions may cost less than employing government employees and others whose tasks the government may want to in-source as a core competency. For an institution that relies on private contractors to an unprecedented degree for its operational success, DOD should give their role much more strategic thought.

VIII. FOREIGN POLICY IMPLICATIONS

How America deals with ES&R contractors carries broad foreign policy implications. This is true most obviously in the wars in which the United States is engaged. The testimony of military personnel and contractors alike suggests that local populations draw little or no distinction between American troops and the contractors they employ; an act committed by one can have the same effect on local or national opinion as an act carried out by the other. (Insurgents have also viewed contractors as potential targets; in Afghanistan, Taliban fighters have begun regularly targeting USAID contractors working with local Afghan officials on civil infrastructure projects.)⁸⁵ In the midst of two counterinsurgency campaigns, contractor conduct directly affects U.S. authority and legitimacy on the ground in Afghanistan and Iraq. In an effort premised on a strategy of "clear, hold and build," and in which much of the "build" mission will be executed by contractors, each of their actions impacts the effectiveness of American policies and information operations on the ground.

Though most American private contractors appear to make a positive contribution, and to be honest, patriotic and dedicated to the mission at hand, media accounts typically focus on the negative aspects of contracting and the ways in which contractors' actions set back the American war effort. The Blackwater shootings in Baghdad's Nisour Square, for example, are well known; less known is that a number of contractors provided interrogation services at Abu Ghraib prison.⁸⁶

ES&R contractors have played a significant role in the counterinsurgency-intensive operations in Iraq and Afghanistan. Such missions often require providing employment for local populations. By "hiring local," the United States attempts to boost the local economy, reduce unemployment and drain away the pool of young men willing to fight. Major General Darryl Scott described the desired



end state as one in which 75 percent or more of available funds are awarded to host-nation contractors and policies encourage the use of local subcontractors for awards not made directly to host-nation firms.⁸⁷ Hiring significant amounts of local labor to carry out contracted tasks can be central to the success of counterinsurgency operations. At the same time, contracting - even locally - can pose difficulties. Employing local labor can draw talent away from the host government and toward higher paying private sector jobs. And there may be greater concerns about security and reliability when employing local contractors rather than Americans to carry out the same tasks.

The great reliance on contractors in wartime raises foreign policy questions that go well beyond the domain of DOD. To cite one example, the United States has brought to Iraq and Afghanistan tens of thousands of workers from developing countries in which labor costs are low. As the surge of 30,000 U.S. troops to Afghanistan gathers pace, the Congressional Research Service projects that 130,000-160,000 contractors will support the nearly 100,000 U.S. troops in Afghanistan by August 2010.⁸⁸ As the number of contract personnel increases, so too does the reliance on host-nation and third-country nationals. In one example, the U.S. government has requested that a contracting firm deploy into Afghanistan some 5,000 support contractors as soon as possible. The vast majority of these will be Indian nationals - irrespective of Pakistan's acute sensitivity to the perception of Indian encroachment in Afghanistan. There appears to be insufficient deliberation within the State Department about the foreign policy implications of contracting decisions made at the corporate level, both on State/USAID funded contracts and on DOD contracts.

Finally, and at perhaps the most overarching level, the role of private contractors may imply changes in the rules-based international society that the United States has endeavored mightily to construct

and protect since 1945. Through legal precedents and norms of behavior established in the course of current wars, U.S. employment of contractors could shape the way that current and rising powers conduct future wars. Washington has long been in the norm-setting and norm-enforcing business, and as a result it should expect that many others will follow America's lead. In this regard, efforts such as the Montreux Document (discussed below) and international legal interpretations will have important precedent-setting implications for the future conduct of American and foreign behavior.

The testimony of military personnel and contractors alike suggests that local populations draw little or no distinction between American troops and the contractors they employ; an act committed by one can have the same effect on local or national opinion as an act carried out by the other.

IX. LEGAL IMPLICATIONS

The legal framework governing ES&R contractors in wartime is complicated, features overlapping jurisdictions and is somewhat ambiguous. Contractors working for the United States can be held accountable for crimes committed overseas under at least two domestic American laws. The Military Extra-Territorial Jurisdiction Act (MEJA) allows contractors hired by DOD to be tried in U.S. (civilian) federal court for crimes committed overseas.⁸⁹ In 2004, Congress expanded MEJA jurisdiction to apply to contractors working for agencies other than Defense as long as their "employment relates to supporting the mission of the Department of Defense overseas." This phrase, however, remains ambiguous and turns on how the "DOD mission" is precisely construed. For instance, in the immediate aftermath of the Blackwater shooting in Nisour Square in Baghdad, the State Department argued for a time that the law did not apply to those guarding its personnel.⁹⁰ It remains unclear whether State Department or USAID contractors fall under MEJA, even in a patently military environment. In addition, MEJA was originally written to provide jurisdiction over criminal acts committed in non-operational environments. There are practical and logistical challenges associated with trying contractors in federal court for crimes committed in hostile environments abroad, including the requirements to procure witnesses, ensure custody of evidence and so on. Perhaps as a result of these factors, relatively few contractors have been tried under MEJA since its passage in 2000 or even after its expansion. (Between March 2005 and March 2010, 17 U.S. national contractors have been prosecuted or charged under MEJA, with an additional 15 cases pending.⁹¹)

The murky legal status of contractors on the battlefield has led numerous observers, including some in the Pentagon, to call on Congress to pass legislation applying MEJA unambiguously to all contractors in a contingency environment. In 2008, then-Sen. Barack Obama introduced an amendment with that

objective, but the effort failed. By adopting legislation of this variety, Congress could significantly increase legal accountability for ES&R contractors.

Given the challenges associated with holding contractors accountable under MEJA, Congress has pursued an alternative path by expanding the jurisdiction of the UCMJ. The FY 2007 National Defense Authorization Act extended military jurisdiction and trial by court martial to contractors "serving with or accompanying an armed force" in a contingency operation. The new provision, which expands UCMJ jurisdiction to a potentially broader pool of contractors than that covered by MEJA, was greeted as a major step toward bringing greater legal accountability to the actions of contractors.⁹² The first case brought under the UCMJ dealt with an Iraqi-Canadian who worked as a contract interpreter for the U.S. Army and was charged with stabbing a colleague.⁹³ The military, given its presence on the battlefield – including its investigators, prosecutors, defense lawyers and judges – and its experience in court-martialing its own personnel for violations of the Uniform Code, is arguably in a better position to hold contractors legally accountable than is the federal court system. Yet serious constitutional questions surround the concept of trying civilian contractors by courts-martial, questions that may eventually require answers from the U.S. Supreme Court.⁹⁴

In short, MEJA presents a constitutionally solid basis for trying contractors but the scope of its jurisdiction is ambiguous and the practical difficulties associated with its application are significant. The UCMJ represents a much more jurisdictionally unambiguous way to proceed and is easier to implement as a practical matter, but its application to civilians is constitutionally questionable.

Further complicating the legal picture, ES&R contractors may also be subject to foreign law. The legal status of contractors varies by country, depending on the jurisdiction and any agreements

in place between the United States and the host government. In Iraq, for instance, the Coalition Provisional Authority issued an order just prior to the transfer of sovereignty that granted contractors immunity from Iraqi law for acts related to their contracts. This situation changed radically following the negotiation of a bilateral Status of Forces Agreement between the United States and Iraq, and today the nearly 80,000 American and third-country national contractors present in Iraq are subject to Iraqi law.⁹⁵ In June 2009, Iraqi security forces detained five U.S. contractors and held them in custody under local law; the FBI actively assisted Iraqi police in their investigation of the contractors.⁹⁶ There exists no immunity clause that protects contractors from local law in Afghanistan, but given the poorly functioning police and court system in that country, the application of Afghan law to U.S. contractors has not yet emerged as a potent issue.

In general, however, the application of local law presents novel challenges for those engaged in ES&R contracting. The United States has a strong interest in clarifying with host-nation governments how local and U.S. law will apply to the activities of contractors, particularly given the significant differences in legal systems and the undeveloped rule of law in theaters like Iraq and Afghanistan. The kind of cooperation that developed between the FBI and Iraqi officials after the June 2009 arrest would ideally take place in the context of a shared understanding of jurisdiction and the various laws at play. In addition, the United States has an interest in avoiding any politically motivated arrests of its contractors in countries where legal traditions are not as robust as its own, as well as in ensuring that a perception of contractor impunity does not damage American public diplomacy and counter-insurgency efforts.

The status of contractors under international law is also somewhat ambiguous. It is, in a way, easier to state what categories such contractors do not fall

into. They are not mercenaries. This is an important point, as the "mercenary" label has been used routinely – often in a pejorative sense – to describe private military contractors (and particularly private security contractors). Yet the definition of "mercenary" under international law is exceedingly narrow and the vast majority of contractors do not fall under its terms.⁹⁷ The status of contractors does not fall neatly into either of the two main categories of individuals under the law of armed conflict – combatants and civilians. As a result, their rights (including, for example, whether they could be subject to direct attack, are immune from prosecution and would be held with prisoner of war status if captured by an enemy) remain unclear.⁹⁸

Under the Geneva Conventions and the law of armed conflict, it appears that most contractors would be considered civilians and thus do not constitute legitimate military targets. They would retain this status so long as they take no active part in hostilities, and enemy forces could not legitimately target them for attack. Contractors deploying with the military and who possess identification cards could qualify as prisoners of war if captured, entitling them to a broader set of rights and protections than those that apply to unlawful combatants.

The legal status is less clear, however, for contractors carrying out functions more closely related to military activities, such as intelligence collection and support, logistics support to forward deployed troops, operating drones, maintaining or repairing weapons systems, or (possibly) using a weapon, even if fired in self-defense. (This concern goes beyond private security contractors, as some ES&R contractors carry weapons for personal protection.) If they are deemed to take an active part in hostilities but do not meet the definition of combatants (because, for example, they are not fully integrated into the armed forces, do not wear distinctive insignia, follow a chain of command, carry a weapon openly, etc.), they would

The "Inherently Governmental" Conundrum

Critics of the greater use of ES&R contracting object to outsourcing functions intimately related to the public interest – that is, those deemed "inherently governmental." U.S. law has long aimed to protect the core functions of government by prohibiting anyone other than federal employees from performing such tasks. Arguably, nothing is more "inherently governmental" than the legitimate use of violence which, as German sociologist Max Weber famously noted, defines the state itself.¹⁰² At the same time, Article I, Section 8 of the U.S. Constitution confers power on Congress to "grant letters of marque and reprisal" which, while no longer used, at one time played a key role in the contracting out of violence.

Today, while there appears to be a rough consensus that there are some functions so intrinsic to the nature of American government that they should never be outsourced, there is little or no consensus about precisely what those functions are.

Until recently, while U.S. law and policy bar anyone other than a government official or entity from performing "inherently governmental" activities, statutes and regulations offered overlapping, conflicting and ambiguous guidance for determining which functions fell into this category.

As one 2007 report tallied, the U.S. Code uses the term 15 times; DOD requires over 120 pages to describe inherently governmental activities; and Federal Acquisition Regulations list 17 examples.¹⁰³ Missing from this picture has been clear and standardized guidance across the U.S. government that could speed the process of contracting out certain activities, permit the development of a competitive civilian sector with these capabilities, and reduce the risk of protracted litigation.

As a result, the FY 2009 National Defense Authorization Act required the Office of Management and Budget to promulgate just such a government-wide definition of "inherently governmental." OMB released a draft policy letter on March 31, 2010 that aims to clarify "when work performed for the Federal government must be carried out, in whole, or in part, by Federal employees," and to have the U.S. government speak with one voice on the issue. The letter adopts the definition contained in the 1998 FAIR Act: an inherently governmental function is one that is "so intimately related to the public interest as to require performance by federal government employees."¹⁰⁴ While this definition appears to shed little light on the issue, the letter does include some basic

guidance for judging whether a function is inherently governmental and lists examples of such functions, including the command of military forces, the direction and control of intelligence operations, and the award, administration and termination of contracts.

The government's draft guidance does not, however, comment directly on some of the most contentious functions that have been contracted out, including the provision of security services, interrogation of enemy combatants and coordination of federal contractors.¹⁰⁵

OMB's publication of the finalized letter is unlikely to resolve the debate simply because there remains little consensus about which functions should be included under the "inherently governmental" rubric. This is perhaps most vividly demonstrated by Congress' inability to enumerate a substantial list of activities that fall into this category and by its decision to pass the responsibility for defining the term to the executive branch.

It is important to note the implications of deeming a particular activity within or outside those bounds. Should a given function be deemed inherently governmental, it then becomes illegal for the government to ever contract it out – even *in extremis*. On

the other hand, simply deeming a task not inherently governmental, and one that agencies could therefore contract out, in no way suggests that it is automatically good policy to do so.

For this reason, a better alternative is to focus on a "core competencies" approach. While Congress should deem inherently governmental any acts it can agree should never be outsourced under any circumstances, a core competencies approach would apply to all of those activities that do not fall under that rubric. It would focus on those functions the government should develop, maintain and enforce, rather than trying to enumerate a list of specific activities for which it is impermissible, under law and in any circumstance, to ever contract out.¹⁰⁸

Thus, for example, the government could decide that interrogating enemy prisoners is a core competency that it wishes to maintain. As it ramps up its federal interrogation capacity, it would aim to avoid contracting out this function, but – and only *in extremis* – it would be permitted under law to hire private contractors to interrogate prisoners should the government workforce prove insufficient to carry out this vital task.

By eschewing contracting in specific areas as a matter of policy, the federal government would leave the option legally open to afford itself the flexibility to employ contractors in times of crisis or other extreme circumstances.

Moreover, the core competencies approach would give commanders and others in the field the access to surge capacity and swiftness often necessary in an unpredictable contingency environment, while moving the U.S. government away from dependence on certain forms of contractors as a more general principle. It would also hold the promise of cutting through continued debates about what does or does not constitute an "inherently governmental" activity and instead concentrate on what the government should be doing and how it will ensure its competency to do so.

be classified as civilians under the law of armed conflict. This, at least arguably, would open them to criminal prosecution for any actions they had taken during hostilities (as opposed to combatants, who enjoy immunity from prosecution for committing hostile acts on the battlefield). These contractors would still be entitled to the baseline humane treatment protections included in Common Article 3 of the Geneva Conventions but not to the broader set of protections they would enjoy if classified as POWs or noncombatants.⁹⁹

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Despite useful efforts by the International Committee of the Red Cross (ICRC), the precise status of contractors, including their rights and obligations, remains ambiguous under international law. In 2008, the ICRC and a number of interested states issued the Montreux Document, a nonbinding set of guidelines for states regulating the application of law to such contractors. The United States, which participated in drafting the document, is one of 34 signatories.¹⁰⁰ The fact that the United States – the world's foremost employer of ES&R contractors – was a direct participant in

the Montreux process represents an important step toward establishing enduring international norms for handling contractors in conflicts. U.S. actions, particularly in the legal arena, will establish precedents that will likely be cited by other countries as they employ their own contractors in similar situations.

Perhaps for this reason, senior Pentagon officials, among others, have called for the establishment of a widely accepted set of international standards governing the employment and conduct of contractors. The International Peace Operations Association (IPOA), a trade association representing contingency contracting firms, has adopted a code of conduct for its members and a complaints process for tracking alleged violations. IPOA's code of conduct is, however, limited in two respects. First, the association's member firms are largely American, and thus offer only a partial solution to the need for robust international norms. Second, there is little coercive enforcement mechanism for violators. After the 2007 Nisour Square shootings, for example, IPOA initiated an independent review to determine whether Blackwater had violated the IPOA code of conduct. Several days later, Blackwater simply withdrew its membership from the association. In addition to IPOA's moves, efforts are proceeding on the international level. Following a mandate of the Swiss government, the Geneva Centre for the Democratic Control of Armed Forces (DCAF) is working with the Geneva Academy of International Humanitarian Law and Human Rights to develop a global code of conduct that will govern industry norms.¹⁰¹

Efforts at Reform

Responding to the many challenges and complexities raised by the expansion of ES&R contracting, Congress is advocating a number of reforms. It first sparked a significant change in DOD's approach by including a requirement in the FY 2007 National Defense Authorization Act (NDAA) that the Department put into place

a new process for preparing for and executing contingency contracting and that it place these functions under the authority of a senior officer.¹⁰⁷ It has directed that contract support requirements be included in pre-deployment training and war games, and the FY 2009 NDAA authorized the addition of ten general officer billets for acquisition.¹⁰⁸ In addition, as described above, Congress established the Special Inspector General for Iraq Reconstruction and the Special Inspector General for Afghanistan Reconstruction.

Efforts to enhance oversight of contracting in hostile environments appear to be accelerating. The Senate and House Armed Services Committees have held hearings on the issues surrounding contracting. Senator Carl Levin, chairman of the Senate committee, has initiated a lengthy investigation into specific allegations of wrongdoing. Senator Claire McCaskill, chair of the Ad Hoc Subcommittee on Contracting Oversight, has held numerous hearings into these issues, including transparency of the contracting system, accountability of foreign contractors and contracts for police training in Afghanistan. Congress also established a Commission on Wartime Contracting with a broad mandate. Senator Jim Webb, who co-sponsored the legislation authorizing the commission, describes its role as "retroactive in terms of accountability and proactive in terms of providing recommendations on wartime contracting."¹⁰⁹ The required interim report, released in July 2009, focused on contractor management and accountability, security services, logistical support and reconstruction efforts. With its authorization extended into 2011, the commission illustrates the increasing attention given to the role private contractors now play in major American conflicts.

