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Contractors on the Battlefield: Resolving the Remaining Policy Issues

by

Richard L. Dunn

 **CENTER FOR PUBLIC POLICY
AND PRIVATE ENTERPRISE**
SCHOOL OF PUBLIC POLICY

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EXECUTIVE SUMMARY

Despite progress in policy development, the United States military is not ready to hit the ground running and effectively provide needed contract support in a new, contingency operation – in an environment anywhere nearly as complex and challenging as it was in Iraq in 2003.

Civilian contractors supporting contingency operations have virtually become a third component, along with the active force and reserve forces, of the U.S. military. In-theater contractor support constitutes both an enhancement of capabilities and a potential constraint on operations. Efforts of contractors supporting contingency operations need to be closely integrated with and responsive to the military command structure. This imperative, in turn, indicates some traditional contract and contract management concepts may be inadequate under conditions likely to be encountered in future contingency operations. Planning, training, concepts of operations, and ways of doing business also need to reflect the likely future environment.

This research looks at policy issues from a three-tiered perspective, namely, (1) top-level policy, primarily exemplified by DOD and Joint policy documents, (2) the “real world” implementation of policy, primarily as reported in Iraq and Afghanistan, and, (3) the institutionalization of policies, as exemplified by the doctrine, personnel, training, logistics and other practices relating to contract support for combat operations by the military services.

Top-level policy has been very slow to develop, considering that the Army initiated the LOGCAP (Logistics Civil Augmentation Program) concept in the mid-1980’s and that the 1990’s saw a series of contingency deployments where contractor support was at a much higher level than in previous operations (e.g., Bosnia 1:1 ratio of contractor personnel to military, and in Afghanistan it is now much higher still). As of early 2010, policy documents of the Department of Defense and the Joint Staff finally provide relatively comprehensive coverage of issues involved in contractor support of contingency operations. The military services have similar policy documents. The top-level policy regime, while relatively comprehensive, is not without some ambiguity and reflects a strong sense of business-as-usual thinking regarding contracting and contract management.

For half a dozen or more years there has been an exceptionally strong contractor presence supporting combat and reconstruction missions in Iraq and Afghanistan. During that time there has been a large amount of criticism – much fair but some unfair – about how contracting has been conducted. Contractors have delivered support vital to theater missions and have suffered casualties in the process. One of the prime criticisms of contract support has been that it is more expensive than equivalent military support. Recent studies and data have shown the opposite, however. Over the years a *modus vivendi* has been established that generally satisfies the needs of the operational

commanders and that has also responded to calls for more auditable and accountable contract management.

In what might be called the institutional or stateside military, and the working level of the DOD staff, the environment is less sanguine. In the military a tension between stateside and theater logistics exists in law and fact. In both the military and DOD staff a strong inclination to believe business-as-usual is good enough for the current combat and contingency environment appears to exist. Top-level policy and even legislative initiatives have done little to shake this perception. In the Army, for example, contracting is dominated by a civilian workforce. Civilians may not be involuntarily assigned to a combat theater. Even those that volunteer generally serve relatively short tours of duty and are overburdened by the workload when in theater. The Army's move toward a more balanced contracting work force (though its recent creation of the Army Contracting Command with a major element of "expeditionary contracting"), and implementation of incentives for civilians to serve in the combat zone, have been long delayed and generally inadequate. Training has been improved but it is doubtful that it actually meets current needs. The institutional military has failed to create a true standby contracting capability to provide the support likely to be needed by the theater commander at the start of the next contingency in Africa, South America, or some other location.

Findings made in the course of this research lead to various recommendations. Two of these stand out as particularly important. First, *standby joint contracting resources* should be created with personnel identified and trained to go to specific theaters with the *authority* to effectively augment the theater commander's contracting capability as soon as needed. Second, a *new set of contracting rules* need to be developed for combat and contingency support contracting. The guiding purpose behind these new rules should be to *facilitate and simplify* rather than regulate and complicate the contracting process.

I. INTRODUCTION AND BACKGROUND

A. General background

From the camp followers of ancient and medieval times to George Washington's civilian wagon drivers, to sutlers in America's western frontier forts, to base support contractors in Viet Nam the presence of civilians, including civilian contractors, accompanying the military and supporting combat operations is hardly a new phenomenon. Despite this the combination of an increasing tempo of contingency operations beginning in the 1990's and growing numbers of contractors engaged in a wide variety of military support functions in those contingencies found the United States military lacking in adequate policies, training, doctrine and operational concepts to fully integrate and properly manage contracted support.

Contractors supporting overseas contingencies raise issues that vary considerably or are not encountered at all with respect to contractors supporting operations on a base in the United States. Domestic law applies differently to contractor personnel overseas. There are implications stemming from the international law of armed conflict, other international law, as well as domestic laws of the host nation and treaty obligations between the United States and host nation and possibly coalition partners.

The functions performed by contractor personnel are widely varied. Some are not replicated in domestic base operations and in other cases the dangerous and stressful environment of a combat zone makes the functions much more critical. Contractors support sophisticated weapons systems, and provide skills lacking in the military such as interpreter or sociological assessment. Even routine functions such as transportation, security guard, food service and janitorial service may be conducted in potentially hazardous conditions. Moreover, the government contracting and contract management function is not centralized in a single base procurement office but may be performed in-theater, stateside, in another country and by a variety of different commands.

The heavy reliance of the United States military on private contractors in contingency operations has raised numerous questions. Among these are whether it is a good idea to rely on contractors to the extent currently being done in Iraq and Afghanistan. Assuming, whatever the exact level may be, that there will be significant contractor involvement in future contingency operations, do we have in place an adequate regime of policy, organization and management practices to do a responsible job and provide critically needed support? This question is the focus of the current paper.

The Government Accountability Office (GAO) has been reporting on weaknesses of Department of Defense (DOD) policies and planning regarding contingency contractors for years, exemplified by a notable report in 2003.¹ In the same year the Army's revised

¹ Contractors Provide Vital Services but Are Not Adequately Addressed in DOD Plans, GAO-03-695 (June 24, 2003).

field manual stated “commanders, staffs and soldiers must be more familiar with how to plan for and use contractors effectively.”² About the same time the lack of unity of command inherent in the separation of contract lines of authority from the regular chain of command was identified as a potential problem and suggestions made on how it could be at least partially ameliorated.³ As a result of a visit to Iraq in 2004 the Director of Defense Procurement noted that the forward deployment of contractors requires exceptional contracting practices and decisions.⁴ A noted scholar of government contracting observed that auditing to federal regulatory standards was simply not possible under the conditions encountered in the early days of contracting in Iraq.⁵

The comments referenced in the preceding paragraph come nearly two decades after the Army initiated a major program to provide worldwide logistic support for contingency operations.⁶ By the early 1990’s the Army began to utilize its LOGCAP capability to support deployed operations. Similar concepts were implemented in the Navy and Air Force.⁷ Operations in Bosnia and Kosovo as well as other operations in the 1990’s illustrated that the numbers of supporting contractor personnel might equal or exceed the number of uniformed military personnel in contingency operations. Thus the need for comprehensive and robust policies, adequate training, and responsive contracting organizations and techniques was not new in 2003 but was merely highlighted in what should have been unmistakable fashion.

B. Previous research

The slow pace of policy development concerning contractors deploying to support contingency operations is particularly remarkable given that in the 1990’s and early 2000’s research exploring many key issues was being conducted and articles written by practitioners, professional military education students, academics, and the GAO was also making its findings known.⁸ In 2005 one Army War College research report said explicitly what other research had suggested in more guarded fashion: “Realistically the

² Contractors on the Battlefield, FM 3-100.21 (Jan 3, 2003).

³ Douglas, Contractors Accompanying the Force: Empower the Commander with Emergency Change Order Authority, 55 *A.F.L.R.* 127 (2004).

⁴ Deidre Lee Describes Exigencies of Forward-Deployed Contracting in Iraq, *The Government Contractor*, Para. 60 (February 2, 2005).

⁵ Remarks of Prof. Steven Schooner (George Washington Univ. conference on Contractors on the Battlefield, Jan. 28, 2005).

⁶ Logistics Civil Augmentation Program (LOGCAP), Army Regulation (AR) 700-137 (Dec. 16, 1985).

⁷ Higgins, Civilian Augmentation of Joint Programs, *Army Logistician* (Jan-Feb 2003).

⁸ Examples include: Gibson, Lack of Extraterritorial Jurisdiction over Civilians: A New Look at an Old Problem, 148 *Mil. L. Rev.* 114 (1995); Stafford and Jondrow, A Survey of Outsourcing and Privatization Initiatives, Center for Naval Analyses (Dec. 1996); Fortner and Jaeckle, Institutionalizing Contractors on the Battlefield, *Army Logistician* (Nov-Dec 1998); Zamperelli, Contractors on the Battlefield: What Have we Signed Up For?, Air War College Report 18-23 (AU/AWC/254/1999-04, March 1999); GAO, Contingency Operations: Army Should Do More to Keep Costs Down in the Balkans, GAO/NSAID-00-225 (Sept 2000); McCullough and Pafford, Contractors on the Battlefield: Emerging Issues for Contractor Support in Combat and Contingency Operations, *Briefing Papers* No. 02-7, West Publishing (June 2002); Hammondtree, Contractors on the Battlefield, *Armed Forces Journal* (June 2002).

Army is now composed of three components...the Active Force, the Reserve Force component, and the civilian contingency contractors.”⁹ The same report pointed out that contractors could enhance capabilities but could also constitute a restraint on operations. The efficient and effective utilization of contractors requires changes in the way contractors are managed. Despite this and the importance of service contracts in general or operational support contracts in particular, the most recent Quadrennial Defense Review barely mentions service contracting and the few references are descriptive rather than strategic in nature.

The public began to become awake to the prevalence of contract support in Iraq and Afghanistan through media reports, popular publications and grandstanding by certain politicians. Popular attention to support contractors typically focused on private military companies (often contractors of the Department of State rather than DOD components), contractors engaged in violent incidents, allegations of outlandish contractor salaries, and “fraud, waste and abuse” generally. The visibility of what were sometimes bogus or distorted accounts related to deployed contractors probably impacted public opinion. DOD policy makers, however should not have been unduly swayed, they had available to them a wealth of research reports and practitioner articles as an information resource in addition to current reports from commanders and staff close to the action.

Contemporaneously with the growth and visibility of the importance of contractors supporting contingency operations another more generic phenomenon was in progress. That was the growth in importance of support service contracts *vis-à-vis* hardware development and production contracts within DOD. Data on that important development was also available to DOD policy makers by the early 2000’s. Robert Lieberman, DOD Assistant Inspector General, testified before a Congressional Committee in 2000 that between FY 1992 and FY 1999 DOD procurement of services had grown from \$40 billion to \$52 Billion.¹⁰ By 2001 services accounted for about sixty per cent of DOD procurement.¹¹ Support service contracting of which battlefield or contingency contracting is in significant measure a specialized variety, or subset, presents challenges with respect to planning, solicitation, evaluation and administration of contracts which may be quite different and more difficult than those associated with hardware procurement.¹² Techniques and training suitable for hardware procurements may not properly equip an organization or individual to manage service contracts. If true for service contracts in general this is even more emphatically true for contingency contracting.

⁹ Lipsit, Operationalizing Contingency Contracting: Considerations for Effective and Efficient Management of Contingency Contractors During Deployments, USAWC Strategy Research Project, 1 (Mar 18, 2005). The Defense Quadrennial Review of 2006 included contractors in the “Total Force.”

¹⁰ Lieberman testimony, U.S. House of Representatives, Subcommittee on Government Management, Information and Technology (Mar 16, 2000).

¹¹ Rush, Performance Based Service Acquisition, Presentation at 2003 DAU Business Managers Conference (Mar 2003) [stating “well over 50%”]; Bruner, Military Forces: What is the Appropriate Size?, Congressional Research Service Report (May 28, 2004) [“60% of total”].

¹² Schooner (note 5).

This author's initial research study on contractors operating in proximity to combat included a relatively comprehensive general review of the subject, identified a number of challenges and made recommendations.¹³ One of the challenges identified was training. Deficiencies in training are multi-faceted but one of the observations made was "expertise in our highly-regulated procurement system does not necessarily contribute to the ability to rapidly acquire needed goods and services in remote or under-developed regions of the world."¹⁴ Another issue was Joint Command contracting capability, where it was asserted that the combat commander's command and control of contractors must be strengthened through the alignment of contract authority and command authority. Specific recommendations were made in each area. Among these (1) was a recommendation for legislation (in addition to needed general procurement reform) to simplify contracting in contingency operations, (2) augmentation of the combatant commander's contracting authority and staff, and, (3) development of an understanding by contracting and oversight personnel that the exigencies of contingency contracting preclude applying "business as usual" approaches to environments incompatible with such approaches.