As with these efforts of reform, a series of reports has called for changes in the way the government contracts for services on the battlefield and oversees

the process. The 2007 Gansler Commission report, for instance, stated that there was "urgent reform required" in the Army's expeditionary contracting system and laid out a series of recommended changes in the contracting process.¹¹⁰ DOD has acted on many of these recommendations, as well as those contained in similar reviews, but State and USAID have made far fewer changes.¹¹¹

Significant additional reforms are needed in the Defense Department, the State Department, USAID and the U.S. government as a whole. As summarized by one government participant in a CNAS working group, the U.S. government is trying to make up for nearly two decades of neglecting contractor management and oversight – and it is doing so in the midst of two ongoing wars that involve unprecedented contractor participation.

X. THE PATH TO REFORM

If the United States is facing an era of persistent engagement, it is also facing an era of persistent contractors. It is time for a new, strategic approach to the role played by ES&R contractors in conflicts, one that seeks to build upon past disparate attempts to reform unique elements of the contracting process. It is past time to rationalize, modernize and improve the system of contingency contracting. This report proposes a new system based on core principles that lead to a new approach. This approach features an interlocking set of recommendations for the way ahead.

Across the U.S. government, there has been insufficient discussion about the way in which the rise in contracting has changed the nature of our foreign policy and expeditionary operations. There is no consensus on the way ahead. Bills currently pending in both houses of Congress would change the way in which contracting is conducted, including its legal framework. Experts disagree about which department(s) should administer ES&R contracting in the future, with some advocating the establishment of a new agency altogether. As all these debates take place, tens of thousands of U.S. contractors carry out their duties every day in conflict environments, often at great physical risk.

There does appear to be a consensus that the current contracting system does not work the way it should and that without change it will not function properly in the future. Future conflicts and reconstruction efforts will not only involve federal employees pursuing national interests but will also depend on the expertise and willingness of for-profit corporations and private citizens to augment federal capacity overseas. This fact reflects the new reality of 21st-century economics, government and warfare. In light of America's ongoing wars and shifts in the nature of conflicts, the U.S. government's approach to contracting in conflicts must change sooner

A Roadmap to Reform

The many changes required fall into 12 critical reforms. Taken together, they would significantly improve the contracting process for American operations today and far into the future.

- Improve U.S. government management of ES&R contracting.
- Rebuild, expand and improve the ranks of contracting personnel.
- Establish a contingency contracting reserve corps.
- Increase transparency and accountability.
- Increase scrutiny of ES&R contractors.
- Improve the legal and regulatory framework.
- Raise standards among contractors.
- Clarify the proper roles of contractors in conflicts.
- Integrate the role of contractors into policy and strategy.
- Integrate contractors into command and control.
- Change the U.S. government's culture of contracting.
- Harvest and apply lessons learned.

rather than later. Should it not, the negative consequences – for the conduct of America's overseas engagements and for broader U.S. foreign policy interests – could well be profound.

Contracting is no longer simply "someone else's business," but rather the business of American policymakers across the board. It will require time and attention commensurate with its importance. Senior policymakers can no longer simply rely on specialists to handle the myriad factors that affect the United States' ability to carry out its missions.

A change in culture and mentality begins, as it does so often inside the U.S. government, with leadership at the top. Department heads and White House officials must begin to place priority on rationalizing and modifying the ES&R contracting process and understand its critical importance to our foreign policy and national security efforts.

The recommendations enumerated below would, if implemented, go a long way toward solving the many current problems facing the U.S. approach to contingency contracting. The recommendations alone – even if all are fulfilled – will not be sufficient to adequately improve the American way of contingency contracting. On the contrary, their implementation must be accompanied by a shift in mentality and culture in the relevant agencies. The Department of Defense, the Department of State, the U.S. Agency for International Development and their bureaus and offices must continue to seek reform in all phases of the contracting process: policy, planning, formation and management.

Recommendation: Improve U.S. Government Management of ES&R Contracting
Coordination is key to everything the United States seeks to achieve via ES&R contracting. Despite the years – and tens of billions of dollars – spent on ES&R contracting since 2001, the approach to contingency contracting remains fragmented and *ad hoc*. Insufficient interagency coordination before and during operations has been combined with an unprecedented degree of dependence by the agencies on contracted support. The result too often has been inefficiency, lack of transparency and insufficient unity of effort. Yet the problem goes beyond this: Even expert contract managers (and, ultimately, contractors themselves) will be unable to adequately contribute to the overall mission if they receive incomplete, vague or contradictory instructions from policymakers and program officers. Policy must drive contracting, not the other way around.

The Department of Defense has taken steps to remedy poor coordination within DOD¹¹² but the State Department and USAID appear to have made fewer improvements in their own internal systems. In addition, interagency coordination has tended to be informal and incomplete; disjunctions between policymakers and contract managers have emerged. (The one exception is a Memorandum of Understanding agreed upon by the three agencies to manage private security contractors.) As a result, it is imperative to improve coordination among policymakers, program officers and federal contracting personnel, and also among the agencies. The best course is to increase the contracting capacity at DOD, State and USAID and establish a formal (but relatively simple) interagency coordination mechanism.

This effort should include expanding the current DOD Office of Program Support, which is located in the Office of the Undersecretary of Defense for Acquisition, Technology and Logistics. This expanded office, which would be renamed the Office of Contingency Contracting (OCC), should be led by a Senate-confirmed Assistant Secretary of Defense for Contingency Contracting. It should be the unambiguous Department locus for planning, funding, staffing and managing DOD's ES&R and private security contracting.

Similarly, the State Department should expand its Office of Logistics Management into a new Bureau of Contingency Contracting located under the Undersecretary for Management. The bureau should be led by a Senate-confirmed Assistant Secretary (the current office is directed by a Deputy Assistant Secretary). USAID should either direct that its Bureau of Democracy, Conflict and Humanitarian Assistance develop a specific expertise in ES&R contracting (including adding contract specialist personnel to the bureau) and provide guidance to USAID regional bureaus as they manage their own contracts or it should establish a separate contracting bureau headed by an Assistant Administrator-level official.

The objectives in making these changes are to expand the capacity within the agencies to handle ES&R contracting, to ensure that the offices are directed by officials whose rank is commensurate with the great importance of such contracting and to equalize within the agencies the ranks of responsible officials in order to harmonize the coordination mechanism described below.

As part of this effort, and to establish quickly a cadre of well-trained contract professionals, the three offices should recruit not only government civilians, active duty military and other direct hires, but should also seek to modify the laws governing civil service retirements in order to induce former federal contracting professionals to return to service without losing their pensions. This would permit the government to quickly hire retired federal contract managers on a temporary basis when needed. In addition, such a step would allow retirees to enlist in the contingency contracting reserve corps (described below) and deploy for temporary duty – thus providing to the government a potentially substantial pool of skilled personnel. The directors of the offices described above should encourage their employees to accept temporary detailing to the corresponding offices in the other two agencies and to contracting positions in theaters abroad in order to broaden their experience and expertise.

This report proposes a mechanism by which the three officials named above would take responsibility for coordinating contingency contracting in future operations. They should meet on a regular basis to develop general guidance for contract managers (including translating policy and mission objectives into specific guidance for contracting personnel), propose any needed changes to the Federal Acquisition Regulation (or to other statutes, regulations and procedures), ensure understanding across agencies, coordinate contracting processes and plans and identify problems that can be resolved or referred to policymakers. This basic structure should include a

representative from the Office of Management and Budget (from either its national security budget section or its Office of Federal Procurement Policy) and should be chaired by a new National Security Council Senior Director for Reconstruction and Stabilization Operations (for whom handling contracting issues would comprise just one of several responsibilities). In addition, to preserve institutional knowledge and enhance the stability of the three expanded offices, the agencies should consider nominating career officers to head them or, at a minimum, direct that each political appointee filling one of the three positions have support from a professional Deputy Assistant Secretary (or Deputy Assistant Administrator).

Replacing an *ad hoc* process with this more formal mechanism would help ensure that the government possesses the ability to articulate and carry out synchronized, efficient and effective strategies to support contingency operations. Before the government initiates a contingency operation, the officials named above and their staffs should coordinate with combatant commands, chiefs of mission, contracting firms and others as appropriate in order to inform operational plans and develop contracting-specific plans. They should also support policymakers in coordinating efforts with foreign governments, non-governmental organizations and international organizations.

Recommendation: Rebuild, Expand and Improve the Ranks of Contracting Personnel

Given the explosion in the number of contracts in recent years, and the degree to which American operations have become dependent on outside contractors, growing the government contract workforce has become the necessary but not sufficient condition for fixing the problems that continue to plague the ES&R contracting process. If the government takes this step, it can implement the many other recommendations offered here to reform the contracting process. If it does not, it is highly likely that most, if not all, of these other reforms will simply flounder.

The recommendations below emphasize the great need to hire more contract professionals in each agency and across the spectrum of contracting responsibilities. It may appear that this report is arguing mainly for a significant increase in government personnel able to oversee contracts. It is. Through working group meetings and in many consultations with government officials, private contractors and others, one theme stood out above all others: The U.S. government is sorely lacking in trained and qualified contract personnel. Over the past three decades, the number of U.S. government personnel managing and overseeing ES&R contracts has fallen significantly, precisely at a time in which the volume and complexity of these contracts has increased tremendously. As a result of these changes, today the government suffers from a serious lack of trained professionals able to manage contracts both from the United States and in theater. Expanding the quantity and quality of the government's contracting workforce must be a top priority.

The need for increased numbers of able government personnel familiar with contracting issues goes well beyond simply increasing the number of contracting officers based in Washington and overseas. There is a dire need for increased numbers of other government personnel involved in the contracting process, including contracting officer representatives, auditors and investigators.

Numbers alone are insufficient; the departments must actively work to improve the skills and elevate the rank of personnel involved in contract management and oversight. To cite one example, the military often assigns contracting officer representative duties to low-ranking personnel in the field who are often not acquisition professionals; their COR duties are viewed by the chain of command as secondary responsibilities.

Reforming the ES&R contracting process also requires that government personnel not directly tasked with overseeing contracts – including

commanders, other military personnel, diplomats and policymakers – are educated in basic contracting issues and procedures. As contractors continue to play an increasing role in the conduct of U.S. foreign policy and national security, U.S. policymakers and other officials must broaden their knowledge of the contracting process and the potential benefits and limitations of outsourcing activities previously carried out by the government.

THE SECRETARY OF DEFENSE SHOULD:

- Continue to significantly increase the number of qualified contract personnel responsible for ES&R contracting.¹¹³ The boost in personnel should include filling the remaining flag officer billets for acquisition authorized in the FY 2009 NDAA and increasing the number of CORs and other government personnel responsible for quality assurance and contract oversight.
- Continue to provide incentives for enlisted personnel, officers and civilians to pursue a career track in contract management or auditing.
- Issue a directive that prioritizes the education, training and assigning of ES&R contracting personnel, as well as other relevant personnel outside the acquisition staff. This directive should:
 - » Direct that CORs should not have other duties that conflict with their contract responsibilities.
 - » Add basic contracting issues to professional military education and flag officer training and education. The aim should be to ensure that officers are qualified to assess compliance with contracting regulations and are familiar with the role of contractors in hostile environments.

THE SECRETARY OF STATE AND THE USAID ADMINISTRATOR SHOULD:

- Significantly increase the number of qualified contracting officers and CORs responsible for ES&R contracting, including in current operational theaters.

*A standard complaint
voiced by Congress,
inspectors general, the
press and the Commission
on Wartime Contracting
revolves around the lack
of transparency and
accountability in the
ES&R contracting process.*

- Provide incentives for foreign service officers and civil servants to pursue a career track in contract management.
- Add basic contracting issues to education and training courses for senior Foreign Service Officers and senior USAID personnel.

Recommendation: Establish a Contingency Contracting Reserve Corps

The FY 2009 National Defense Authorization Act created a government-wide Contingency Contracting Corps – a pool of individuals currently working in the federal acquisition workforce who agree to make themselves available for deployment in response to an emergency, major disaster or contingency operation. The Corps is authorized to deploy either within or outside the United States, and voluntary membership is open to all military and federal employees working in federal acquisition.

While the creation of this corps is a welcome development and provides an attractive model for dealing with the problems associated with the lack of qualified contract managers in

theater, it is somewhat peculiarly housed at the General Services Administration (GSA). The GSA Administrator has responsibility for standing up the corps and the OMB Director has the authority (with the concurrence of other agency heads) to deploy members of the corps. In addition, the new corps replicates in large measure the deployable contracting capacity housed at the Federal Emergency Management Agency (FEMA); indeed, many federal contracting personnel who have agreed to join the FEMA-based contracting corps for domestic deployment have also sought to join the GSA-led contingency corps.

A better model would move the GSA-based contingency contracting reserve corps to an expanded DOD Office of Contingency Contracting, with deployment authority resting with the Secretary of Defense. In addition, deploying such a corps to manage ES&R contracts in a contingency environment should serve as the beginning, rather than the end, of the government's efforts to deal with a future mismatch between the requirements for skilled contract managers and the pool of such managers available for deployment. The contingency contracting reserve corps should serve as a surge capacity when needed, but the government should aim to transition to non-reserve corps federal contract managers within a relatively fixed period of time (e.g., one year). This time could be used to hire and deploy skilled contract specialists as temporary federal employees, ensuring both that the U.S. government has the necessary capacity and that the necessary personnel are federal employees (i.e., not themselves contractors).

Recommendation: Increase Transparency and Accountability

A standard complaint voiced by Congress, inspectors general, the press and the Commission on Wartime Contracting revolves around the lack of transparency and accountability in the ES&R contracting process. This opacity has led to poor management and glaring inefficiencies: as of December 2009, federal auditors

had identified nearly a billion dollars in wasteful spending in Afghanistan contracts.¹¹⁴ Congress has held numerous hearings on issues related to mis-spent contracting funds, revealing that the executive branch for a time failed to keep sufficient records on companies operating under government contracts or subcontracts in Iraq – or was unwilling to provide them.¹¹⁵ Various factors exacerbate the difficulties of monitoring contract performance, including the multitude of contracts awarded, the relatively small staff that monitors them and the fact that contracting officers are often located far away from the area in which services are actually provided.

A number of measures have been taken in recent years to address this problem. DOD now provides Congress with periodic reports on the contractors and subcontractors it employs. The Army trains and deploys CORs to sites where contractors are providing services in order to ensure on-the-ground monitoring.¹¹⁶ The U.S. government has also attempted to centralize responsibility for contractor oversight at the country level. In Afghanistan, for example, the Coordinating Director for Development and Economic Assistance in Kabul is tasked with reviewing each contract and ensuring its compliance with U.S. standards and strategy.¹¹⁷

Another major step forward was the establishment of the Synchronized Predeployment and Operational Tracker (SPOT) system in January 2007. SPOT was designed to serve as a unified database for contingency contractor and contract services information. Although SPOT plays a useful role in aggregating information for better contractor management and oversight, there are still areas in which it falls short. GAO continues to report that many information fields in SPOT are left unfilled because agencies differ in their interpretations regarding which contractor and subcontractor personnel must be entered into the system, leading to important knowledge gaps.¹¹⁸ In addition, wide discrepancies have emerged

between the counts offered by SPOT and by the CENTCOM Quarterly Census. DOD, which conducts a manual count to track contractor personnel, regards the census as more accurate than SPOT, while GAO has found shortcomings in both systems. In one recent example, an April 19, 2010 SPOT report identified 32,000 contractors working for DOD in Afghanistan; meanwhile, the Quarterly Census found 107,000.¹¹⁹ Agencies continue to use a variety of other systems – many of which are *ad hoc* – to obtain information on contractor personnel and contracts, undermining the utility of SPOT as a centralized database. This patchwork of practices must be integrated in order to establish SPOT as a fully effective contractor monitoring tool.

In addition to aggregating data, there is a keen need to ensure full access to contracts for government auditors. This at times requires auditors to link with customers as closely as possible. To cite one example, the Defense Contract Audit Agency (DCAA) has co-located auditors at the facilities of some major services contractors, creating what is essentially a continuous audit. State, on the other hand, has not been able to station auditors on site and has had to rely on DCAA to audit some of its books.

THE SECRETARY OF DEFENSE, IN COORDINATION WITH THE SECRETARY OF STATE AND THE USAID ADMINISTRATOR, SHOULD:

- Establish uniform standards across agencies and ES&R contract type for consistency and consolidation of data. This standardization should include finalizing and standardizing the SPOT system and issuing identical directives to DOD, State and USAID regarding the information each must input into the system. To bolster the fidelity of this data, COs should rely not simply on firms' reported employment figures but also confirm such reports in site visits.
- Further integrate auditors into the contracting process by making wider use of co-located auditors at large ES&R contracting firms.

- Improve accountability and monitoring of sub-contractors, which account for 70 percent of the contracting workload, by revising regulations to allow government contracting personnel to demand more transparency in subcontracted projects.
- Establish enhanced mechanisms for planning, executing and monitoring Commander's Emergency Response Program projects.
- Establish a future baseline ratio of government contracting personnel (e.g., investigators, COs and CORs) to contractors to help ensure adequate oversight in future contingencies.
- Include clauses in ES&R contracts that require contracting firms to enforce rules governing behavior that impacts the overall U.S. mission, beyond the narrowly construed completion of their contracted activities.

THE SECRETARY OF STATE AND THE USAID ADMINISTRATOR SHOULD:

- Develop a quarterly census to track the number of contractors in contingency operations, similar to the one used currently by U.S. Central Command, until the SPOT system proves a reliable source of contractor information.

THE ADMINISTRATION, TOGETHER WITH CONGRESS, SHOULD:

- Establish a permanent, independent inspector general that would (as SIGIR and SIGAR do today in Iraq and Afghanistan, respectively) provide audit, inspection and investigation services for ES&R contracting in contingency environments. This inspector general should possess the authorities enumerated in the Inspector General Act of 1978.

Recommendation: Increase Scrutiny of ES&R Contractors

Congress, the press, government watchdog groups and others have focused to a large degree on the actions of private security contractors. Though they

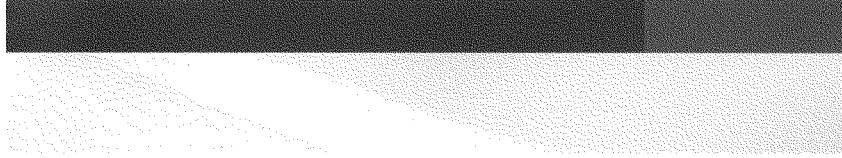
comprise the vast majority of U.S. contractors in hostile environments, and receive the bulk of taxpayer dollars expended on contingency contracting, ES&R contractors have received much less scrutiny. This phenomenon adds to the perceived lack of transparency in dealing with contractors on the battlefield and should be altered in order to enhance transparency and accountability; illuminate contractor wrongdoing; uncover further instances of fraud, waste and abuse; and highlight those firms and contractors that perform at a high level.

CONGRESS, THE MEDIA, GOVERNMENT WATCHDOG GROUPS AND THE COMMISSION ON WARTIME CONTRACTING SHOULD:

- Increase the amount of attention, time and resources dedicated to examining ES&R contractor conduct in America's overseas engagements. In so doing, these groups might draw on the effective example set by the Special Inspector General for Iraq Reconstruction. Such examinations should focus on, among other factors, contractor misconduct; fraud, waste and abuse in the contracting process (both on the governmental and contractor sides); and whistle-blower allegations. At the same time as they point out these negative factors, they should highlight those contracting firms that are properly and efficiently performing a variety of tasks for the United States.

Recommendation: Improve the Legal and Regulatory Framework

Nine years after the commencement of hostilities in Afghanistan, and seven years after the war in Iraq began, the legal framework governing the use of ES&R contractors in hostile environments remains patchy and even ambiguous in some areas. One reason for this is the generally improvised approach Congress and two administrations have taken to codify law in this area, coupled with a belief in some quarters that the role of contractors in future contingencies will be – or can be forced to be – seriously diminished. Because, as explained above, this is unlikely, it is vitally important to establish a clear



statutory and regulatory framework in which contractors operate and are subject to stronger oversight. Such a framework should resolve jurisdictional issues for all contractors working for the U.S. government, including American citizens, host-nation citizens and third country contractors. In addition, it is essential to educate contractors and government workers about their legal rights and obligations and to provide the government personnel necessary both to ensure compliance and handle violations.

THE DEPARTMENT OF DEFENSE GENERAL COUNSEL, TOGETHER WITH THE DEPARTMENT OF JUSTICE, SHOULD:

- Clarify how the various laws that potentially apply to ES&R contractors in theater – including the Military Extraterritorial Jurisdiction Act, the Uniform Code of Military Justice, the Special Maritime and Territorial Jurisdiction (SMTJ), host-nation law (including any Status of Forces Agreements) and international law – interact to create obligations for or jurisdiction over private contractors.
 - » This should include clarifying the laws and jurisdiction relevant to third-country nationals employed by both contracting firms and subcontractors.
 - » It should also include engaging with America's partners, and with NATO allies in particular, to ensure a common coalition view of the ways in which host-nation law and international law apply to private contractors.

THE WHITE HOUSE, THE SECRETARY OF DEFENSE AND THE ATTORNEY GENERAL, TOGETHER WITH CONGRESS, SHOULD:

- Amend MEJA to unambiguously cover all ES&R contractors working for the U.S. government in theater and remove the provision limiting MEJA jurisdiction to only those contractors working in support of the "mission of the Department of Defense" overseas.

- Increase the number of Defense Criminal Investigative Service (DCIS) special agents in Iraq and Afghanistan in order to enhance DOD's ability to investigate wrongdoing by contractor personnel.
- Establish in the Department of Justice a unit – a portion of which could be located in theater – dedicated to investigating and prosecuting any crimes committed by contractors in violation of MEJA, the Foreign Corrupt Practices Act or other relevant laws. This unit should work, when appropriate, in cooperation with DCIS.
- Establish a new, streamlined contingency Federal Acquisition Regulation that reduces the enormous amount of regulations contained in the current FAR and its laborious requirements before a contract can be cancelled. The contingency FAR should include an automatic waiver process and should attempt to achieve a better balance between preventing fraud, waste and abuse and providing the flexibility and speed necessary to carry out contracting in a hostile environment.
 - » The contingency FAR should establish protocols for coordinating among agencies on decisions related to ES&R contracting in theater.
 - » The contingency FAR should establish a framework that actively encourages the sharing of contractor information among agencies and U.S. government personnel (including ground commanders) in theater.

ES&R CONTRACTING FIRMS SHOULD:

- Ensure that senior managers and in-theater supervisors are familiar with relevant U.S. and local law, Status of Forces Agreements, the law of armed conflict and the applicable rules of engagement.
- Precisely define the way in which legal obligations and rules of engagement apply to their contract employees, including local nationals.

THE U.S. GOVERNMENT SHOULD:

- Press for wider international adoption of the Montreux Document and initiate other efforts to clarify the status of private contractors under the law of armed conflict.

Recommendation: Raise Standards Among Contractors

Just as the government must reform the way it handles ES&R contracts, so too should contracting firms and individual contractors bear responsibility for effecting change. Contractors working in the service of the U.S. government must be pressed to eliminate fraud, waste and abuse; hold their employees to the highest ethical and professional standards; and ensure that their employees are adequately trained and prepared for the unique demands of ES&R contracting in hostile environments. Where contracting firms are reluctant to carry out these responsibilities individually or in concert, the government should demand reasonable efforts to fulfill them as a condition of U.S.-issued contracts.

ES&R CONTRACTING FIRMS SHOULD:

- Enforce existing rules that require key employees (such as those who will carry weapons or are likely to see hostile fire) to have basic training in the law of armed conflict (e.g., the Geneva Conventions) and the rules of engagement for a particular theater of operations.
- Institute enhanced vetting procedures for third-country and local contractors to ensure that those with criminal pasts, a history of human rights violations or connections to enemy forces are prevented from obtaining employment.
- Establish a trade association that includes, as members, firms specifically engaged in ES&R contracting (as opposed to private security contracting). Such an association should:
 - » Establish an accreditation program and licensing standards for firms.

- » Serve as an interlocutor with the government on ES&R contracting issues.
- » Establish a database of contractors working for licensed firms and put into place a process for receiving and investigating complaints.
- » Promulgate education and training guidance for contractors working for member firms.
- » Encourage the development of, and participate in the design of, an international code of conduct to which firms, both American and foreign, may voluntarily commit and which spells out specific repercussions for severe violations.
- Work with Congress, the Secretary of Defense, the Secretary of State and the USAID Administrator to establish and mandate compensation mechanisms for victims of contractor abuse.

Recommendation: Clarify the Proper Roles of Contractors in Conflicts

One of the most passionate debates in the area of contingency contracting revolves around what activities are, or are not, "inherently governmental." The term seeks to draw a stark line between tasks and behaviors that can be legitimately contracted out and those that cannot. In reality, such a clear delineation is often difficult to establish. There currently exist various instances of contractors carrying out precisely the sorts of tasks that many would deem to be "inherently governmental," including providing security, conducting interrogations of enemy prisoners, maintaining weapons and coordinating the efforts of other contractors. An alternative approach would have the government determine, in advance, those areas it seeks to avoid contracting out as a matter of policy but also leave open the possibility of legally employing contractors in the same positions during times of crisis. This report proposes a hybrid to resolve the "inherently governmental" conundrum: The

government should define as “inherently governmental” those areas in which there is some consensus and move toward a “core competencies” approach in areas where there is not.

CONGRESS SHOULD:

- State in law any specific activities that it deems “inherently governmental.” It has already designated offensive combat operations and direct contractual oversight as such, and should expand the list to the degree that Congress can agree on enumerated activities.¹²⁰

THE OFFICE OF MANAGEMENT AND BUDGET SHOULD WORK WITH CONGRESS TO:

- Move toward a “core capabilities” approach to activities not specifically deemed by Congress to be inherently governmental. Such an approach would focus on the functions the U.S. government should possess and maintain, rather than debate internally over which are inherently governmental.
- Address structural and institutional factors that make hiring temporary federal workers (e.g., contracting officers as part of a surge capacity during a contingency operation) more difficult. The factors addressed should include existing disincentives that discourage qualified contracting personnel who have left government to return to it, such as prohibitions against retaining government pension payments while returning to temporary government service.

CONGRESS SHOULD:

- Require the executive branch to carry out comprehensive cost analyses that compare the costs of contracted services with the costs of the same services provided by government personnel.

Recommendation: Integrate the Role of Contractors into Policy and Strategy

Until now, discussions on the role of contractors in conflict have emerged in a largely *ad hoc* fashion, often in reaction to news stories highlighting their

mistakes. While numerous statements and reports have noted the indispensable nature of contractors in future U.S. engagements, this has not directly translated into a policy discussion of the optimal features of a contracting force working alongside the military, diplomatic corps or USAID officials. As described above, the increasing use of private contractors has deep and widespread implications for American foreign and defense policy. The U.S. government must adopt a strategic view of the role of contractors and actively integrate them into planning mechanisms to ensure their systematic, effective and lawful deployment in future conflicts.

THE SECRETARIES OF DEFENSE AND STATE, TOGETHER WITH THE USAID ADMINISTRATOR, SHOULD:

- Establish an interagency process to determine the possible foreign policy implications of contracting with particular third-country nationals (e.g., employing contractors whose nationality and presence in a combat zone would provoke political sensitivities).
- Increase contracting coordination among International Security Assistance Force partners in Afghanistan and ensure that the role of contractors is considered in NATO policy decision making.
- Further integrate the role of contractors in strategic-level guidance, military doctrine and diplomatic strategy. Such efforts should include:
 - » Ensuring that all aspects of ES&R contracting are considered in the formulation of the National Defense Strategy, the next QDR and future field manuals and joint publications, as well as other relevant tactical and operational level manuals.
 - » Ensuring that all aspects of ES&R contracting are considered in the development of the Quadrennial Diplomacy and Development Review (QDDR).

Recommendation: Integrate Contractors into Command and Control

Various hurdles have prevented the fully effective integration of contractors into existing command and control structures. Commanders and officers have reported not knowing even basic facts about the contractors operating in their areas of responsibility, such as their numbers and their missions. Knowledge of the rules governing these contractors can be equally scarce. Private security contractors generally operate outside the chain of command and the relationship between commander and contractor is sometimes unclear. Communication failures between commanders and contractors sharing an area of responsibility compound the problem. In Fallujah in 2004, for example, the Marine unit based just outside the city did not find out about the attack that killed four Blackwater contractors until it was reported by journalists.¹²¹

In addition, both pre-deployment training and the development of operational and contingency plans generally take place without adequate appreciation for the role of contractors on the battlefield. Training often includes individuals playing every role *but* contractors, and operational plans – while they now take into account the role of contractors – still tend to be developed without adequate consultation with contractors or with fully developed plans for their use on the battlefield.

THE SECRETARY OF DEFENSE SHOULD:

- Ensure that operational and contingency plans take into account every aspect of contractor support by:
 - » Expanding Annex W, which contains information on the numbers of contractors required for a military operation and the tasks they will perform, and ensuring that it contains relevant and adequate detail.
 - » Requiring that other functional annexes identify contracted support requirements.
 - » Identifying probable transition points at

which government employees will cede functions to private contractors or vice versa.

- Consult with contractors during the military's mission planning process, to the extent that the mission will rely on contractor support. This process should include ensuring that commanders know – before they deploy – the number of contractors they will encounter in an area of operations and the services these contractors will provide.
- Require military staffs to establish contracting planning cells to:
 - » Determine the precise roles contractors will play in a given operation.
 - » Develop contingency plans for the possibility that a contractor either fails or is not permitted to perform a service as specified in a contract.
- Integrate contractor roles into pre-deployment training and war games. This should include issuing the joint policy document mandated by Congress in 2008 and ensuring that it includes guidance for the inclusion of contractor roles in all facets of training.

Recommendation: Change the U.S.**Government's Culture of Contracting**

A change in the culture of DOD, State and USAID with respect to contracting is long overdue. As one report noted, the Department of Defense has demonstrated an "inability to institutionalize operational contract support by accepting contractors as an integral part of the total force."¹²²

Yet DOD may be the agency that has become the most comfortable with contracting out functions that until recently were performed largely by government personnel. In the State Department in particular, familiarity with contractors is sparse and there are few incentives for skilled personnel to move into contracting roles. Only a continued cultural shift in the way the three agencies view ES&R contracting – a shift that leads to changes in training, education, doctrine and planning – can lead to necessary change.

**THE SECRETARIES OF DEFENSE AND STATE,
TOGETHER WITH THE USAID ADMINISTRATOR,
SHOULD:**

- Provide clear incentives, including financial bonuses and promotions, to skilled employees who take on key contracting duties.
- Encourage employees in the field to become familiar with managing and communicating with private contractors. This should include promoting communication between military personnel and contractors on the battlefield and interaction between relevant State Department and USAID personnel (e.g., officials serving on Provincial Reconstruction Teams) and contractors.

**Recommendation: Harvest and Apply
Lessons Learned**

The lessons learned in Iraq and Afghanistan constitute one of the most expensive educations in American history. Only over a number of years has the United States begun to get a handle on the broad implications of its reliance on great numbers of contractors to carry out missions in hostile environments. As this report attests, that work is hardly done. The United States should not compound its problems and mistakes by forgetting the lessons learned in their wake.

**THE SECRETARIES OF DEFENSE AND STATE,
TOGETHER WITH THE USAID ADMINISTRATOR,
SHOULD:**

- Establish a contingency contracting lessons-learned center to collect, process and disseminate a history of past contracting experiences and the lessons that can be drawn from them. This center should attempt to capture lessons learned that apply not only to the employment of contractors by the Department of Defense but also by the Department of State and USAID.

JUNE 2010

Contracting in Conflicts
The Path to Reform

XI. CONCLUSION

The U.S. government and its contract employees have been thrust together as partners in a shared endeavor, the scale, cost and duration of which have taken nearly all observers by surprise.

Private contractors now represent an enduring feature of American conflicts, stabilization operations and reconstruction efforts. In light of changes in business practices, the provision of government service and the character of modern warfare, this surprising circumstance is unlikely to change. The reality is that America's reliance on private contractors is not likely to fade, and it is time for the United States to adapt to this new way of war.

Nine years after America's initial engagement in Afghanistan, and seven years after the U.S. invasion of Iraq – and with continuing American commitments and interests across the globe – action is long overdue. America's national security policy demands new ways of organizing, managing and overseeing the use of private contractors in overseas engagements. It requires new standards and new levels of oversight at home. It means thinking hard about what tasks should be outsourced and which should not. And it entails a greater understanding by policymakers and the American public of the role that the private sector has come to play in current and future engagements.

This report aims to draw together the most salient issues surrounding the use of contractors in American conflicts and chart a path forward. Taken together, the recommendations outlined above would reform, rationalize and improve the process of employing private contractors in ES&R roles. The government, the military, the contracting community and ultimately the American people will benefit from sweeping reform of the ES&R contracting system that ensures the private sector's role in American engagements aligns firmly with our nation's interests and values.