C. International and domestic law

The international law of armed conflict, primarily provisions of Hague and Geneva Conventions, govern the legality of acts of military personnel and persons accompanying military forces and their eligibility for prisoner of war status if captured.¹⁵ These treaties are undertakings of states which are parties to them and generally apply to international conflicts between nation states. They do apply in part to insurgencies, however, and along with other treaties and protocols referred to as international humanitarian law apply as norms of conduct even if not formal treaty obligations. The United States military generally applies the law of armed conflict even in situations where its enemy does not. Thus, policy governing contractor personnel in combat situations, including insurgencies, will be governed by the international law of war and humanitarian law as well as U.S. domestic law. Moreover, in specific situations host nation laws and bi-lateral treaty obligations will impact how contractors can be utilized.

A primary focus of the international humanitarian law community in recent years has been the establishment of norms of behavior for private military companies and armed contractors. Another issue that has garnered attention is the "torture" of prisoners or other detainees. A variety of other issues such as human trafficking have also come in for attention. The position of the International Committee of the Red Cross (ICRC) is that compliance with the law of armed conflict is a state responsibility and not a corporate one.¹⁶ Moreover, the employing company is not the "responsible command," which personnel engaged in armed conflict are required to be under. Thus the theater

¹³ Dunn, *Contractors on the 21st Century Battlefield*, Proceedings of the 2nd Annual Acquisition Research Symposium p. 449, Naval Postgraduate School (May 2005).

¹⁴ *Ibid.*, 483.

¹⁵ Hague Convention of 1907, IV: Convention Respecting the Law and Customs of War on Land (18 Oct 1907); Geneva Convention of 1949, III: Relative to the Treatment of Prisoners of War (12 Aug 1949).

¹⁶ Remarks of Andres Kruesi, ICRC (GWU conference, note 5).

commander would likely be viewed as the “responsible command” potentially liable for the illegal actions of deployed contractor personnel operating in his theater. In the United States this international law principle has been applied to a commander even though the commander did not exercise actual control of personnel engaged in illegal acts.¹⁷ The doctrine of command responsibility is alive in U.S. law but some suggest it has not been applied where it should have been in Iraq.¹⁸

Domestic law applies to deploying contractors in a variety of ways. The arming of contractor personnel provides an example of various domestic laws and regulations that may impinge on the performance of a contract. A contractor may be *authorized* by the theater commander to arm its personnel, and *required* by the contract to arm its personnel, but still be subject to Department of State *licensing* before it can send weapons overseas. The legal authorities to authorize, require and license are all different.

A decade ago it was uncertain whether there was any effective means of subjecting contractor personnel to United States criminal jurisdiction for crimes committed overseas. There are now at least three jurisdictional regimes whereby contractor personnel may be subjected to U.S. criminal laws.¹⁹ The problem now is sorting out which regime should be applied, and who is in charge of the prosecution.²⁰ The fact that the U.S. decides to prosecute a contractor does not in itself provide the contractor any protection from being prosecuted by the host nation for the same acts. This certainly constitutes change but whether it should be considered progress might be questioned.

The slow pace of DOD policy development and the inadequacy of some of its management and policy responses to issues related to deployed contractors has resulted in DOD receiving “help” from Congress. This usually takes the form of provisions in the annual National Defense Authorization Act (NDAA). According to the count of the Assistant Deputy Under Secretary of Defense (Program Support), in the last several years NDAA sections related to “operational support” have varied from a low of three sections (NDAA FY 2007) to as many as twenty sections (NDAA FY 2009).²¹ Provisions have

¹⁷ Application of Yamashita, 327 U.S. 1 (1946) [Japanese theater commander in the Philippines sentenced to death for serious crimes committed by troops under his command even though they were not under his effective control or acting according to orders].

¹⁸ Contrast Smidt, Yamashita, Medina and Beyond: Command Responsibility in Contemporary Military Operations, 164 *Mil. L. R.* 155 (2000) and Smith, A Few Good Scapegoats: The Abu Ghraib Courts-Martial and the Failure of the Military Justice System, 27 *Whittier L. R.* Vol. 3 (2006). Abu Ghraib involved misconduct by both military and contractor personnel. A brigadier general was reprimanded as a result of the Abu Ghraib incidents. Her subsequent relief from command, demotion and retirement were not officially linked to the misconduct there.

¹⁹ These are the Military Extraterritorial Jurisdiction Act, 18 U.S. Code chapter 211; the Uniform Code of Military Justice, 10 U.S. Code chapter 47; and, Special Territorial Jurisdiction of the United States, 18 U.S. Code section 7; MEJA was enacted in 2000 and subsequently amended. An amendment expanded UCMJ jurisdiction to contractors in contingency operations.

²⁰ Involved in the decision as to which regime applies are the Department of Justice, the U.S. Attorney for the district in which the accused resided before going overseas, and the military.

²¹ ADUSD (Program Support), Operational Contract Support Concept of Operations, Ref-1 (20 Oct 2009); the appendices of this document contain an impressive reference list of laws, policy documents, leadership statements and reports concerning operational contracting.

ranged from minor technical matters, creation of statutory definitions of relevant terms, to the creation of a commission on wartime contracting.

II. CONTRACT SUPPORT POLICY

A. The policy evolution of contract support for deployed operations

As of 1990 a single instruction was the only policy document DOD had issued that addressed, in any detail, the issue of contractors in contingency or crisis situations. The title of the document “Continuation of Essential DOD Contractor Services During Crisis” well illustrated its primary policy concern.²² The instruction announced that it was DOD policy to utilize the most effective mix of the Total Force including “contract resources necessary to fulfill assigned peacetime and wartime missions.” Contractors were expected to perform, according to the terms of their contracts, “during periods of crisis, until appropriately released or evacuated by military authority.” The main thrust of the instruction was to tell commanders to “prepare a contingency plan for obtaining essential services from alternate sources (military, DOD civilian, host-nation, other contractors)” when there was doubt an incumbent contractor would continue essential services during crisis situations.

The instruction required an annual review of contracts that provided essential services. A risk analysis and contingency planning was specified for such contracts. Although DODI 3020.37 recognized that contractors would support wartime missions, the language about release or evacuation did not suggest that contractors would be routinely required to maintain a persistent presence in combat situations.

The idea that contractors might fail to provide essential support at moments of crisis was not new. As early as 1818 Secretary of War John C. Calhoun warned Congress that “it is often in the interest of the contractor to fail at the most critical juncture...”²³ However, by the early 1990’s times had changed. The Army’s new LOGCAP contract and other contracts were being used to place support contractors in situations that were known to involve physical risks to personnel and where the contractor was expected to remain and provide services despite the risks.

Military deployments supported by contractors included Bosnia, Haiti, Somalia, Desert Shield/Storm, Panama and Grenada. In Desert Storm the J-STARS surveillance aircraft, then undergoing full-scale development was pressed into service. Contractor personnel were aboard the aircraft as it flew combat missions. Civilian contractors were aboard ship and involved in logistics at Dhahran shipping terminal, as Scud missiles fell nearby. Civilian contractors provided both weapons system support and logistic support in these operations. In some cases the contractor presence was modest, but in other cases thousands of contractors supported military personnel that numbered little more than the total of contractor personnel.