*The reality is that
America's reliance on
private contractors is not
likely to fade, and it is
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to adapt to this new way
of war.*

ENDNOTES

1. This figure is based on three sources: Department of Defense, *Contractor Support of U.S. Operations in USCENTCOM AOR, Iraq, and Afghanistan*, USCENTCOM Quarterly Census 1st Quarter FY2010, http://www.acq.osd.mil/log/PS/hot_topics.html; General Ray Odierno interview with Fox News Sunday (18 April 2010) stating that there are currently 95,000 U.S. troops in Iraq; and John J. Kruzel, "Afghanistan Troop Level to Eclipse Iraq by Midyear," identifying 83,000 U.S. military personnel in Afghanistan (24 March 2010), <http://www.defense.gov/news/newsarticle.aspx?id=58461>.
2. The National Defense Authorization Act for Fiscal Year 2008 (P.L. 110-181 Sec. 864) defines private security functions as the guarding of personnel, facilities or properties, and any other activity for which contractors are required to be armed.
3. PBS Frontline, "The High-Risk Contracting Business" (21 June 2005), <http://www.pbs.org/wgbh/pages/frontline/shows/contractors/highrisk.html>; Department of Justice, "Five Blackwater Employees Indicted on Manslaughter and Weapons Charges for Fatal Nisur Square Shooting in Iraq" (8 December 2008), <http://www.justice.gov/opa/pr/2008/December/08-nsd-1068.html>.
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5. *Ibid.*
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7. Peter Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (Ithaca, NY: Cornell University Press, 2003): 88.
8. This term was suggested by Herb Fenster, to whose encyclopedic knowledge of this subject we are in debt.
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10. James A. Huston, *The Sinews of War: Army Logistics, 1775-1953* (Washington: Office of the Chief of Military History, 1966): 63, 81. See also Major William W. Epley, *Contracting in War: Civilian Combat Support of Fielded Armies* (Washington: US Army Center of Military History, 1989): 5-6.
11. James A. Huston: 35. See also Major William W. Epley: 5-6.
12. Erna Risch, *Quartermaster Support of the Army: A History of the Corps, 1775-1939* (Washington: Office of the Chief of Military History, 1962): 78-79.
13. Erna Risch: 142-43. See also James A. Huston: 105.
14. Major William W. Epley: 10-14.
15. *Ibid.*: 19.
16. *Ibid.*: 25.
17. *Ibid.*: 28-29. These figures do not include Merchant Marines.
18. *Ibid.*: 37-38.
19. Deborah C. Kidwell, "Public War, Private Fight? The United States and Private Military Companies," *Global War on Terrorism Occasional Paper 12* (Fort Leavenworth, KS: Combat Studies Institute Press, 2006): 15.
20. *Ibid.*: 16.
21. "Vietnam: How Business Fights the 'War By Contract,'" *Business Week* (5 March 1965).
22. Deborah C. Kidwell: 16.
23. Lieutenant General Joseph M. Heiser, *Civilian Combat Support in Vietnam: Some Lessons Learned* (McLean, VA: Logistics Management Institute, December 1990): 1. Civilian support during the Vietnam War came from four primary sources: federal employees (approximately 1 percent of the total civilian support), American contractors (5 percent), third-country nationals (12 percent) and Vietnamese nationals (83 percent).
24. U.S. Department of the Army, Regulation 700-132, *Logistics Civil Augmentation Program* (16 December 1985).
25. Congressional Budget Office, *Logistics Support for Deployed Military Forces* (October 2005): 3 (Table 1.1).
26. United States Army, "LOGCAP IV Logistics Contract Awarded through Full and Open Competition" (17 April 2008), <http://www.army.mil/-newsreleases/2008/04/17/0573-logcap-iv-logistics-contract-awarded-through-full-and-open-competition/>.
27. Congressional Budget Office, *Contractors' Support of U.S. Operations in Iraq* (August 2008): 13.
28. Government Accountability Office (formerly the General Accounting Office), *DDO Force Mix Issues: Greater Reliance on Civilians in Support Roles Could Provide Significant Benefits*, GAO/NSIAD-95-5 (Washington: October 1994): 5. Nearly 5,000 DDO civilian employees also deployed to the Persian Gulf to support the war effort.
29. The military's active component fell in personnel from 2,046,144 to 1,384,338 between 1990 and 2000; the DOD budget (in FY 2008 dollars) fell from 491 billion dollars to 385 billion dollars over the same period. See Department of Defense, *Active Duty Military Personnel Strengths by Regional Area, and by Country* (309A) (30 September 1990), <http://siadapp.dmdc.osd.mil/personnel/MILITARY/history/Hst0990.pdf> and Department of Defense, *Active Duty Military Personnel Strengths by Regional Area, and by Country* (309A) (30 September 2000), <http://siadapp.dmdc.osd.mil/personnel/MS/Hst0900.pdf>. For U.S. military budgetary statistics, see Steven M. Kosiak, *Historical and Projected Funding for Defense: Presentation of the FY 2008 Request in Tables and Charts*, Center for Strategic and Budgetary Assessments (7 June 2007), www.cbaonline.org. Personnel and budget statistics cover FY 1990 through FY 2000.
30. Congressional Budget Office, *Contractors' Support of U.S. Operations in Iraq*: 12.
31. *Ibid.*: 1.
32. *Ibid.* From 2003-2007, the Department of Defense awarded contracts totaling 76 billion dollars, whereas the U.S. Agency for International

Development and the Department of State obligated 5 billion dollars and 4 billion dollars, respectively. During this period, 75 percent of DOD contracts were obligated through the Army.

33. Government Accountability Office, *Contingency Contracting: DOD, State, and USAID Contracts and Contractor Personnel in Iraq and Afghanistan* (Washington: October 2008): 20, 29, 34.

34. Moshe Schwartz, *Department of Defense Contractors in Iraq and Afghanistan: Background and Analysis*, Congressional Research Service R0764 (14 December 2009): 8.

35. Office of Management and Budget, *Circular Number A-76: Performance of Commercial Activities*, <http://www.whitehouse.gov/omb/circulars/a076/a076.html>.

36. Allison Stanger, *One Nation Under Contract: The Outsourcing of American Power and the Future of Foreign Policy* (New Haven, CT: Yale University Press, 2009): 15-16.

37. Office of Management and Budget Fact Sheet, *Work Reserved for Performance by Federal Government Employees* (30 March 2010).

38. Allison Stanger: 119; Ben Barber, "Andrew Natsios: Getting USAID on its Feet," *Foreign Service Journal* (September 2002): 23.

39. Congressional Budget Justification, *Foreign Operations FY 2010 Budget Request* (22 May 2009): 89.

40. Allison Stanger: 110, 119.

41. Gansler Commission on Army Acquisition and Program Management in Expeditionary Operations, *Urgent Reform Required: Army Expeditionary Contracting* (31 October 2007): 30.

42. Gansler Commission Report: 42.

43. Shay Assad and Jeffrey Parsons, Written Statement before the House Appropriations Committee Subcommittee on Defense, Department of Defense Contingency Contracting Initiatives (11 March 2010).

44. Allison Stanger: 125.

45. Rupert Smith, *The Utility of Force: The Art of War in the Modern World* (New York: Knopf, 2007): 272.

46. Julian E. Barnes, "U.S. to Boost Combat Force in Afghanistan," *Los Angeles Times* (2 September 2009), <http://articles.latimes.com/2009/sep/02/world/fq-afghan-troops2>.

47. The White House, "Remarks by the President on Procurement" (4 March 2009), http://www.whitehouse.gov/the_press_office/remarks-by-the-president-on-procurement-3/4/09.

48. *Ibid.*

49. Department of Defense, *Quadrennial Defense Review Report* (February 2010): xiii.

50. ProPublica, "Disposable Army: Civilian Contractors in Iraq and Afghanistan," <http://www.propublica.org/series/disposable-army>.

51. Thomas L. Friedman, "The Best Allies Money Can Buy," *New York Times* (4 November 2009), <http://www.nytimes.com/2009/11/04/opinion/04friedman.html>.

52. James Glanz, "New Fraud Cases Point to Lapses in Iraq Projects," *New York Times* (13 March 2010), <http://www.nytimes.com/2010/03/14/world/middleeast/14reconstruct.html>; Special Inspector General for Afghanistan Reconstruction, *Quarterly Report to the United States Congress* (30 April 2010).

53. Of note, SIGIR's focus is on the management of contracts, rather than the contractors themselves.

54. See, for example, numerous testimonies of Stuart W. Bowen Jr., including "Oversight: Hard Lessons Learned in Iraq and Benchmarks for Future Reconstruction Efforts," Subcommittee on International Organizations, Human Rights, and Oversight of the Committee on Foreign Affairs, United States House of Representatives (24 February 2010); Special Inspector General for Iraq Reconstruction, *Quarterly Report and the Semi-Annual Report to the United States Congress* (30 January 2010).

55. Special Inspector General for Iraq Reconstruction, *Applying Iraq's Hard Lessons to the Reform of Stabilization and Reconstruction Operations* (February 2010): 19.

56. Special Inspector General for Afghanistan Reconstruction, *Quarterly Report to the United States Congress* (30 April 2010): 18.

57. James Glanz.

58. Special Inspector General for Afghanistan Reconstruction, *Quarterly Report to the United States Congress* (30 April 2010).

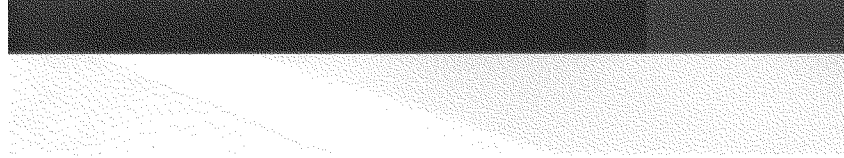
59. "Joint Contracting Command-Iraq/Afghanistan (JCC-1/A) Supports Commanders and Their Troops," *Army AL&T* (July-September 2006): 31.

60. Nagl/Fontaine email communication with DOD official (8 January 2010).

61. Congressional Budget Office, *Logistics Support for Deployed Military Forces* (October 2005): xiii, 38.

62. Government Accountability Office, *Military Personnel: DOD Needs to Improve the Transparency and Reassess the Reasonableness, Appropriateness, Affordability, and Sustainability of Its Military Compensation System*, GAO-05-798 (Washington: July 2005).

63. The office concluded that, in comparing State Department costs versus contractor costs in four different task orders, the cost of using State Department employees was higher in three (e.g., providing static security) while contractors were more expensive for carrying out one of the task orders, providing personal security. The office emphasized, however, the dynamic nature of such calculations, which turn on the need to recruit, hire, and train additional employees; administrative costs required for the government to reduce personnel if no longer needed; administrative costs associated with awarding and overseeing contracts, etc. GAO reported that the Department of Defense was unable to estimate these costs.



64. Congressional Budget Office, *Logistics Support for Deployed Military Forces*: xi-xii.
65. Fontaine email communication with DOD official (7 April 2010).
66. Congressional Budget Office, *Logistics Support for Deployed Military Forces*: xi-xii. The CBO report notes that during Operation Iraqi Freedom the average lag between activation of reserve-component units and their arrival in-theater was 158 days for full battalions and around 60 days for smaller detachments. By contrast, some aspects of the Army's logistics contract require that performance begin as early as 15 days after the Army notifies a contractor to proceed with a task order. While the contractor has not always met that goal, the report continues, "It has generally responded faster than Army reserve-component units."
67. Ibid.
68. General Stanley McChrystal, Remarks at the French National Defense Academy, L'Institut des Hautes études de Defense Nationale, IHEDN (16 April 2010).
69. Government Accountability Office, *Warfighter Support: DOD Needs to Improve Its Planning for using Contractors to Support Future Military Operations* GAO-10-472 (Washington: March 2010). The GAO reported that as of February 2010, the Secretary of Defense had approved just four operational plans with Annex Ws and that DOD must continue to work to ensure that operational contract support requirements are included in future operational plans.
70. Government Accountability Office, *Warfighter Support: Continued Actions Needed by DOD to Improve and Institutionalize Contractor Support in Contingency Operations* GAO 10-551T (Washington: 17 March 2010): 26.
71. Ibid: 26.
72. Ibid: 26.
73. Ibid: 26-7.
74. National Defense Authorization Act for Fiscal Year 2008, P.L. 110-181 (2008), section 849.
75. Government Accountability Office, *Warfighter Support: Continued Actions Needed by DOD to Improve and Institutionalize Contractor Support in Contingency Operations* GAO 10-551T: 25.
76. National Defense Authorization Act for Fiscal Year 2008, section 849.
77. Private contractors in contingency areas have been dismissed for consuming alcohol in theater, which in Iraq and Afghanistan constitute a violation of General Order No. 1. See, for example, Andrew Quinn, "U.S. to Drop Contractor in Kabul Embassy Scandal," *Reuters* (8 December 2009), <http://www.reuters.com/article/idUSTRESB75F420091208>.
78. Congressional Budget Office, *Contractors' Support of U.S. Operations in Iraq*: 20-21. As an example of this opacity, the Marine unit based just outside Fallujah in 2004 did not find out about the attack that killed four Blackwater contractors until it was reported by journalists. See Peter Singer, *Can't Win with 'Em*, *Can't Win Without 'Em*: Private Military Contractors and Counterinsurgency, (Washington: The Brookings Institution, September 2007): 13-14.
79. Congressional Budget Office, *Logistics Support for Deployed Military Forces*: xii.
80. Government Accountability Office, *Warfighter Support: Continued Actions Needed by DOD to Improve and Institutionalize Contractor Support in Contingency Operations* GAO 10-551T (Washington: 17 March 2010): 26.
81. Ibid.
82. Ibid: 21.
83. Department of Defense, *Quadrennial Defense Review Report* (February 2010): 93.
84. Shay Assad and Jeffrey Parsons, Written Statement (11 March 2010): 24; Department of Defense, *Quadrennial Defense Review Report* (February 2010): 55-56.
85. Joshua Partlow, "Taliban Targets U.S. Contractors Working on Projects in Afghanistan," *Washington Post* (17 April 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/16/AR2010041604521.html>.
86. MG George R. Fay, "AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade," Department of the Army (23 August 2004): 9, 19, 33, 40, 48, 74, *inter alia*; LTG Anthony R. Jones, "AR 15-6 Investigation of the Abu Ghraib Prison and 205th Military Intelligence Brigade," Department of the Army (23 August 2004): 6, 11, 18; MG Antonio M. Taguba, "AR 15-6 Investigation of the 800th Military Police Brigade," Department of the Army (May 2004): Executive Summary, 36, 48.
87. "Joint Contracting Command-Iraq/Afghanistan (JCC-IA) Supports Commanders and Their Troops," *Army AL&T* (July-September 2006): 32.
88. Moshe Schwartz, *Department of Defense Contractors in Iraq and Afghanistan: Background and Analysis*: 12-13.
89. Alexandra Zavis, "Army Interpreter Sentenced At Court-Martial," *Los Angeles Times* (28 June 2008), <http://articles.latimes.com/2008/jun/24/world/fg-interpreter24>.
90. Del Quentin Wilber and Karen DeYoung, "Justice Dept. Moves Toward Charges Against Contractors in Iraq Shooting," *Washington Post* (17 August 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/08/16/AR2008081601967.html>.
91. Fontaine email communication with DOD official (20 April 2010).
92. Peter Singer, *Frequently Asked Questions on the UCAI Change and its Applicability to Private Military Contractors* (Washington: The Brookings Institution, 12 January 2007).
93. Alexandra Zavis.
94. A conversation one of the authors had with a U.S. senator suggests that, at least among supporters of the provision in Congress, there exists confidence that its constitutionality will be upheld.

95. USCENTCOM Quarterly Census 1st Quarter FY2010.

96. Waleed Ibrahim, "Iraqi Forces Arrest Five U.S. Security Contractors," *Reuters* (7 June 2009), <http://www.reuters.com/article/idUSL24660>.

97. Daphne Richemond-Barak, "Private Military Contractors and Combatancy Status under International Humanitarian Law," paper presented for "Complementing IHL" conference (1-3 June 2008): 6.

98. Fontaine email communication with International Committee of the Red Cross official (29 April 2010); Fontaine email communication with the Geneva Centre for the Democratic Control of Armed Forces official (29 April 2010).

99. This paragraph draws heavily on the excellent discussion of the legal status of military personnel, government citizens and contractors contained in Congressional Budget Office, *Logistics Support for Deployed Military Forces*: 9-13.

100. The Montreux Document is open to all states and international organizations. See "Participating States of the Montreux Document," <http://www.eda.admin.ch/eda/en/home/topics/intlia/humlaw/pse/parsta.html>.

101. Geneva Centre for the Democratic Control of Armed Forces website, http://www.dcaf.ch/news/_diarydetails.htm.cfm?lng=en&id=108835&nar=2.

102. See, for example, Michael Walzer, "Mercenary Impulse," *The New Republic* (12 March 2008).

103. Roger D. Carstens, Michael A. Cohen, and Maria Figueroa Kupcu, *Changing the Culture of Pentagon Contracting* (Washington: The New American Foundation, October 2008): 13.

104. Office of Management and Budget, "Work Reserved for Performance by Federal Government Employees," *Federal Register* (31 March 2010).

105. *Ibid.*: 16196-16197.

106. Several observers have offered two potentially useful principles that might underlie any determination of what activities should be considered core competencies. Under these principles, core competencies are those activities which, if removed, would clearly lead to mission failure, and those which if performed by contractors would pose significant legal complications. An additional consideration is the desire to avoid lost skill sets; if the U.S. government outsources a function, it may risk losing the capacity to carry out the activity at any point without contractors.

107. H.R. 5122, the John Warner National Defense Authorization Act for Fiscal Year 2007, Section 854.

108. Edward M. Harrington and Jeffrey P. Parsons, Statement before the Subcommittee on Contracting Oversight, U.S. Senate Committee on Homeland Security and Governmental Affairs (17 December 2009). The FY 2009 NDAA authorized an increase of five general officer billets specifically for the Army (see, P.L. 110-417 sec. 503(a)), all five of which were reserved for those who serve in an acquisition position (see, P.L. 110-417 sec. 503(e)(1)). It also authorized an increase of 53 general officer and flag officer positions that are joint duty assignments, which may be designated for exclusion from the statutory limitations on the numbers of general officers and flag officers on active duty (see, P.L. 110-417 sec.

503(c)). Of these 53 new positions, five are reserved for general officers or flag officers who serve in an acquisition position, with one assignment specifically placed within DCMA (see, P.L. 110-417 sec. 503(e)(2)). It appears that any service (including Army) may be considered for these other five billets.

109. Office of Senator Jim Webb, "Freshman Senators Call for Commission to Investigate Wartime Contracting" (18 July 2007), <http://mccaskill.senate.gov/newsroom/record.cfm?id=279465>.

110. Gansler Commission Report.

111. Fontaine email communication with official from Special Inspector General's office (13 April 2010).

112. Among other steps, DOD has issued doctrine in the 31 March 2010 "Operational Contract Support Concept of Operations" establishing an Army Contracting Command and establishing a Joint Theater Support Contracting Command for contingency-specific contracts in Iraq and Afghanistan.

113. Secretary of Defense Robert Gates stated that DOD intends to hire an additional 9,000 defense procurement professionals by 2015, including 2,500 auditors at the DCAA. This cadre will have responsibility, however, for procurement across the spectrum, not only for ES&R contracting. See DOD News Briefing by Secretary of Defense Robert Gates (6 April 2009).

114. Opening statement by Senator Claire McCaskill before the Subcommittee on Contracting Oversight, U.S. Senate Committee on Homeland Security and Governmental Affairs (17 December 2009).

115. Jennifer K. Elisea, Kennan H. Nakamura, and Moshe Schwartz, *Private Security Contractors in Iraq: Background, Legal Status, and Other Issues*, Congressional Research Service RL 32419 (25 August 2008).

116. Edward M. Harrington and Jeffrey P. Parsons, Statement before the Subcommittee on Contracting Oversight (17 December 2009).

117. Dan Feldman, Remarks before the Subcommittee on Contracting Oversight, U.S. Senate Committee on Homeland Security and Governmental Affairs (17 December 2009).

118. Government Accountability Office, *Warfighter Support: Continued Actions Needed by DOD to Improve and Institutionalize Contractor Support in Contingency Operations* GAO 10-551T: 17.

119. Department of Defense, *Contractor Support of U.S. Operations in USCENTCOM AOR, Iraq, and Afghanistan*, USCENTCOM Quarterly Census 1st Quarter FY2010 and Synchronized Predeployment and Operational Tracker (SPOT), "Weekly SPOT numbers for DOD, DOS, USAID, and Other" (19 April 2010).

120. Carstens et al.: 13.

121. Peter Singer, *Can't Win with 'Em, Can't Win Without 'Em: Private Military Contractors and Counterinsurgency* (Washington: The Brookings Institution, September 2007): 13-14.

122. Government Accountability Office, *Warfighter Support: Continued Actions Needed by DOD to Improve and Institutionalize Contractor Support in Contingency Operations* GAO 10-551T (Washington: 17 March 2010): 26-7.

Appendices

APPENDIX A: RECOMMENDATIONS BY AGENCY OR ACTOR 48

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APPENDIX B: LIST OF WORKING GROUP PARTICIPANTS 59

APPENDIX A:
RECOMMENDATIONS BY AGENCY OR ACTORTHE WHITE HOUSE (TOGETHER WITH THE DEPARTMENTS OF DEFENSE
AND JUSTICE AND CONGRESS) SHOULD:

- Amend MEJA to unambiguously cover all ES&R contractors working for the U.S. government in theater and remove the provision limiting MEJA jurisdiction to only those contractors working in support of the "mission of the Department of Defense" overseas.
- Increase the number of Defense Criminal Investigative Service (DCIS) special agents in Iraq and Afghanistan in order to enhance DOD's ability to investigate wrongdoing by contractor personnel.
- Establish in the Department of Justice a unit – a portion of which could be located in theater – dedicated to investigating and prosecuting any crimes committed by contractors in violation of MEJA, the Foreign Corrupt Practices Act or other relevant laws. This unit should work, when appropriate, in cooperation with DCIS.
- Establish a new, streamlined contingency Federal Acquisition Regulation (FAR) that reduces the enormous amount of regulations contained in the current FAR and its laborious requirements before a contract can be cancelled. The contingency FAR should include an automatic waivers process and should attempt to achieve a better balance between preventing fraud, waste and abuse and providing the flexibility and speed necessary to carry out contracting in a hostile environment.
 - » The contingency FAR should establish protocols for coordinating among agencies on decisions related to ES&R contracting in theater.
 - » The contingency FAR should establish a framework that actively encourages the sharing of contractor information among agencies and U.S. government personnel (including ground commanders) in theater.

THE ADMINISTRATION (TOGETHER WITH CONGRESS) SHOULD:

- Establish a permanent, independent inspector general that would (as SIGIR and SIGAR do today in Iraq and Afghanistan, respectively) provide audit, inspection and investigation services for ES&R contracting in contingency environments. This inspector general should possess the authorities enumerated in the Inspector General Act of 1978.

THE ADMINISTRATION SHOULD:

- Press for wider international adoption of the Montreux Document and initiate other efforts to clarify the status of private contractors under the law of armed conflict.

THE DEPARTMENT OF DEFENSE SHOULD:

- Continue to significantly increase the number of qualified contract personnel responsible for ES&R contracting. The boost in personnel should include filling the remaining flag officer billets for acquisition authorized in the FY 2009 NDAA and increasing the number of CORs and other government personnel responsible for quality assurance and contract oversight.
- Continue to provide incentives for enlisted personnel, officers and civilians to pursue a career track in contract management or auditing.
- Issue a directive that prioritizes the education, training and assigning of ES&R contracting personnel, as well as other relevant personnel outside the acquisition staff. This directive should:
 - » Direct that CORs should not have other duties that conflict with their contract responsibilities.
 - » Add basic contracting issues to professional military education and flag officer training and education. The aim should be to ensure that officers are qualified to assess compliance with contracting regulations and are familiar with the role of contractors in hostile environments.
- Ensure that operational and contingency plans take into account every aspect of contractor support by:
 - » Expanding Annex W, which contains information on the numbers of contractors required for a military operation and the tasks they will perform, and ensuring that it contains relevant and adequate detail.
 - » Requiring that other functional annexes identify contracted support requirements.
 - » Identifying probable transition points at which government employees will cede functions to private contractors or vice versa.
- Consult with contractors during the military's mission planning process, to the extent that the mission will rely on contractor support. This process should include ensuring that commanders know – before they deploy – the number of contractors they will encounter in an area of operations and the services these contractors will provide.
- Require military staffs to establish contracting planning cells to:
 - » Determine the precise roles contractors will play in a given operation.
 - » Develop contingency plans for the possibility that a contractor either fails or is not permitted to perform a service as specified in a contract.
- Integrate contractor roles into pre-deployment training and war games. This should include issuing the joint policy document mandated by Congress in 2008 and ensuring that it includes guidance for the inclusion of contractor roles in all facets of training.

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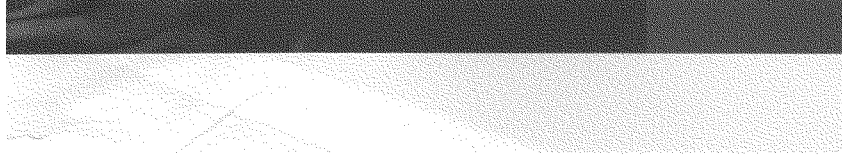
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THE DEPARTMENT OF DEFENSE (IN COORDINATION WITH THE WHITE HOUSE, THE DEPARTMENT OF JUSTICE, AND CONGRESS) SHOULD:

- Amend MEJA to unambiguously cover all ES&R contractors working for the U.S. government in theater and remove the provision limiting MEJA jurisdiction to only those contractors working in support of the "mission of the Department of Defense" overseas.
- Increase the number of Defense Criminal Investigative Service (DCIS) special agents in Iraq and Afghanistan in order to enhance DOD's ability to investigate wrongdoing by contractor personnel.
- Establish in the Department of Justice a unit – a portion of which could be located in theater – dedicated to investigating and prosecuting any crimes committed by contractors in violation of MEJA, the Foreign Corrupt Practices Act or other relevant laws. This unit should work, when appropriate, in cooperation with DCIS.
- Establish a new, streamlined contingency Federal Acquisition Regulation that reduces the enormous amount of regulations contained in the current FAR and its laborious requirements before a contract can be cancelled. The contingency FAR should include an automatic waivers process and should attempt to achieve a better balance between preventing fraud, waste and abuse and providing the flexibility and speed necessary to carry out contracting in a hostile environment.
 - » The contingency FAR should establish protocols for coordinating among agencies on decisions related to ES&R contracting in theater.
 - » The contingency FAR should establish a framework that actively encourages the sharing of contractor information among agencies and U.S. government personnel (including ground commanders) in theater.

THE DEPARTMENT OF DEFENSE (IN COORDINATION WITH THE STATE DEPARTMENT AND USAID) SHOULD:

- Establish uniform standards across agencies and ES&R contract type for consistency and consolidation of data. This standardization should include finalizing and standardizing the SPOT system and issuing identical directives to DOD, State and USAID regarding the information each must input into the system. To bolster the fidelity of this data, COs should rely not simply on firms' reported employment figures but also confirm such reports in site visits.
- Further integrate auditors into the contracting process by making wider use of co-located auditors at large ES&R contracting firms.
- Improve accountability and monitoring of subcontractors, which account for 70 percent of the contracting workload, by revising regulations to allow government contracting personnel to demand more transparency in subcontracted projects.
- Establish enhanced mechanisms for planning, executing and monitoring Commander's Emergency Response Program projects.
- Establish a future baseline ratio of government contracting personnel (e.g., investigators, COs and



CORs) to contractors to help ensure adequate oversight in future contingencies.

- Include clauses in ES&R contracts that require contracting firms to enforce rules governing behavior that impacts the overall U.S. mission, beyond the narrowly construed completion of their contracted activities.
- Establish an interagency process to determine the possible foreign policy implications of contracting with particular third-country nationals (e.g., employing contractors whose nationality and presence in a combat zone would provoke political sensitivities).
- Increase contracting coordination among International Security Assistance Force partners in Afghanistan and ensure that the role of contractors is considered in NATO policy decision making.
- Further integrate the role of contractors in strategic-level guidance, military doctrine and diplomatic strategy. Such efforts should include:
 - » Ensuring that all aspects of ES&R contracting are considered in the formulation of the National Defense Strategy, the next QDR and future field manuals and joint publications, as well as other relevant tactical and operational level manuals.
 - » Ensuring that all aspects of ES&R contracting are considered in the development of the Quadrennial Diplomacy and Development Review (QDDR).
- Provide clear incentives, including financial bonuses and promotions, to skilled employees who take on key contracting duties.
- Encourage employees in the field to become familiar with managing and communicating with private contractors. This should include promoting communication between military personnel and contractors on the battlefield and interaction between relevant State Department and USAID personnel (e.g., officials serving on Provincial Reconstruction Teams) and contractors.
- Establish a contingency contracting lessons-learned center to collect, process and disseminate a history of past contracting experiences and the lessons that can be drawn from them. This center should attempt to capture lessons learned that apply not only to the employment of contractors by the Department of Defense but also by the Department of State and USAID.

THE DEPARTMENT OF DEFENSE (TOGETHER WITH THE DEPARTMENT OF JUSTICE) SHOULD:

- Clarify how the various laws that potentially apply to ES&R contractors in theater – including the Military Extraterritorial Jurisdiction Act, the Uniform Code of Military Justice, the Special Maritime and Territorial Jurisdiction (SMTJ), host-nation law (including any Status of Forces Agreements) and international law – interact to create obligations for or jurisdiction over private contractors.
 - » This should include clarifying the laws and jurisdiction relevant to third-country nationals employed by both contracting firms and subcontractors.
 - » It should also include engaging with America's partners, and with NATO allies in particular, to ensure a common coalition view of the ways in which host-nation law and international law apply to private contractors.

THE STATE DEPARTMENT SHOULD:

- Significantly increase the number of qualified contracting officers and CORs responsible for ES&R contracting, including in current operational theaters.
- Provide incentives for foreign service officers and civil servants to pursue a career track in contract management.
- Add basic contracting issues to education and training courses for senior Foreign Service Officers and senior USAID personnel.
- Develop a quarterly census to track the number of contractors in contingency operations, similar to the one used currently by U.S. Central Command, until the SPOT system proves a reliable source of contractor information.

THE STATE DEPARTMENT (IN COORDINATION WITH THE DEPARTMENT OF DEFENSE AND USAID) SHOULD:

- Establish uniform standards across agencies and ES&R contract type for consistency and consolidation of data. This standardization should include finalizing and standardizing the Synchronized Predeployment and Operational Tracker (SPOT) system and issuing identical directives to DOD, State and USAID regarding the information each must input into the system. To bolster the fidelity of this data, COs should rely not simply on firms' reported employment figures but also confirm such reports in site visits.
- Further integrate auditors into the contracting process by making wider use of co-located auditors at large ES&R contracting firms.
- Improve accountability and monitoring of subcontractors, which account for 70 percent of the contracting workload, by revising regulations to allow government contracting personnel to demand more transparency in subcontracted projects.
- Establish enhanced mechanisms for planning, executing and monitoring Commander's Emergency Response Program projects.
- Establish a future baseline ratio of government contracting personnel (e.g., investigators, COs and CORs) to contractors to help ensure adequate oversight in future contingencies.
- Include clauses in ES&R contracts that require contracting firms to enforce rules governing behavior that impacts the overall U.S. mission, beyond the narrowly construed completion of their contracted activities.
- Establish an interagency process to determine the possible foreign policy implications of contracting with particular third-country nationals (e.g., employing contractors whose nationality and presence in a combat zone would provoke political sensitivities).
- Increase contracting coordination among International Security Assistance Force partners in Afghanistan and ensure that the role of contractors is considered in NATO policy decision making.
- Further integrate the role of contractors in strategic-level guidance, military doctrine and diplomatic strategy. Such efforts should include:

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- » Ensuring that all aspects of ES&R contracting are considered in the formulation of the National Defense Strategy, the next QDR and future field manuals and joint publications, as well as other relevant tactical and operational level manuals.
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- Encourage employees in the field to become familiar with managing and communicating with private contractors. This should include promoting communication between military personnel and contractors on the battlefield and interaction between relevant State Department and USAID personnel (e.g., officials serving on Provincial Reconstruction Teams) and contractors.
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USAID SHOULD:

- Significantly increase the number of qualified contracting officers and CORs responsible for ES&R contracting, including in current operational theaters.
- Provide incentives for foreign service officers and civil servants to pursue a career track in contract management.
- Add basic contracting issues to education and training courses for senior Foreign Service Officers and senior USAID personnel.
- Develop a quarterly census to track the number of contractors in contingency operations, similar to the one used currently by U.S. Central Command, until the SPOT system proves a reliable source of contractor information.

USAID (IN COORDINATION WITH THE DEPARTMENTS OF STATE AND DEFENSE) SHOULD:

- Establish uniform standards across agencies and ES&R contract type for consistency and consolidation of data. This standardization should include finalizing and standardizing the SPOT system and issuing identical directives to DOD, State and USAID regarding the information each must input into the system. To bolster the fidelity of this data, COs should rely not simply on firms' reported employment figures but also confirm such reports in site visits.

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THE COMMISSION ON WARTIME CONTRACTING (IN COORDINATION WITH THE MEDIA, GOVERNMENT WATCHDOG GROUPS, AND CONGRESS) SHOULD:

- Increase the amount of attention, time and resources dedicated to examining ES&R contractor conduct in America's overseas engagements. In so doing, these groups might draw on the effective example set by the Special Inspector General for Iraq Reconstruction. Such examinations should focus on, among other factors, contractor misconduct; fraud, waste and abuse in the contracting process (both on the governmental and contractor sides); and whistle-blower allegations. At the same time as they point out these negative factors, they should highlight those contracting firms that are properly and efficiently performing a variety of tasks for the United States.