²² DODI 3020.37 (6 Nov. 1990).

²³ Dunn (note 13), 20; quoting Nagle, *A History of Government Contracting*, George Washington University Press (1992), 109.

During the early 1990's it was becoming evident that reliance on contractors was increasing and that the risks involved in such reliance might be merely one of a number of risks that needed to be considered in planning an operation. A research study on contract support in the Balkans (the Balkans Support Contract, BSC, preceded by LOGCAP) made exactly that point.

First, not all the risks in the BSC are inherently contractual. The discussion of hypothetical BSC failures and the contract's track record suggest that relatively few risks arise directly – or only – from the decision to contract. Rather most are inherent in particular activities or the operating environment. Indeed a contract may provide an effective vehicle for addressing risk through its structure, including its management and oversight mechanisms.

Second, a contract is only as good as its customer. The customer – and those acting on the customer's behalf – must possess the ability to plan, coordinate, and manage the contract. To the extent that performance-based contracts, particularly those involving wide-ranging participation, require special skills, DOD contracting and functional personnel and Army and other end users might require additional training.

Third, risk management is not risk elimination. A commander obviously wants to anticipate hazards and reduce or avoid risks associated with them whenever it is practical, but, to achieve the Army's primary objective in the theater, it may be necessary to accept some risk. It may be necessary to balance risks across competing objectives. This logic applies to the use of contractors as it does to any other aspect of operational command.²⁴

The language quoted above suggests the policy thrust of DODI 3020.37 was of dubious utility because of its narrow focus. Being specific to contractors it might even discourage a more broadly-based risk analysis that was more likely to be a useful planning tool. The report's mention of a need for a good customer and the suggestion that DOD contracting and functional personnel *might* need additional training was both salutary and an understatement.

In January 1996 DODI 3020.37 was revised in a very interesting way. Two pages of "Guidelines for Theater Admission Procedures" were added as Enclosure 3 to the instruction. The enclosure listed fourteen issues related to the "issuing and implementing theater admission requirements...for civilian contractors" by the Chairman of the Joint Chiefs of Staff, Combatant and Supporting Commanders, and other DOD Components. Issues included such matters as training civilians in their responsibilities "(e.g., standards of conduct, as well as coping skills if they become Prisoners of War)"; issuing to, and training, civilian contractors with the same protective gear issued to military personnel; immunizing civilians; providing civilians with the same cultural awareness training given to military; issuing Geneva Convention cards; medical care; procedures in case of death; and, legal assistance.

Enclosure 3 obviously addressed issues that were far afield from merely doing contingency planning to address a potential lapse in essential contractor services. The issues listed appeared to be an attempt to establish a broad policy for processing civilian

²⁴ Greenfield and Camm, Risk Management and Performance in the Balkan Support Contract, Rand Arroyo Center, xx (2005).

contractors into a theater. However, the enclosure was mentioned only once in the text of the revised instruction. That was under responsibilities of the Chairman, Joint Chiefs of Staff. It stated “Establish procedures for the Combatant Commanders to declare theater and/or scenario-specific civilian contractor support requirements including equipment that is in addition to standard support requirements described in Enclosure 3.”²⁵

This provision seems to raise more questions than it answers. Is the Combatant Commander responsible for establishing requirements only for contracts he controls? May he impose requirements on contracts for weapons system support or world-wide logistic support that he does not control? What or whose standards of conduct? Are the issues discussed in the enclosure actually requirements? The opening paragraph of enclosure 3 states the Chairman, commanders and components “should include the following.” The word *should* is generally understood to be precatory rather than mandatory. Issues related to theater admission requirements were oddly placed in an instruction dealing with continuation of essential contractor services which hardly ensured they would be seen by officials responsible for authorizing contractors into a theater. A possible explanation is that no other relevant policy document was in existence. By a fair reading of its own terms it was questionable whether Enclosure 3 imposed requirements on anyone. If this was an attempt to establish a uniform policy on the matters addressed in Enclosure 3 it is not surprising to find it was unsuccessful.

There is ambiguity as to who the responsible party is with respect to the *requirements* in the instruction. Is the official that issues the “theater admission requirement” responsible for execution or merely creating a requirement? Many of the requirements appear to be levies on someone in government. For example, “ensuring that civilian contractors are issued any required security clearances expeditiously” is neither a responsibility of the employing contractor nor the theater commander nor is it anything either can ensure. The officials named in the leading paragraph of the enclosure appear to be responsible for “issuing...the same protective defensive protective gear as is issued to military personnel.” This example is interesting since military personnel are typically equipped prior to entering the theater via their chain of command and the military supply system. This same provision also seems to imply the military rather than the contractor may be responsible for aspects of force protection for contractor personnel.

DODI 3020.37 as originally issued was, as noted previously, based on an outdated concept and of marginal utility. With the changes incorporated in the instruction in 1996, the purpose of the instruction seemed to broaden but with a considerable increase in ambiguity. For a number of years DODI 3020.37 was the principal DOD policy document dealing with contractors deploying in contingency situations. The 1996 version remains in effect as this is written.

DOD policy on contractors in deployed operations as represented by DODI 3020.37 was essentially vacuous and Joint Publications contained scant mention of deployed contractor issues. This does not imply a complete absence of policy. Basic contracting procedures existed and absent anything specific to contingency contracting these applied

²⁵ DODI 3020.37, Para. 5.3.4.

by default. Each of the military services had in effect various policies, operating manuals and procedures that applied to deployed contractors. Policies among the services were not entirely consistent but since overarching law and key regulations applied generally there was considerable consistency as well. The Army's policies and procedures were more developed than those in the other services. However, in the environment of the late 1990's the Army, despite considerable success, arguably proved not fully up to the task of managing large scale (by standards of the day) contracts supporting deployed operations in a completely efficient and effective manner.²⁶

The Government Accountability Office found that in the Balkans Army personnel were not familiar with the type of contract in use (cost reimbursement, performance-based service contract) and were unsure of their role in oversight of the contract. Short tours of duty, of about six months for the government's civilian contracting personnel, gave them little time to become fully familiar with the contract and local conditions.²⁷ GAO's report of inadequate contract administration was not universally accepted.²⁸ However, essentially similar reports were to be made in other locations, on other contracts over the subsequent decade.