ES&R CONTRACTING FIRMS SHOULD:

- Ensure that senior managers and in-theater supervisors are familiar with relevant U.S. and local law, Status of Forces Agreements, the law of armed conflict and the applicable rules of engagement.
- Precisely define the way in which legal obligations and rules of engagement apply to their contract employees, including local nationals.
- Enforce existing rules that require key employees (such as those who will carry weapons or are likely to see hostile fire) to have basic training in the law of armed conflict (e.g., the Geneva Conventions) and the rules of engagement for a particular theater of operations.
- Institute enhanced vetting procedures for third-country and local contractors to ensure that those with criminal pasts, a history of human rights violations or connections to enemy forces are prevented from obtaining employment.
- Establish a trade association that includes as members firms specifically engaged in ES&R contracting (as opposed to private security contracting). Such an association should:
 - » Establish an accreditation program and licensing standards for firms.
 - » Serve as an interlocutor with the government on ES&R contracting issues.
 - » Establish a database of contractors working for licensed firms and put into place a process for receiving and investigating complaints.
 - » Promulgate education and training guidance for contractors working for member firms.
 - » Encourage the development of, and participate in the design of, an international code of conduct to which firms, both American and foreign, may voluntarily commit and which spells out specific repercussions for severe violations.
- Work with Congress, the Secretary of Defense, the Secretary of State and the USAID Administrator to establish and mandate compensation mechanisms for victims of contractor abuse.

JUNE 2010

Contracting in Conflicts
The Path to Reform
CONGRESS SHOULD:

- State in law any specific activities that it deems "inherently governmental." It has already designated offensive combat operations and direct contractual oversight as such, and should expand the list to the degree that Congress can agree on enumerated activities.
- Require the executive branch to carry out comprehensive cost analyses that compare the costs of contracted services with the costs of the same services provided by government personnel.

CONGRESS (IN COORDINATION WITH THE WHITE HOUSE AND THE DEPARTMENTS OF DEFENSE AND JUSTICE) SHOULD:

- Amend MEJA to unambiguously cover all ES&R contractors working for the U.S. government in theater and remove the provision limiting MEJA jurisdiction to only those contractors working in support of the "mission of the Department of Defense" overseas.
- Increase the number of Defense Criminal Investigative Service (DCIS) special agents in Iraq and Afghanistan in order to enhance DOD's ability to investigate wrongdoing by contractor personnel.
- Establish in the Department of Justice a unit – a portion of which could be located in theater – dedicated to investigating and prosecuting any crimes committed by contractors in violation of MEJA, the Foreign Corrupt Practices Act or other relevant laws. This unit should work, when appropriate, in cooperation with DCIS.
- Establish a new, streamlined contingency Federal Acquisition Regulation that reduces the enormous amount of regulations contained in the current FAR and its laborious requirements before a contract can be cancelled. The contingency FAR should include an automatic waivers process and should attempt to achieve a better balance between preventing fraud, waste and abuse and providing the flexibility and speed necessary to carry out contracting in a hostile environment.
 - » The contingency FAR should establish protocols for coordinating among agencies on decisions related to ES&R contracting in theater.
 - » The contingency FAR should establish a framework that actively encourages the sharing of contractor information among agencies and U.S. government personnel (including ground commanders) in theater.

CONGRESS (TOGETHER WITH THE ADMINISTRATION) SHOULD:

- Establish a permanent, independent inspector general that would (as SIGIR and SIGAR do today in Iraq and Afghanistan, respectively) provide audit, inspection and investigation services for ES&R contracting in contingency environments. This inspector general should possess the authorities enumerated in the Inspector General Act of 1978.

CONGRESS (IN COORDINATION WITH THE MEDIA, GOVERNMENT WATCHDOG GROUPS, AND THE COMMISSION ON WARTIME CONTRACTING) SHOULD:

- Increase the amount of attention, time and resources dedicated to examining ES&R contractor conduct in America's overseas engagements. In so doing, these groups might draw on the effective example set by the Special Inspector General for Iraq Reconstruction. Such examinations should focus on, among other factors, contractor misconduct; fraud, waste and abuse in the contracting process (both on the governmental and contractor sides); and whistle-blower allegations. At the same time as they point out these negative factors, they should highlight those contracting firms that are properly and efficiently performing a variety of tasks for the United States.

CONGRESS (TOGETHER WITH THE OFFICE OF MANAGEMENT AND BUDGET) SHOULD:

- Move toward a "core capabilities" approach to activities not specifically deemed by Congress to be inherently governmental. Such an approach would focus on the functions the U.S. government should possess and maintain, rather than debate internally over which are inherently governmental.
- Address structural and institutional factors that make hiring temporary federal workers (e.g., contracting officers as part of a surge capacity during a contingency operation) more difficult. The factors addressed should include existing disincentives that discourage qualified contracting personnel who have left government to return to it, such as prohibitions against retaining government pension payments while returning to temporary government service.

THE OFFICE OF MANAGEMENT AND BUDGET (TOGETHER WITH CONGRESS) SHOULD:

- Move toward a "core capabilities" approach to activities not specifically deemed by Congress to be inherently governmental. Such an approach would focus on the functions the U.S. government should possess and maintain, rather than debate internally over which are inherently governmental.
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APPENDIX B: WORKING GROUP PARTICIPANTS

The following individuals participated in working group sessions designed to help inform this project. However, all opinions expressed within the report – unless otherwise noted – are those solely of the authors and not necessarily conclusive of the working group sessions.

Deborah Avant University of California, Irvine	Margaret Daum Senate Homeland Security and Governmental Affairs Committee Subcommittee on Contracting Oversight	Ambassador John Herbst Office of the Coordinator for Reconstruction and Stabilization, U.S. Department of State	Kevin O'Brien Innovative Analytics & Training LLC
Fred Berger The Louis Berger Group	Bob Dickson Commission on Wartime Contracting	Major General Pat Hickerson, USA (Ret.) CH2M HILL	Dr. Ken Oscar Fluor
Doug Brooks International Peace Operations Association	Dominick Donald AEGIS	David Isenberg Independent Analyst	Brigadier General Craig Peterson, USA (Ret.) Former Chief of Staff, Multi-National Division North, Operation Joint Guard, Bosnia
Colonel Ross Brown U.S. Army	Major General Charles Dunlap, USAF (Ret.) Former Deputy Judge Advocate General	Rob Jenkins Office of Transition Initiatives, U.S. Agency for International Development	Richard Ressler Booz Allen Hamilton
John Brummet Special Inspector General for Afghanistan Reconstruction	Andrew Erdmann	Ed Laughlin BAE Systems	Moshe Schwartz Congressional Research Service
Major General Julian Burns, USA (Ret.) BAE Systems	Colonel Jay Farrar, USMC (Ret.) Bechtel	Howie Lind Fluor	Mark Silverman International Committee of the Red Cross
Tom Callahan Lockheed Martin	Herb Fenster McKenna Long & Aldridge, LLP	Kristin Lord Center for a New American Security	Allison Stanger Middlebury College
Pablo Carrillo Senate Armed Services Committee	Richard Fontaine Center for a New American Security	Linda McKnight KBR	Chris Taylor Mission Essential Personnel
Phil Carter McKenna Long & Aldridge, LLP	John Gastright DynCorp International	J.J. Mesner International Peace Operations Association	Bill Walter KBR
Kristi Clemens Rogers AEGIS	The Honorable Pete Geren Twentieth Secretary of the U.S. Army	Gary Motsek Program Support, Office of the Assistant Secretary of Defense (Logistics and Material Readiness)	Jamie Williamson International Committee of the Red Cross
Carole Coffey U.S. Government Accountability Office	Kristen Gilley Special Inspector General for Afghanistan Reconstruction	Jeb Nadaner Lockheed Martin	Colonel Henry Zimon USA (Ret.) MPRI L-3 Communications
Jock Covey Bechtel	Bill Greenwalt Lockheed Martin	John Nagl Center for a New American Security	
Ginger Cruz Special Inspector General for Iraq Reconstruction	General Ron Griffith, USA (Ret.) L-3 Communications	Rebekah Nottingham BAE Systems	
Colonel Jack Cunnane, USA U.S. Army Contracting Command			

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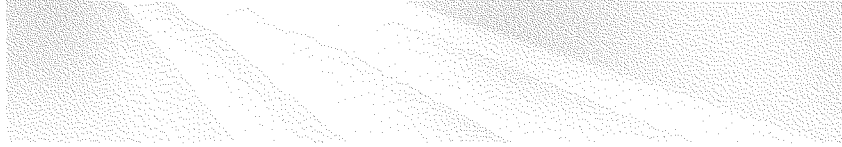
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Mr. TIERNEY. Thank you, Mr. Fontaine.

Thank all of you.

And now, for the continuation of that bad news I spoke about. I think it's probably more prudent if we just break now and go and vote. There's only a few minutes left on the vote.

There are only two votes, so hopefully we will be back relatively soon, I would say certainly by about 5 minutes of 11 or 11 a.m. So if you want to get yourself a cup of coffee or relax a little bit. My apologies, and we will be back. So we will be adjourned until 11.

[Recess.]

Mr. TIERNEY. Thank you for your patience. We had one more vote than had been anticipated, and so it took a little bit longer. But we are happy that you are all back with us, and ready to start asking some questions, which I will kick off for 5 minutes, because I want to ask something about the basic premise of this whole operation here.

Everybody seems to be testifying on the notion that we have accepted the premise that private contracting and subcontracting is here to stay on contingency operations. Yet, every one of you cites numerous problems with oversight, with management and personnel, integration of the planning, the command structure, legal issues, liability, responsibility, control over individuals for whom we are going to get the blame, whatever they do, even though they may not be technically be in our Department of Defense or our State Department or at USAID.

So, given all of those difficulties—and separating out the State and USAID part of it right now, but start with Department of Defense—why aren't we giving more consideration to the notion of not having contractors and subcontractors in our military operations where we already have established clear lines of responsibility for those in the military, clear lines of management, clear lines of accountability, and all of that?

I mean, it seems to me that if we just define military operations as inherently governmental because the military operations are under the name of the United States and under our flag overseas, that would remedy a lot of these problems.

Mr. Solis.

Mr. SOLIS. I will take a first stab at it.

I think what we have tried to say is that we are not saying that contractors should be used one way or the other. I think what we try to say is that, from what we understand from the Department and military operations, that it's likely that they are going to be part of it. So we are not saying that they are.

That being said, going back to what I mentioned in our statement, is that there needs to be a fundamental look at the requirements for contracting, if, in fact, you want to do contracting. I don't think we're trying to say that you will use contracting, but if that is what you are going to do in terms of your military operations, you have to plan that up front.

You have to look and say, are we going to contract for certain things—not just on the logistical side, that we are using contractors on the intel side and network operations and a number of other things. We are using them as linguists. Everywhere I go, you know, military members say, "I think we have gone too far."

But I think there needs to be this fundamental look-see at the beginning to say whether or not we are going to use them. And if we are going to use them, then we need to put the proper oversight and controls in place.

Mr. TIERNEY. I certainly would agree with you there.

I'll tell you something. You know, when I look at all of you talking about being on top of this issue since the 1990's and advising everybody to start looking at these contracts and moving forward and, basically, there's a large part just being blown off.

I mean, here we are 20 years later, and you have a little bit of compliance with some of the recommendations and a whole lot of noncompliance and sometimes inattention to them.

Ms. Ugone.

Ms. UGONE. Yeah, I think the whole issue, and I think my colleagues here have raised it, is the inherently governmental function issue, which is—I believe OMB has proposed policy definitions of that.

The issue is, how closely related is it to the inherently governmental function, and should these critical capabilities be in-sourced? I believe there was legislation passed in the last couple years that requires the military departments to take a look at their contracted-out capabilities to see whether or not any of them should actually be in-sourced, which is brought back in-house.

And that is one way in which the Department can analyze that particular situation. I think there is already legislation out there that allows—

Mr. TIERNEY. The legislation is there; the compliance isn't. And that is the problem.

And, again, the question goes back to, when did war ever become something that wasn't inherently governmental, in all the things that go with it?

When I see recommendations here, you know, trying to incorporate in and integrate into the command chain contractors so that they are more involved in the planning and the operation and stuff like that, well, if you're going to do that, you might as well have them be on your payroll.

Mr. Bowen.

Mr. BOWEN. Mr. Chairman, you say, when did that happen? I think the time is the late 1980's, when LOGCAP I was created and, essentially, the support—fuel, food, billeting—of troops in the field was outsourced. And we have spent now on LOGCAP in Iraq in excess of \$35 billion in those three areas.

It has been incremental increases since the late 1980's. "What can be covered," is a continuing question in every conflict, and the answer is always, "a little bit more."

Mr. TIERNEY. Has anybody ever looked at, you know, what is it that we did in World War II, what is it that we did in the Korean conflict?

Mr. Fontaine, what a segue, huh?

Mr. FONTAINE. Yeah, exactly. In our report, actually, we have a historical section that looks back, actually, all the way to George Washington. And contractors in some way, shape, or form have played a role in all of our conflicts going back that far. There were, you know, thousands of contractors working in Vietnam and Korea.

The big change, though, has been what they've done and the dependence that the United States has had upon what they've done. So in Vietnam, for example, you had a large number of contractors working on construction projects in Vietnam. And that, obviously, is less controversial, in terms of what contractors do. You know, now, in the current wars, we've had contractors doing interrogation, private security operations, weapons maintenance, according to reports even maintaining drone operations, those sort of things, which are much more controversial.

So I think that is the big change that has happened over the years, is the scope of activities that contractors have begun to carry out. And because we have, you know, upwards of 200,000 contractors now in Iraq and Afghanistan, if you pulled those out of the operation or tried to Federalize them all, it would be very difficult to do so.

Mr. TIERNEY. And I wonder how easy it would be to keep voting to be over there involved in these conflicts if it was 200,000 people, U.S. citizens in combat, as opposed to 90,000 in one place, with 110,000 contractors, sort of, off the books. It's a political consideration.

Mr. FONTAINE. Right. I mean, I think this is another aspect of it, is the political cost goes down to the degree that contracting support goes up. Because, you know, we always mourn the losses of American service people who are killed; they are on the "faces of the fallen" tributes and everything else. But contractors die and are hurt, and they barely register. So there's a reduction in the political costs of these operations.

But I think, at the same time, unless the United States has a very significant reduction in its international commitments—which, personally, I think is relatively unlikely, at least in the near to mid-term—then we will probably continue to rely with our current force structure on contractors to do the work that our military is not big enough to carry out on its own.

Mr. TIERNEY. Thank you.

Mr. Flake.

Mr. FLAKE. Let me just follow on that theme, if I could. And Mr. Bowen and Mr. Fontaine first.

The report that was issued, "Warlord, Inc.," this is one—and it was mentioned before by Mr. Solis that you take into account both efficiency and whether or not it aids our policy, our overall policy goals. This is one where, when you have local contractors with the trucking contract, it's, I think, undoubtedly the most efficient way to move goods between military bases in Afghanistan.

But when we find out that a significant portion of the money that is used to pay those contracts is going for protection money to some very unsavory characters, some of whom are very tight with the Taliban or are contracting with the Taliban for this protection, that certainly runs counter to our policy, our counterinsurgency policy, which calls for one source of authority—that being the Afghan Government, and no parallel authority structures there—that we're, in this case, not only tolerating, we're building up these militias and warlords.

How do we reconcile that? It goes back to what the chairman was talking about, you know, the political cost. Certainly, if we did

what the Soviets did, used their force structure to guard the supply lines—according to this report, it was 75 percent of their force structure—that would require, you know, a doubling of our number of troops. And it wouldn't be very efficient, and we would have, certainly, more casualties. But it may be the only way to run an effective counterinsurgency policy as we have defined it.

How do we reconcile that? Or can we reconcile that?

Mr. Bowen, do you want to give it a shot?

Mr. BOWEN. Well, the policy issue, I guess, is using financial resources to pacify a region. And it was certainly expedient, an expedient process, ad hoc, with respect to keeping the trucking routes safe.

In Iraq, it was much more complicated, a much more thought-through process. The "Anbar Awakening," the Sons of Iraq program, spent in excess of \$450 million of Commander's Emergency Response Program money to pacify Anbar province and similar regions. Similar policy issues, different approaches to how well-thought-out, how well-structured the execution of the two programs was.

In Afghanistan, the policy execution was essentially expedient and almost outsourced, as you point out. In Iraq, it was carefully thought through, as was the transition of the maintenance of that pacification program, now borne financially by the Iraqi Government.

Mr. FLAKE. Mr. Fontaine, do you have any thoughts on that? From that 35,000-foot level, how does this look in terms of the use of contractors in this trucking contract?

Mr. FONTAINE. Well, obviously, in any war, funneling money to your enemy is not a good idea. So I think you should start from that premise.

I do think that, at some point, there may need to be a fundamental choice made whether to proceed—whether the effects are mitigated through more oversight and that kind of thing, to proceed in a fashion where we are willing to trade money in order to have a pacified area through which our supply lines can travel, knowing that some of that money will go to our enemy, or whether we are willing to tolerate the potential of more casualties and more disruption of our supply lines. I think that is probably a fundamental choice.

But when it comes to counterinsurgency, I think that not only do they have all the problems that you just described when it comes to aiding our enemies, reducing government legitimacy, giving them more opportunity to attack rather than to not attack, but I also think there is a strategic communications issue to this. We are supposed to be on the side of the good guys. And so, as word gets out that we are, sort of, willingly or knowingly providing money that ends up in the hands of the Taliban, I wonder if that promotes a sense that the United States is not in this, sort of, for the long term, in order to actually see the government succeed, rather than trying to go with short-term expediency.

Mr. FLAKE. Thank you.

Ms. Ugone, I have just a moment left. You mentioned that there are provisions; if there is no value added from having the prime

contractor or the subcontractors, that we have the authority to pull back some of the funds used for that. How often is that utilized?

Ms. UGONE. We haven't done work in the area, on the pass-through. That was legislation that was enacted, I think, in fiscal year 2007.

But one of the things that it focuses on is the subcontractor level. We do plan to do some work based on the contingency contracting framework for reform. We have identified where primes have had problems, where we plan to take a look at the primes that are primarily IDIQ contracts. And we are going to do down to the sub-level to see if there are issues related to passthrough, as well as other issues related to subcontractor responsibility as well.

Mr. FLAKE. OK. Let me just ask it another way quickly. You're not aware of any instance where we have actually pulled back funds?

Ms. UGONE. No. I'm not aware of any instances about recovering excess costs.

Mr. FLAKE. OK. Thanks.

Mr. TIERNEY. Thank you.

Ms. Chu, you're recognized for 5 minutes.

Ms. CHU. Thank you, Mr. Chair.

Well, last week, we found out that, in the course of investigating the Host Nation Trucking contract, that military logisticians were relying on reports from prime contractors to gain visibility into the subcontractors that were actually driving the trucks and providing security for the convoys. And there was strong evidence that these subcontractors were paying off the Taliban. This is a very distressing situation.

And what I would like to ask the panelists is, in general, what areas of oversight are appropriate for DOD to leave up to the prime contractor, and what areas should DOD take a more direct role in overseeing? And, in doing so, how can we prevent this corruption from occurring?

Ms. UGONE. You know, I think one of the things—in preparing for this hearing, it became quite apparent that the Federal Acquisition Regulation has not kept up with subcontract management. We just took one contract out of here, an IDIQ contract with I believe it was five prime contractors, and there were 200 subcontractors under that prime.

If you take a look at the Federal Acquisition Regulation, there are provisions, but as far as subcontract management, I don't think it's kept up with the level of subcontractor performance that is required under these primes. So I think there needs to be a look at the Federal Acquisition Regulation with respect to subcontract management.

Ms. CHU. Are there not guidelines for this?

Ms. UGONE. There are. And there is—and I talked about it a little bit in my opening statement—there is the consent to subcontract, which is, if the contracting officer requires a prime to provide information on their subs in order for the contracting officer to consent to subcontract, then there is some insight into subcontractor responsibility. But if the contracting officer does not require that, then you're not going to have the insight.

And the provisions in the current FAR allow a lot of leeway to the contracting officer.

Ms. CHU. And what would change it so that you could have this more stringent oversight of the subcontractor?

Ms. UGONE. Excuse me? I didn't quite hear the question.

Ms. CHU. What would it take to change it so that you could have—

Ms. UGONE. Well, one of the things is, I think the provisions—let me just take the situation with the warlord situation. The contracting officer can, under the current provisions of the FAR, designate subcontracts in that situation. If something requires special surveillance or special oversight, it does allow, in the FAR, to do that. For example, you could say to the prime, "I need to be able to consent to you subcontracting with these primes. I need to get insight into your subcontractors." I can also establish, perhaps, a special surveillance program for those particular subcontractors.

So there are some provisions, but it's up to the contracting officer to determine whether or not those provisions are invoked.

And there are some other additional requirements that have to do with the contractor purchasing system, and it gets a little bit more detailed, as to when you have to get a consent to subcontract from a contracting officer.

Ms. CHU. I want to ask another question about the culture at the Department of Defense.

And, Mr. Solis, you talked about the fact that the contracting reform at DOD is hampered by the Department's inability to institutionalize operational contract support by accepting contractors as an integral part of the total force. But I also note that you had had several recommendations but the DOD has been slow to implement many of the recommendations.

What could change this culture?

Mr. SOLIS. I think one of the things, again—and I think the Joint Staff—and I think this was alluded to at the hearing last week. There was a Joint Staff study to look at the reliance on contractors in Iraq. And I think that, again, begins the process of looking at how reliant the DOD is, not only for Iraq but for future operations, in terms of the reliance.

I think, also, as I mentioned in the testimony here, when you look for future operations, there are requirements to look for—there are requirements to produce what was called an "Annex W," which looks at contractor requirements for new operations or future operations. That has to be done. That has to be done very rigorously and on time. And I think, unless the Department does that kind of thing, we are going to be in this same situation, talking about another contract, the next time.

I think the only other thing I would offer is that I know in the current version of the defense authorization bill that the Senate just passed that they made some changes to the requirements for looking at contractor requirements in the defense bill. And that is going to be part of the QDR, at least as envisioned now. So it's going to bring that strategic look up to it at that point.

I still think there are some basic problems in terms of, again, as I mentioned, lessons learned, you know, background screenings. I think those things—we're on record with some of the recommenda-

tions to make changes to that. For whatever reason, the Department has not acted upon all those in a timely manner. We are still trying to pursue some of those. But, again, I think the fundamental piece is that you have to look at your reliance on contractors before you start making other adjustments.

Ms. CHU. Thank you. I yield back.

Mr. TIERNEY. Mr. Duncan, you're recognized for 5 minutes.

Mr. DUNCAN. Well, thank you. Thank you very much, Mr. Chairman, and thank you for holding another hearing and trying to call attention to all the problems, all the waste, fraud, and abuse, the one scandal after another that has gone on through these many years that we have been in Iraq and Afghanistan.

Throughout all this time, we have had more contractors and subcontractors than we've had soldiers in these areas. I heard Mr. Fontaine say a moment ago that the use of contractors by the military has gone on since the founding of the country. But I can tell you there's never been the ridiculous markups, the excessive, almost obscene profiteering, there's never been the rip-offs of the taxpayers that have gone on to the extent that they have gone on in Iraq and Afghanistan. And these wars have always been more about—far more about money than they have been about any real threat to this Nation.

It's really shameful, and it's very, very sad, what has gone on. And there is really no real way to correct it. When you have private companies dealing with each other, things are done at a fourth or a third or half of the cost that you have when you have the Federal Government involved dealing with contractors. And the Department of Defense, because of the lobbying influence of the retired admirals and generals, has been the worst and the most expensive of any of the Federal contracting that has gone on by our government.

But that is really all I have to say. I thank you very much for giving me this time.

Mr. TIERNEY. Thank you, Mr. Duncan.

Mr. Lynch, you are recognized for 5 minutes.

Mr. LYNCH. Thank you, Mr. Chairman. And I want to thank you for holding this hearing.

Mr. Bowen, it's good to see you again.

Mr. Bowen, you and I have had a pretty long history over the Iraq reconstruction model. I have been to Iraq 12 times, working with you to try to tighten up the situation there. We started at a very low basis, and I think there were a lot of lessons learned.

What troubles me is that now, when I more often visit Afghanistan, I don't see that the lessons learned in Iraq are being used in Afghanistan. And it distresses me greatly.

I have been involved with the chairman on this Host Nation Trucking issue. I went down and tried to meet with a couple of the warlords down there on the Afghan-Pakistani border. They ended up shutting down the pass there at Spin Boldak and shut off the trucking because they didn't want me down in that area asking questions.

I just have come to question whether or not even the modest and painful gains that were achieved in Iraq are possible in Afghanistan. And I'm wondering, Mr. Bowen, because, you know, you're

the Inspector General for Iraq Reconstruction, you're the one who was the point person for us, can you point—now, I know you've helped the Inspector General—the SIGAR, right? Special Inspector General for Afghan Reconstruction?

Mr. BOWEN. Yes, sir, that's right.

Mr. LYNCH. I know you've helped them file some reports. The reports, at least the ones that I have seen and asked for, they are, well, very poor, I would say, in my estimation. Going into Afghanistan and asking for a progress report on where we were, just a status report, even if there is no progress to report, just tell us where we were—that information has been very poor, not very informative.

When I compare it to the information I get from you and your office in Iraq—and I know you have been helping them generate some reports, but, look, I have low confidence in the Special Inspector General for Afghan Reconstruction. It may be because of the environment there; it may not be his office. It may be it's just a different environment and my expectations are too high.

But I wonder if you could share, you know, just some of the lessons learned in Iraq and maybe some things going on in Afghanistan that you think could be done better.

Mr. BOWEN. First, Mr. Lynch, I think almost exactly 2 years ago, we had a colloquy in this room about subcontractors, and that was regarding the DynCorp contract. And you identified in our then-recently released audit, our first one on DynCorp, that a subcontractor who apparently didn't do much work but pocketed \$8 million, Cogen Corp and then Corporate Bank, you remember for the police training camp that never got completed? I point that out simply to say that this is a continuing and enduring problem, that is, ensuring that taxpayer interests are protected while mission goals are achieved. One doesn't trump the other.

Reform is still needed, and the reason for that shortfall then and the shortfalls that you saw in Afghanistan and the shortfalls that are experienced today in both countries is the lack of transparency, no required reporting, as we have heard today regarding subcontractors, the lack of effective accountability, and insufficient oversight presence in country. You went outside the wire. We have been outside the wire a lot in Iraq.

We have been together, you and I, sometimes when our inspectors have visited sites. Frequently we are the first Americans that they have seen in a long time. So the quality assurance programs being done outside the wire are not sufficient to protect those taxpayers' interests, notwithstanding the importance of the mission goals.

What lessons should be applied? Two are in my statement. One, the contingency Federal Acquisition Regulation that we have talked about before, recommended 4 years ago in our lessons learned report, I think these settings, as you point out, are uniquely difficult and uniquely susceptible, I believe to fraud, waste and abuse; and, therefore, specially focused contracting regulations should be used for all agencies to use in theater.

What I think most don't realize is that there are multiple versions of the FAR at work in both Iraq and Afghanistan because each agency can amend and apply the FAR as it sees fit to con-

tracting overseas. That creates problems for contractors; it creates problems for contract management, and causes waste, which is ultimately where the taxpayers' interests are shortchanged.

I think also that we have talked about the need for unity of effort in contingency operations and we don't have that in Afghanistan, and we haven't seen it sufficiently in Iraq. It shouldn't be dependent on personality; it ought to be driven by structure, and that structure ought to be something like the U.S. Office for Contingency Operations that would bring contracting, bring IT, bring personnel, bring planning, bring oversight, and bring execution under one roof. Right now all of those elements are diffused across the agencies in a disordered fashion; and the results, unfortunately, are occasionally revealed in oversight reporting.

Mr. LYNCH. Thank you, Mr. Chairman. I yield back the balance of my time.

Mr. TIERNEY. Let me continue on that line.

Mr. Solis, your testimony recalled a December 2009 trip to Afghanistan that you took, and you were told by members of the Defense Contract Management Agency that they required at least 47 more subject matter experts for contract oversight. And since government personnel were unavailable, they planned to staff those positions with contractors. How are we doing? Obviously, I think I know what your answer is going to be. I mean, is this wise strategy? You are going to hire out contractors to oversee contractors?

Mr. SOLIS. It is being done. I am not saying that is the way it should be done. I think it is through the lack of planning for the use of contractors. I think, again, you have to look at what your requirements are going to be. And if we are going to be doing more contracting and if we are going to require people who have to have technical backgrounds, particularly in the construction trades and the engineering trades, is this where we want to be? I think ultimately, this is what they may have had to do because they had no other choice.

Mr. TIERNEY. The choice has been since the late 1980's. As Mr. Bowen said, they have had this issue since the late 1980's. You have pointed it out to them over and over again. It seems to me to be total nonresponsiveness, or certainly very insufficient responsiveness.

Following along that line, you talked about the risk-based approach for contract officer representatives. They are going to assign contract officer representatives to oversee only those contracted services related to health and safety, such as food service and power generation, leaving other services with no contractor officer representative and only quarterly oversight. How smart is that?

Mr. SOLIS. Well, we haven't looked at it in detail, but my understanding is that they were categorizing high and medium risk, and it is not that they weren't going to have oversight, it is that they were going to have less oversight. They were not going to review those contracts as often. I think it was maybe once a quarter or longer periods of time. It does create risk. And certainly, just by looking at some of these contracts and things, I think you've got to continue to look at is this going to increase my risk. I think there has to be a continual review. You cannot just say I am not

going to do this ever again because I think you are going to set yourself up for problems.

Mr. TIERNEY. Ms. Ugone, they talked about the deployable cadre of experts. There was testimony to that regard. Do you have any information on how the Department of Defense is progressing with regard to identifying a so-called deployable cadre of contracting experts?

Ms. UGONE. As far as a deployable cadre of contracting experts, I don't have a macro view. I have a much more selected view, depending on the contract. For example, the INLE contract, the International Narcotics Law Enforcement contract we looked at, that was a billion dollars, running, equipping and training the Afghan National Police, we were told by the command that they stood up a contracting officer representative oversight structure just for that one contract.

But we do have concerns about contingency contracting in Afghanistan, particularly using our framework for reform.

The area that is problematic is getting the requirements right and translated into the contract correctly and then monitoring and paying. We have concerns about those same issues again in Afghanistan. And that's one of the things that we want to watch as the money flows in to equip and train the Afghan National Police and the security forces.

Mr. TIERNEY. Thank you. I think you have made that point quite well. Unfortunately, this cuts across a number of government agencies, and it cuts across a number of functions. And we look at it in the procurement aspect as well. Too little oversight, and too few people who are professionalized in managing the contracts, and all that pertains to that, so we had people in one case, we contracted out the people to oversee the contractor, only they were from the same company. That is how absurd it gets.

Ms. UGONE. Yes. I think the key is you are going to get it wrong at the end if you don't get it right at the beginning. If you don't translate those requirements correctly and you don't plan the acquisitions and you don't have a strategy for how you are going to spend the money, then you are going to have a problem definitely.

Mr. TIERNEY. I am beginning to think that we can't rely on the Department of Defense and maybe the State Department to do this any longer. It has been since the late 1980's. We are going to have to maybe put a SWAT team together and just get these things in place and just shove it on them. We will see about that.

I will yield to Mr. Flake.

Mr. FLAKE. Mr. Solis, obviously the contracting DOD does dwarf everything, any other agency of the U.S. Government does; but what best practices can we look at from some of the other agencies that could be done here? What are some of the others agencies doing, or is it applicable at all given the scale that we are dealing with here at DOD?

Mr. SOLIS. Congressman, my work has been focused on the DOD side, so I can't really answer your question in terms of best practices.

Obviously, I think the Department knows things that it has to do. Again, it just hasn't always translated into doing those best practices. Again, doing lessons learned, as Stuart mentioned, I

think translating that over from Iraq to Afghanistan, whether it is reconstruction or military operations on the use of contractors, so I think the Department is aware of the kinds of things that it needs to do in terms of those best practices. And so I think it is a matter of implementation at this point. And they do a lot of contracting. I can't really speak for State or AID as to what I would deem is best practices for DOD. But I think DOD is aware of the things that it needs to do, and I think it is a matter of implementation at this point.

Mr. FLAKE. Matter of implementation, so is it incumbent on us, we can rewrite the regs, but nothing has seemed to work to prompt them other than simply withholding funds, and then you get into policy issues that are bigger than all of this.

Mr. SOLIS. There is obviously a lot of guidance out there already. As I mentioned, I think there is another attempt in the current version of the NDA to try to raise this at a more strategic level in terms of planning for the overall use of contractors and operations and military missions. I think that is one of the first things that needs to be done.

I think holding folks accountable and feet to the fire in terms of implementing these regulations is probably the next step; but I think there is an awful lot of guidance.

The other thing I would mention, we talk about this in a contracting sense. I think the other entity within DOD that has to step up to the plate is Personnel and Readiness because I think it is a force structure issue.

Again, how we look at Iraq or Afghanistan, we have nearly a couple hundred thousand personnel, both contractors and military members, doing the mission. Is that where we want to be? Is that how we want to do these things? Are the kinds of things contractors doing today the kinds of things that we want to do for future operations? That is where I think it is not just the contracting side. I agree with everything that my colleagues have said about things like requirements and planning, but I also think it has to be a force structure issue. It has to look and see where we want to be with personnel, both contractors and military members.

Mr. FLAKE. Thank you, Mr. Chairman.

Mr. TIERNEY. Mr. Bowen, we talked at one point in time about the idea of having an Inspector General for Contingency Operations. What are your current thoughts on that and how would that improve our ability to oversee any progress or lack of progress from these various agencies in this area?

Mr. BOWEN. Having a standing Inspector General for Contingency Operations would simply ensure that the oversight was well prepared in advance of any operation beginning. In both Iraq and Afghanistan, adequate oversight was not created until well after those operations were underway. In Afghanistan's case, it was 7 years after it was underway. The dam had broken. The disaster was unfolding. It is difficult to make a significant difference as I think we were able to make in Iraq through lessons learned reporting that helped the course corrections get implemented.

Thus, I think it makes perfect sense and fits within the gist of this hearing of the need for greater accountability together with more transparency.

Mr. TIERNEY. Mr. Fontaine, can you compare for us the competencies involved when the military oversees its own personnel, versus how well they do in overseeing the conduct of contractors?