A GAO report reviewing contract support in the Balkans, southwest Asia, and central Asia from August 2002 to April 2003 documented both the importance of contracted support and numerous inadequacies in the execution of that support.²⁹ Among DOD and the military services only the Army was found to have a relatively comprehensive policy on planning and administering operational contract support. A GAO report on contracting in Iraq in 2004 documented a continuation of deficiencies found in earlier reports.³⁰ In addition to GAO reports contractors on the battlefield were receiving considerable attention in the media. Gun battles involving contractors, contractors killed and mutilated, as well as the scandal at Abu Ghraib prison, which involved contractor personnel as well as military, were all in the news in 2004. There were major Congressional hearings.

DOD responded to the growing perception of the importance of contracted support for combat and contingency operations by ramping up policy development on a number of fronts and by considering organizational changes. Work began on a comprehensive DOD policy document on what became known as operational support and "contractors deploying with the force." Numerous related but less comprehensive initiatives were also started.

Pending issuance of DOD policy the service's policies had continued to evolve. In 2003 the Army revised the 2000 version of its field manual on contractors on the battlefield.³¹

²⁶ GAO 2000 (note 8).

²⁷ *Ibid.*

²⁸ McElroy, Critical Logistics Link. DCMC at work in the Balkans, *Dimensions* (Defense Logistics Agency magazine), Sept/Oct 1999.

²⁹ GAO 2003, (note 1).

³⁰ GAO, DOD's Extensive Use of Logistic Support Contracts Requires Strengthened Oversight, GAO-04-854 (July 2004).

³¹ Note 2, *id.*; other Army guidance included AR 715-9, Army Contractors Deploying with the Force (29 Oct 1999) and FM 100-10-2, Contracting Support on the battlefield (4 Aug 1999).

The new version contained a more realistic and limited view of a commander's authority with respect to contractors, making clear that, though in his theater, contractors were not in his chain of command. Service policies continued to take divergent views on various subjects. The Army and Air Force held inconsistent positions on whether contractor force protection was the responsibility of the employing contractor or the military. A DOD policy review that would identify and reconcile some of the ambiguity and inconsistency in practice among the military services was overdue.

The year 2004 was something of a watershed. Policy developments churned within the Pentagon and at other government agencies. New policy and procedure documents soon began to gush forth. At the same time reports of the Government Accountability Office, various auditors and inspectors general began to multiply. Congressional interest was evident both from hearings and relevant provisions included in annual National Defense Authorization Acts.

One of the first results of the upsurge in policy development activity was a notice of proposed rule-making in March 2004 that proposed Defense Federal Acquisition Regulation Supplement (DFARS) policies and a contract clause related to contractors deploying with military forces.³² This was just the first of a series of FAR and DFARS changes initiated over the next few years. Most followed the normal formal rule making process applicable to FAR changes but some changes were issued as interim rules in an abbreviated process. Some of the changes were sweeping and others were narrowly focused. The initial change to DFARS Part 225 was interesting in that the issue of vesting the theater commander with emergency change order authority was floated as part of the review process but eventually rejected in the final version of the change. This proved to be a harbinger of what was to come. Whenever issues such as the need for unity of command or other operational imperatives competed with business as usual contracting concepts business as usual came out on top. This particular provision had an extended gestation. After the initial proposed rule making there was another notice of proposed rule-making over a year later.³³ "Final" action did not occur until a further year went by when an *interim* rule was promulgated.³⁴

In October 2005 the definitive DOD instruction on "Contractor Personnel Authorized to Accompany the U.S. Armed Forces" was issued.³⁵ The stated purpose of this instruction was to establish and implement policy and guidance, assign responsibilities, and serve as the comprehensive source of DOD policy and procedures concerning DOD contractor personnel authorized to accompany the force. Included were contractors and their employees, subcontractors at any tier, including third country nationals and host country nationals. These were included within the broad definition of "contingency contractors" while "contractors deploying with the force" came in for special deployment, redeployment, and accountability requirements. In addition the distinction between

³² 69 Federal Register (F.R.) 13067 (19 Mar 2004) proposing changes to Part 225 DFARS.

³³ 70 F.R. 23790 (5 May 2005).

³⁴ 71 F.R. 34826 (16 June 2006); this interim rule formally became final in 2008.

³⁵ DODI 3020.41 (3 Oct 2005).

external support contractors, theater support contractors and system support contractors which had long been in use was officially recognized.

The new DOD instruction contained some concepts that may well be considered logically inconsistent. Paragraph 6.1.4 stated a familiar maxim: “The contract is the principal legal basis for the relationship between the Department of Defense and the contractor.” The contractor being an independent contractor is responsible for its employees and sub-contractors. However, the instruction suggested something different in Paragraph 2.2 which stated that the instruction applied “to contractor personnel that deploy...” Thus the instruction itself created rights and obligations between the government and contractor personnel rather than these being entirely derivative from the contract. In one sense this is not surprising. Knowing which U.S. citizens supporting operations are in a combat zone, as well as their condition and location is probably important. DOD policy went to some pains to make sure contractor personnel about to be deployed were properly prepared and that their whereabouts and condition could be tracked once they were in the theater. While not surprising this approach is at variance with traditional contracting concepts.

In 2006 a new FAR Part 18, Emergency Contracting, was promulgated.³⁶ This was followed in January 2007 by its defense implementation as DFARS Part 218. FAR Part 18 was applicable to contingency contracting but its issuance probably owes more to the contracting glitches associated with Hurricane Katrina in 2005 than with contractors on the battlefield. Moreover, Part 18 was primarily a matter of appearance rather than substance. Part 18 directed contracting officials to existing FAR authority that might be useful in an emergency rather than creating new authority. It did however authorize the “head of an agency” to increase the dollar amounts for utilizing procedures known as micro purchasing and simplified acquisition methods. Much of DFARS Part 218 was also of relatively little substance but it did authorize the head of a “contracting activity” to act as head of an “agency” for certain purposes, including raising the thresholds of the simplified acquisition methods.

Absent from these policies was the requirement to form a joint contracting command to support joint task force operations. The Joint Contracting Command Iraq and its successor Joint Contracting Command Iraq/Afghanistan were formed in the absence of any overarching policy or doctrine. There was no single office or official in the Office of the Secretary of Defense specifically responsible for joint operational contracting matters and there was no office with the responsibility to aid in the formation and staffing of any joint contracting commands that might be needed in the future.

Following the promulgation of these initial policies, numerous other DOD and service policy documents incorporated provisions addressing the presence of contractors in theater. Relevant policy was promulgated by the Joint Chiefs of Staff in Joint Publication 4-10, Operational Contract Support (17 October 2008). A DOD Directive titled Orchestrating, Synchronizing and Integrating Program Management of Contingency Acquisition Planning and Its Operational Execution (DODD 3020.49) was issued 24 March 2009. This directive established the baseline policy for operational contract

³⁶ 71 F.R. 38247 (5 July 2006).

support. It was issued only after Congressional mandates in 2006 and 2008 and, a GAO report finding DOD's initial response to Congressional direction inadequate.³⁷ It is more than a little ironic that the baseline policy was promulgated after years of piecemeal policy development.