Mr. FONTAINE. This is an ongoing problem related to the laws, regulations, and internal command structures that the military has versus what the contractors have. The contractors, at the end of the day, are responsible to the terms of their contract. Nonfulfillment of the contract has certain penalties, but not the same penalties that military personnel have if they don't obey an order where they can be court-martialed.

So the discipline and the command and control procedures are much clearer and crisper on the military side rather than the contracting side. On the contracting side, there has been increasingly an attempt to write into the contracts themselves some of these. So, for example, contractors before were not subject to the Uniform Code of Military Justice; they are now subject to some provisions of the UCMJ. Contractors, in some cases before, were not subject to fragmentary orders and other orders given by commanders in the field. Now many contractors are subject to those.

So there has been a move in the right direction; but I think you fundamentally will have a disjunction between the way military personnel operate and contractors doing the same function simply because of who they are responsible to at the end of the day.

Mr. TIERNEY. I didn't see Mr. Welch was back, and I don't want to usurp his time.

Mr. Welch, I recognize you for 5 minutes.

Mr. WELCH. Thank you very much, Mr. Chairman. I thank the witnesses for the good work they are doing.

One of the contradictions, of course, is the more we spend on contracting, the more we undercut the chain of command in the military. I want to just ask your opinions on things because you are not the ones who make the decisions.

Mr. Solis, I understand it has been recently reported that there is a \$100 million contract to Blackwater, now known as Xe to provide security to CIA bases. As you know, Blackwater has an incredible history. The Nisour Square incident, they fatally shot 17 Iraqis. It looks very much like it was a hair-trigger kind of response.

In December 2007, Blackwater officials allegedly authorized a secret payment of \$1 million to Iraqi officials to buy their support for allowing the company to continue in business. The company is under continuing investigation with the Foreign Corrupt Practices Act. In 2009, Blackwater lost its State Department contract to provide diplomatic security for U.S. officials in Iraq because of the Nisour Square incident. And in April 2010, Federal prosecutors charged five former senior Blackwater officials with weapons violations and making false statements. Why in the world would we enter into any new contract with a company like that? Can you explain that to me?

Mr. SOLIS. I'm not sure I can answer the question, Congressman, in detail, but I think it is obvious that when the folks who were making the decision on that contract, they obviously have to look at past performance, how those folks have worked in the past. Obviously the things you have raised would raise concern, I would

imagine. But not being in the decision chain, I don't know exactly how that decision would have been made by the folks who are making it.

Mr. WELCH. Ms. Ugone.

Ms. UGONE. Well, there are a couple of things. Definitely as Bill said, past performance, and we did an audit a few years ago, and frankly, the population of past performance information, we are not doing a very good job of populating that. That actually would be quite helpful in having primes register that kind of information. They also have a section in the past performance information blocks for also providing information on subcontractors.

At the same time, there also should be a look at whether or not any of these subs are on the excluded parties list or have been suspended or debarred. There are numerous checks that the contracting officer can use.

Mr. WELCH. Let me just develop on this because obviously you can have a list where the history of the subcontracts is made available to the people who are going to be signing a contract. But obviously, in the case of Blackwater, it is well known what their record is. So that wasn't a mystery to the CIA. One of the dilemmas that we have, and maybe Mr. Bowen, I will ask you to comment on this, is that the urgent requirements of providing security in this case to our CIA officers in forward-operating bases, which obviously has to be a compelling concern for Mr. Panetta, outweigh considerations about criminal allegations, reckless use of violence by a company because they can, "more or less get the job done." So that internal contradiction means that we waive decency in some respects and go back to Blackwater, despite their sorry record. Do you have any comment on that?

Mr. BOWEN. I think it is almost a rhetorical question. We can't waive our core principles of stewardship of the taxpayer dollars. Mission accomplishment has to be balanced with the core principles of oversight and execution in country. Mission accomplishment does not trump those principles.

I think, though, regarding the subcontracting issue, we have talked about it today, so much of it is discretionary. What kind of information can you as an oversight body get access to to find out what is going on below that surface so that you and, frankly, departments can make better judgments? That calls for some, I think, amendment of the Federal Acquisition Regulation that will give you data, information, about subcontractors so that from here, from this dais, you can make judgments about how the primes are doing.

Mr. WELCH. I commend you for the good work you have been doing over the years.

Mr. Chairman, I yield back.

Mr. TIERNEY. Mr. Lynch, any further questions?

Mr. LYNCH. Mr. Chairman, thank you.

Mr. Fontaine, right now it seems since the beginning of the war in Iraq and up to the present, there has been a trend to subcontract out, to contract out core government services. The argument initially made by the Bush administration was that this would allow us to save some money here. There were efficiencies gained here. But after all of our experience, I just don't see that. Is there cause to revisit that assumption that contracting out,

while it does allow us to tap into some expertise that is not available or wasn't available at the time, is there cause here for us to review that decision to contract out government services rather than to build internally our government capacity to actually do this with government employees?

Mr. FONTAINE. Yes, I think I would divide that into two separate points. First is on the cost and providing comprehensive cost comparisons between contractors and government personnel carrying out the same function. I think our GAO colleague may be able to say more on this, but it has proven to be exceedingly difficult for a variety of reasons. One of the last GAO reports required data from the Department of Defense in order to make this comparison, and the Department of Defense was unable to provide the data.

But there seems to be a difference in cost as you move up the skills chain. So if you are going to hire locals or third-party nationals to do things like construction or laundry or mail service, then you are much more likely to save money than to do things at the top of the skills chain, private security, more engineering functions, where if you hire Americans, you may be paying on a per-day basis more than you would pay to an American official to do the same things. The benefits seem to be less on the cost side often and more on the quick deployability of such contractors into a war zone.

On the inherently governmental side, there is certainly reason to try to revisit this whole issue. Our recommendation has been to try to move away from trying to divide every single activity into inherently governmental and then against the law to ever contract out, or not inherently governmental, which doesn't mean that it is a good idea to contract out, it just means it is not against the law, and instead move to something you were suggesting which is to try to determine the universe of activity which it is a good idea for the U.S. Government to have an in-house capacity to carry out rather than to contract out and then move toward that.

And then only in extremes, if we need to contract it out, we may be allowed the flexibility to do that as a surge capacity, but that should not be the run-of-the-mill way we do our operations.

Mr. LYNCH. In our recent experience, we have found that our Federal pension rules, we have some very, very highly skilled, experienced personnel who we could really use in Afghanistan and Iraq. The problem is that if we brought them back in as government employees, and this goes for Treasury, DOD, the whole nine yards, they would have to—well, they would basically violate their pension rules and they would be penalized for coming back. Recently in the subcommittee that I chair on Federal employees, we have actually entertained creating some flexibility there to allow folks to come back for a year, to come back into government employment without violating their pension rules and without being penalized to come back onto the payroll and provide that service for a year or 18 months and then go back into retirement. Is that the type of flexibility that might help us in some of those upper tranche responsibilities that you refer to?

Mr. FONTAINE. Yes, the double dipping problem you refer to is a real issue. I think that definitely makes sense in the upper tranche, but I would also say that it makes sense on the contract officer, contract management level. A number of people have point-

ed out correctly that we do not have enough contract officers in the U.S. Government to oversee these contracts. That has led to fraud, waste and abuse problems and all sorts of other problems. You cannot mint a qualified government contracting officer in 5 days, maybe not even in a year.

And you also often can't just pluck one who has never done government contracting from the private sector. What you may be able to do is get folks who were contract officers in the government before, but who have left the government and have pensions, don't have an incentive to come back in because they would have to give that up, be able to come back in for a year or 2 years or something like that to serve their country and put their expertise to use. I think that makes perfect sense.

Mr. LYNCH. I yield back the balance of my time.

Mr. TIERNEY. Thank you.

Mr. Solis, you talk in your report about contracting reform and the Department of Defense being hampered by the Department's inability to institutionalize operational contract support by accepting contractors as an integral part of the total force. Part of my reaction to that was if you are going to do that, you might as well make them part of the total force. Assuming that what I think is common sense doesn't prevail, what are the major obstacles that you think are preventing the Department of Defense from actually doing that, from accepting contractors as an integral part of their force?

Mr. SOLIS. Again, I think that was reiterated going back to what the Department said in its 2006 QDR. And I think it has always been out there, just to reframe in terms of what the reliance on contractors would be. They have said that their total force includes military members, DA civilians and contractors.

I think in terms of trying to get to that point about institutionalization, and again, I keep hammering this thing about planning, planning, planning, and I think it is something that while they do a lot of on the military side, military force structure piece, it is left out in gaps for the contractor side. I think the Army, for example, does a total Army analysis. There was talk before I came to this hearing about the fact that there is a piece in there about doing something for contractors. To my knowledge, that has never been done. I think what has to happen is you have to look at what you are going to need for your military force structure; and if I have gaps, then you have to make a policy decision, do I want to fill that with military members? Do I want to fill that with civilians, or do I want to fill that with contractors?

If I want to fill it with any of those, particularly contractors, then what are the risks involved with those? What are the requirements? What am I going to need to absorb that contractor force into that force structure.

I think again, it has to be something that the military makes as a stop priority. I know that the Secretary has talked about this and Admiral Mullen has talked about this, but I think the time is now, and we have to do it at the highest level.

Mr. TIERNEY. We have heard the talk as well. Do you know of any effort that has gone from talk to action?

Mr. SOLIS. Again, it has been ad hoc. I think there have been efforts, as I mentioned the joint staff study was to look at reliance on contractors in Iraq. I think there are efforts to put planners out at the different combatant commands to help them prepare and do the Nnnex W's. But again, it has been slow. So I think there needs to be a more forceful effort at the highest levels to implement and do the things that are already on the books. There is a lot of guidance. There is work force planning guidance out there that includes not only just contractors but again military, the whole force structure of what you need to conduct your military operations.

Mr. TIERNEY. The slowness of activity borders on insubordination, almost. The failure to respond and actually do some of these things, it is frustrating from the policy aspect. I think the legislation is pretty much in place. I think the regulation is pretty much in place, it is just the actual execution that we keep waiting on and waiting on and waiting on. We have to think of some strategy from our end and from the White House's end, frankly, to get this thing in gear.

I want to just wrap things up if nobody else has any questions. We didn't talk a lot about background screening, badging and tracking of local personnel, which did come up during our last hearing on a trucking situation. It was an important factor. In fact, the witnesses came up afterwards to reiterate how important it was for them to be able to identify the subcontractors out there. In Iraq, Mr. Bowen, we seem to do it one way sort of theater-wide; and in Afghanistan, it appears they are doing it on an ad hoc installation-type basis, making sure there is some aspect on that.

If there is a Department of Defense wide screening policy that is absent on that, do we know whether or not your agency, Mr. Solis, or Ms. Ugone, have you done any work in this area or made any recommendations?

Ms. UGONE. Actually, we do have some ongoing work right now on the issue of contractors occupying sensitive positions who don't have proof of clearances.

There is existing regulation in the Department that needs to be complied with, and the issue is a compliance issue. That report that we are working on right now, we are expecting it to go final in the next month or two. But we have issues in that regard as well.

Mr. TIERNEY. The Department of Defense, are they moving forward on this as well?

Ms. UGONE. It depends on their response to our report. We haven't received it yet as to where—we are predicting they will agree with us, that there is an issue and we need to solve it.

Mr. TIERNEY. We are going to track that. We are going to ask the staff to make sure that we followup on that and move it on.

One obstacle cited in the GAO report on department-wide screening policy was a disagreement apparently between the Under Secretary of Defense for Intelligence and the Under Secretary for Acquisition, Technology and Logistics over the level of detail required in screening local personnel. It seems sort of fantastic that would bring things to a grinding halt and they wouldn't find some way to resolve that. Mr. Solis, have they resolved that particular dispute or found someone that can referee it?

Mr. SOLIS. My understanding is that has been turned over to AT&L to resolve this issue in terms of trying to figure out what the background screening requirements are going to be.

Mr. TIERNEY. You believe that will happen, that is the right place to boot it to and get it resolved?

Mr. SOLIS. Our recommendation was that there be somebody, a sort of referee, between USDI and AT&L because I don't know that it clearly falls in either spot. But there needed to be some way of coming up with a plan that would incorporate what USDI would be looking for, as well as AT&L. But my understanding is that it has been turned over to AT&L, and that is about as far as what I know at this point and they have not responded in terms of the specific things that they are going to do. We will continue to follow-up on that. Obviously, it is a very important issue in terms of background screening, and that is something we will look into.

Mr. TIERNEY. Ms. Ugone, you mentioned that your report didn't really get into an examination of subcontractors on that. Do you think most of your recommendations with respect to contractors would also apply to subcontractors?

Ms. UGONE. Yes. The process itself is absolutely critical, particularly when it comes to the requirements of translating it into a statement of work and the actual contract administration. Those two areas we think are absolutely critical. If you don't get it right in the beginning, you are going to have problems at the end. And also, contract administration has the payment function in it. That is a recurring problem in the contract administration, not having the invoices and receipts of goods and services reconciled is a key issue.

Mr. TIERNEY. Thank you. I suspect we could go on for quite a bit of time because your written testimony, together with your oral testimony was very provocative and very in depth and informing. I'm going to stop at this point, but I'm going to give you each an opportunity to mention if there is one thing that we didn't cover thoroughly enough or didn't mention at all.

Mr. Solis.

Mr. SOLIS. I think we have covered a lot, and I appreciate the fact that the subcommittee has had this hearing. I think there are a lot of things that have gone on with operational contract support that need to be looked into. Obviously, we have talked about a lot of things that they haven't done. I think there are opportunities for the Department to move out and grasp these things. And I think again, as Mr. Flake mentioned, asked about best practices, I think they are aware of what they need to do. It is a matter of execution at this point.

So I would just offer again, the only other thing, I think there needs to be more planning for the use of contractors in contingencies. I think by doing that, that will eliminate, or mitigate a number of the issues to include things like the Host the Nation Trucking contract problems.

Mr. TIERNEY. Thank you. Ms. Ugone.

Ms. UGONE. I think as money flows into equipping and training the Afghan National Security Forces, the Department needs to apply the lessons learned from prior contingency contracting prac-

tices, particularly paying attention to planning for the acquisition up front as billions of dollars are flowed in to do the mission.

Mr. TIERNEY. Thank you. Mr. Bowen.

Mr. BOWEN. Mr. Chairman, you were exploring the causes of these problems and when did they begin. And we were talking about LOGCAP. I was thinking, contemporaneous with the expansion of LOGCAP in the late 1980's or early 1990's was the decision, perhaps as part of a cold war dividend, to drastically reduce the contracting corps. So just as outsourcing was expanding, the capacity to oversee and contract manage that outsourcing was contracting; and the consequences therefrom, I think, are with us today.

Mr. TIERNEY. Mr. Fontaine.

Mr. FONTAINE. Just one final point, and it gets to training. If contractors are going to be part of the total force which the 2010 QDR says that they are, then those military individuals or civilians who go over to theaters who don't do contract management will need to know something about contractors, what they do, how to find out what they do, what the regulations are, whether they can order them to do something or not.

Currently, if you go out to one of the training places before the predeployment training, they are actually run by contractors, but there is almost no one playing contractors. And then when these guys get over to Afghanistan or Iraq, they will actually find more of them than they will find of the military. The same is true of war gaming. The role of contractors is rarely incorporated.

In the 2008 National Defense Authorization Act, there was a requirement that DOD issue a joint directive to bring together war gaming and predeployment training, the role of contractors and integrate that, and they have not issued that document yet, even though it was required in 2008. And I think moving down that path would be a real step forward.

Mr. TIERNEY. Thank you.

So my final panel question, would each of you tell me what you think is the place or person at the Department of Defense, the State Department, and USAID where this committee should go to inquire on progress in the area of contracting and put pressure on them and make sure that results occur?

Mr. SOLIS. Again, I will say for DOD, because I am not as familiar with State Department or AID, it is combined between Dr. Carter and the Under Secretary for Personnel and Readiness. I think it falls between those two because as I mentioned, it is not only a contracting and contract issue, it is a force structure and personnel issue.

Mr. TIERNEY. Thank you. Ms. Ugone.

Ms. UGONE. Yes, two offices, NATO training mission, combined security transition command Afghanistan; and the Under Secretary of Defense Comptroller.

Mr. TIERNEY. Thank you. Mr. Bowen.

Mr. BOWEN. The only one I would add is Pat Kennedy, the Under Secretary for Management at the State Department.

Mr. TIERNEY. Thank you. Mr. Fontaine.

Mr. FONTAINE. Since we are adding people as we go along the table here, at AID it is actually somewhat split. But I think that there are two areas both at AID, the bureau that handles conflict

and humanitarian reconstruction would be the place to go. If you don't go above that, to say is there one locus at USAID that handles these sorts of issues; and if not, why isn't there?

Mr. TIERNEY. Well, thank you all very much once again for both your written testimony and oral testimony here today. I think we have benefited greatly from it. Thank you for your service.

We are adjourned.

[Whereupon, at 12:22 p.m., the subcommittee was adjourned.]