B. Current policy and the organizational response

The baseline policy document DODD 3020.49 issued in 2009 has been mentioned in the preceding paragraph. Also in 2009 a DOD instruction on private security contractors was issued.³⁸ Currently DODI 3020.41 is in revision with a new draft having been developed and a new title proposed. In response to directions from Congress, revised policy will not only provide guidance for DOD but establish a foundation for government-wide cooperation.

Procurement policy developments include joint "procedures, guidance and information" (PGI) relating to contingency operations, and applicable to all the services, are being developed by the director of defense procurement and acquisition policy. A revision to DFARS Part 218 is also being prepared.

In addition to JP 4-10, Operational Contract Support, contingency contracting is being integrated into other publications, such as updates to CJCS Manual 3122.03, Joint Operation Planning and Execution System (PES), Volume II; and, inputs into the Joint Logistics White Paper. Adoption of a theater business clearance process will enable coordination and integration of external and system support contracts with theater support contracts prior to award.

Visible organizational responses to the growing awareness of the importance of contingency contracting support began with Central Command's creation of a Joint Contracting Command Iraq/Afghanistan in 2005. High-level support resulted in its initial commander being a highly-experienced Major General. The office of the Assistant Deputy Under Secretary of Defense (Program Support), or ADUSD (PS), was established within the office of the Under Secretary of Defense (Acquisition, Technology and Logistics) in October 2006. The Joint Contingency Acquisition Support Office (JCASO) was established under USD (AT&L) in October 2008 and assigned to the Defense Logistics Agency.

There are currently under way, within DOD, numerous initiatives to enhance operational contracting. These include an Annex W template for operational plans, to ensure operational contracting issues are integrated into planning. In addition there is continued development of policy and doctrine; initiatives affecting organization and personnel; improvements in training and education; and, the development of tools and materials to

³⁷ See section 854, P.L. 109-364 (NDAA2007); section 862, P.L. 110-181 (NDAA 2008); DOD Developed Draft Guidance for Operational Contract Support but Has Not Met All Legislative Requirements, GAO 09-114R (20 Nov 2008).

³⁸ Private Security Contractors (PSC) Operating in Contingency Operations, DODI 3020.50 (22 July 2009).

implement policy. Many of these are documented in the Concept of Operations document developed under the auspices of ADUSD (PS).³⁹ Particularly pertinent to this inquiry are observations in that document to the effect that the emerging joint theater contracting center concept “must evolve” and that “facilities construction and management, reconstruction support, and major external support contracts by the military services must improve...” Additionally as a “critical capability” operational contract support “needs to be integrated into DOD institutional processes to ensure its effective and efficient use in the future.”

As has been already noted, Congress has (through legislation) forced DOD to address a number of policy issues associated with contingency, or operational, contracting. In some cases Congressional action has encouraged DOD to develop necessarily policies which it should have done in more timely fashion on its own initiative. In other instances “help” from Congress has been less useful. These have forced DOD to deal with relatively minor issues or unnecessarily injected DOD into matters that should be dealt with between a contractor and its employees. Examples of these will be mentioned in the next section, along with more central policy issues.

C. Assessment and critique

As a result of developments over the last several years top level DOD policy regarding contractors on the battlefield or in other guises – contingency contracting, operational support/program support or expeditionary contracting – has matured to the state of being relatively comprehensive and well developed. Within the current body of policy, however, are a number of concepts that may limit the effectiveness of contract operational support as new situations confront the United States military. Moreover, the complexity of potential future challenges, which may well involve other departments of the U.S. government and coalition partners, has not been fully accounted for.

In 2003 the General Accountability Office (GAO) found that there was no DOD-wide guidance on the subject of contractors deploying overseas with military forces and that DOD “has not fully included contractor support in its operational and strategic plans.”⁴⁰ Lack of DOD-wide policy was remedied in 2005. Surprisingly, DOD policy was promulgated not in a DOD Directive but in changes to the DFARS. Subsequently, a DOD Instruction (“Contractor Personnel Authorized to Accompany the U.S. Armed Forces,” DODI 3020.41, 3 Oct. 2005) was issued requiring use of “contractor support...consistent with the” DFARS. Thus DFARS constituted top level DOD policy for areas within its coverage. The DODI coverage overlaps the DFARS to a considerable extent and also covers areas not addressed by the DFARS. An operational commander is unlikely to consult DFARS.

The DFARS prescribes a contract clause (Antiterrorism/Force Protection Policy for Defense Contractors outside the United States, DFARS 252.225-7040) for inclusion in

³⁹ Concept of Operations (note 21), pp. 71-74.

⁴⁰ GAO 2003 (note 1).

contracts to be performed outside the United States. The clause requires contractors to understand that contract performance in support of forces deployed outside the U.S. may require work in dangerous or austere conditions, and the contractor accepts the risks associated with the required contract performance. Another provision states that contractor personnel are not combatants, such personnel shall not undertake any role that would jeopardize their status, and the contractor employees shall not use force or otherwise directly participate in acts likely to cause actual harm to enemy armed forces.

The clause requires contractors to comply with, and, ensure that its personnel are familiar with and comply with all applicable U.S., host country, and third country national laws, treaties and international agreements, U.S. regulations, directions, instructions, policies and procedures, and orders and directives and instructions issued by the combatant commander relating to force protection, security, health, safety, or relations or interactions with local nationals.

The most interesting part of the DFARS changes is what they do not contain. As originally proposed (69 Federal Register 13500) language would have vested in combatant commanders authority to order emergency changes in contract performance. This provision was deleted from the final version of the rule. Some comments received in the rule making process raised concerns about the language. DOD reversed its original position and stated the “proposed language is not consistent with existing procurement law and policy.” Other comments received during the rule-making process supported the recommended change and even suggested clarifying or expanding the proposed authority of the combatant commander, as well as vesting subordinate commanders with similar authority. The DOD response nonconcurring with these comments stated “DOD does *not recommend any revisions or expansions to the authorities of the combatant commander...*” (emphasis added). As noted above, DOD policy makers apparently did not foresee any need to enhance the theater commander’s contracting capability, such as creating a centralized, joint contracting office in the theater.

DOD did not recommend any revisions or expansions to the authorities of the combatant commander. For all the many pages of fine print in the DFARS changes and DOD Instruction, that was the bottom line. DOD recommends no changes that will enhance unity of command nor increase the combatant commander’s control over contractors supporting his operations. New contract language that talks about contractors complying with orders and directions of the combatant commander is not according to DOD’s comments in the rule making process intended to expand the commander’s authority.

Language in the DFARS contract clause that talks about contractors not being combatants or harming enemy forces may actually contain less substance than first meets the eye. The clause specifically states: “Contractor personnel are not combatants and shall not take any role that would jeopardize their status. Contractor personnel shall not use force or otherwise directly participate in acts likely to cause actual harm to enemy forces.” (DFARS 252.225-7040 (b) (3)). Neither the words used nor their context makes these provisions applicable to the contractor. They are directed toward and applicable, by their express terms, to “contractor personnel” who “shall not...” The government has no

privity of contract with employees of the contractor. The words are not applicable to the contractor and, since the government has no direct relationship to the contractor's employees, the quoted language is of questionable legal effect at best.

It is probably correct to say that DOD policy changes failed to enhance the contracting authority of the combatant commander or contribute to unity of command in the least. To the extent the policy embodied in the new contract clause attempted to address the issue of contractor personnel participating directly in combat, it did so in an inept and ineffective way.

Various provisions of the DFARS and DODI address the subject of "direct participation" by contractor personnel and sometimes seem to conflict. The DODI expressly permits their "indirect participation in military operations" and additionally notes their "inherent right to self defense" (DODI 3020.41, Para. 6.1.1). The DFARS does not prohibit contractor personnel from being armed either pursuant to contract or with privately-owned weapons. The discussion of the final rule states the combatant commander will be involved in issues regarding arming contractor personnel on a case-by-case basis. The discussion then concludes by saying that the contractor is "to ensure that its personnel who are authorized to carry weapons are adequately trained. That should include training not only on how to use a weapon, but when to use a weapon" (70 Federal Register 23797). The DFARS states contractor personnel "shall not use force." The DODI says contractor personnel are "authorized to use force" for self-defense (Para. 6.3.4.1). The DODI also expressly permits security services to be provided by armed contractor personnel (Para. 6.3.5). In the case of ongoing or imminent combat operations such services are to be used "cautiously" (6.3.5.2). It is interesting to note that a Navy contracting officer at a forward operating base in Afghanistan is a combatant, per DOD policy, while an armed security guard is not.⁴¹

"Indirect" participation in combat operations allowed by the DODI includes "transporting munitions and other supplies, performing maintenance functions for military equipment, providing security services..." (6.1.1) and, as already suggested, there is no restriction from the performance of these functions when combat is "ongoing or imminent." Experience has shown that when contractors perform these functions under battlefield conditions they are likely to be involved in combat. This entitles them to engage in their "inherent right" to self-defense.

Neither the DFARS nor DODI attempted to expressly deal with hard questions concerning "direct participation" that have actually occurred. These include civilians flying combat missions on J-STARS, civilians operating UAVs, repairing weapons under combat conditions, civilian interpreters accompanying combat forces on operations, or contractors flying onboard aircraft involved in re-supply missions in defended areas. Circumstances constituting "indirect participation," other than a very few examples given, are left to case-by-case analysis. Moreover, the examples given may, as suggested in the previous paragraph, involve contractors in combat situations. Although both

⁴¹ Remarks of Moshe Schwartz, ABA Public Contract Law Section, Battlespace committee (15 Jan. 2010 teleconference).

documents require compliance with treaties and international agreements, neither document warns contractors that the concept of “direct participation” is currently in a state of evolution in international law.⁴²

The strictures against “direct participation” and limitations to “self defense” invite hard questions. What exactly is the role of contractor security guards who come upon insurgents preparing to fire a mortar or rocket into a forward operating base? The school solution seems to be that they can only notify military personnel of the threat or wait until they perceive a threat to themselves that would authorize self-defense. In a real life scenario the security guards took direct action against the insurgents and prevented the attack. However, the guards in question were Gurkhas, not U.S. citizens, and were not under U.S. contracts.⁴³ Under DOD policy a pre-emptive attack is said to be an “inherently governmental function.” However, under both domestic criminal law and international law pre-emptive action to forestall imminent attack is viewed as a form of self-defense.

It should be noted that neither the DFARS nor DODI were solely or even primarily limited to the issues discussed above. In both documents there is evidence that considerable time, thought and effort was devoted to a variety of issues that affect contingency contracting and the role of contractors supporting a deployed force. Some of the issues might be characterized as “house keeping” type issues, but that is not to say there are not quite important on the practical level. Despite the effort devoted to crafting appropriate DOD policies for contractors supporting military deployments policies, promulgated in 2005 still left many unresolved issues.

Highly publicized incidents often bring a Congressional reaction. After it came to light that contractor personnel had been present at interrogations at the Abu Ghraib prison at the time the scandal occurred there in 2004, Congress required (section 1092, NDAA2005) that contractor personnel that interact with detainees receive training regarding applicable international obligations and U.S. law. DOD promulgated an interim rule revising DFARS in September 2005.

This brought a response from the Professional Services Council, an industry association that represents many companies with contracts in Iraq and Afghanistan. While not opposing the intent of the rule the Council was concerned that the rule did not contemplate consistent and standardized training. The Council made a number of specific recommendations for improving the rule. Because the rule was already in effect, as an

⁴² The International Committee of the Red Cross (ICRC) which has a key role in overseeing the Geneva Conventions and the development of international humanitarian law has sponsored conferences (Geneva, 2003 and The Hague, 2005) on “Direct Participation in Hostilities” and plans additional conferences. Scholarly writing in this area is increasing. For example see, Schmitt, “Humanitarian Law and Direct Participation in Hostilities by Private Contractors and Civilian Employees,” 5 *Chi. J. Int’l L.* 511 (2005).

⁴³ Remarks of Douglas Brooks, President International Peace Operations Association (Telephone interview Jan 2010).

interim rule, the Council recommended DOD expeditiously consider public comments and make revisions before the rule was adopted as final.⁴⁴

Another mandate apparently stemmed from a shooting incident in September 2007 in which Iraqi civilians were killed by security guards employed under a Department of State contract. Section 862 of NDAA2008 (P.L. 110-181) required the secretaries of defense and state to issue regulations on private security contractors (PSCs) that would require registration and accounting for contractors providing private security functions, their weapons and vehicles. Additional requirements were reporting incidents of the discharge of weapons or actions leading to injury or death; independent reviews of misconduct; training requirements; and, guidance to combatant commanders about PSCs. A revision of the FAR was also required.

As noted above, DODI 3020.50 covering this subject was issued in July 2009 to implement the requirements of the law. It basically supplemented DODI 3030.37 and expanded its coverage of PSCs. The new instruction brought a reaction from the Public Contract Law section of the American Bar Association (ABA) which advised that the instruction might be difficult to implement, included ambiguities and contained insufficient guidance for combatant commanders. The Committee's comments were fairly extensive and contained a number of thoughtful recommendations.⁴⁵

The commentary from the ABA committee and the Professional Services Council illustrate instances where DOD's policy development process might have been more substantive and thoughtful. In responding to Congressional mandates DOD sometimes appears merely to "check the blocks" with a minimum response rather than fully explore the subject involved.

Yet another Congressional mandate resulted in the Director of Defense Procurement and Acquisition Policy issuing a class deviation that added new requirements to DFARS. Section 854 of NDAA2009 (P.L. 110-417), required the Secretary of Defense to implement, among other requirements, mechanisms to (1) ensure that "contractors are required to report" certain offenses that are "alleged to have been committed by or against contractor personnel to appropriate investigative authorities," and (2) provide "contractor personnel who will perform work on a contract in Iraq or Afghanistan, before beginning such work, information on" how and where to report these offenses and where to seek victim/witness assistance related to these offenses.

To implement section 854, DOD issued a Class DFARS Deviation which states:

Use the following clause in all new solicitations and resultant contracts in Iraq or Afghanistan, as well as modifying existing solicitations and contracts to the extent practicable, in accordance with FAR 1.108(d). "Contract in Iraq or Afghanistan" means a contract with the Department of Defense, a subcontract at any tier issued under such a contract, or a task order or delivery order at any tier issued under such a contract

⁴⁴ Contractor Association: Rule on Treatment of Detainees lacks Clarity, *The Government Contractor*, Para. 466 (2 Nov 2005).

⁴⁵ ABA comments available at www.abanet.org/contract/federal/regscomm/emerging_013.pdf

(including a contract, subcontract, or task order or delivery order issued by another Government agency for the Department of Defense, if the contract, subcontract, or task order or delivery order involves work performed in Iraq or Afghanistan for a period longer than 14 days.

ADDITIONAL REQUIREMENTS AND RESPONSIBILITIES RELATING TO ALLEGED CRIMES BY OR AGAINST CONTRACTOR PERSONNEL IN IRAQ AND AFGHANISTAN (DEVIATION) (DEC 2009)

(a) The Contractor shall report to the appropriate investigative authorities any alleged offenses under--

- (1) The Uniform Code of Military Justice (chapter 47 of title 10, United States Code) (applicable to contractors serving with or accompanying an armed force in the field during a declared war or a contingency operation); or
- (2) The Military Extraterritorial Jurisdiction Act (chapter 212 of title 18, United States Code).

(b) The Contractor shall provide to all contractor personnel who will perform work on a contract in Iraq or Afghanistan, before beginning such work, information on the following:

- (1) How and where to report an alleged crime described in paragraph (a) of this clause.
- (2) Where to seek victim and witness protection and assistance available to contractor personnel in connection with an alleged offense described in paragraph (a) of this clause.⁴⁶

The Class Deviation was issued without prior publication or opportunity to receive public comments. This action has been a subject of discussion including by a committee of the ABA. In discussions with ABA members it has been pointed out that the Class Deviation's use of certain terms is vague and overbroad.

Additionally, like many of the new laws and regulations, these only apply to Iraq and Afghanistan; so similar future operations will require new laws and regulations.

Importantly, section (a) of the Class Deviation clause appears intended to apply to the contractor itself and not to the contractor's principals, employees, or subcontractors. The use of the phrase "contractor personnel" later in the clause, to refer to those that "will perform work" on the contract, further supports this reading of the clause. Thus, section (a), as written, appears to only require that the prime contractor itself, not any employee or subcontractor, report any "alleged violations" of the Uniform Code of Military Justice (UCMJ) or the Military Extraterritorial Jurisdiction Act (MEJA) to investigative authorities. As written, however, the clause also uses of the word "contractors" in section (a) when referring to the applicability of the UCMJ. This suggests a different meaning for the word "contractor(s)," as the UCMJ is only applicable to individuals and not corporations. Based on this confusion, the definition of "contractor" in the clause should be clarified. Ambiguities in the class deviation could result in overly broad reporting of any and all possible criminal conduct including false allegations. The standard for

⁴⁶ Office of Director Defense Procurement, DAR Tracking No. O0014 (14 Dec 2009); This class deviation was discussed in the Emerging Issues committee of the ABA Public Contract Law section but their comments have yet to be made final or submitted.

contractor notice of alleged offenses could be improved and the deviation provides insufficient guidance in an area where there is as yet little experience.

The examples outlined above should be sufficient to illustrate that while DOD policy regarding operational support contracting has made tremendous strides in the past several years examples of imperfections are not hard to find. Moreover, some of these imperfections illustrate basic tensions that exist in the landscape of contractors on the battlefield. Is it feasible or good practice to maintain a strict dichotomy between the military chain of command and contract lines of authority? Are contingency contractor employees only the concern of the independent contractor who formally employs them, or do they sometimes act more like “borrowed servants” who need to be responsive to the immediate needs of the military project leader on the project they are working on? These and other questions and their answers may suggest that operational support contracting may be less routine than is reflected by DOD policies and procedures. Finally, shouldn’t these be more generic rules that will apply to the next situation (beyond Iraq and Afghanistan)?

The foregoing summary analysis and critique of DOD policy does not purport to review all the many policy or guidance documents in which some aspect of contingency contracting is mentioned or regulated. The succeeding parts of this report will mention some of the implementation aspects of the policy overlay. The material below attempts to explore how the policies actually affect the implementation of effective action and whether they prepare the military for future contingencies.

III. POLICY AND THE OPERATIONAL ENVIRONMENT

A. *Studies and reports*

In this part a cross section of government and private studies, reports and commentary will be reviewed to accumulate data to determine how the operational environment has affected or failed to affect the pace and sufficiency of policy development. Earlier sections of this study have touched on a number of relatively early research reports and GAO studies so the emphasis here will be on more recent studies as well as the author's current research.

DOD Self Assessment. As an initial matter it might be asked how DOD officials assess the progress that has been made in contingency or expeditionary contracting. In a hearing before the Commission on Wartime Contracting on April 19, 2010, DOD and Army contracting officials indicated things were going well.⁴⁷ Shay D. Assad, director of defense procurement and acquisition policy, asserted regarding the commitment to contingency contracting: "It has been institutionalized." Assad also stated that there was "a tremendous sense of urgency" within DOD regarding service contracting. None of the commission members agreed with these statements, and several forcefully made clear that they disagreed. Assad also declined to comment upon the level of concern in the past, or the slow pace of policy and organizational development. Commission members pointed out the slow pace of policy development, a lack of sense of urgency and the failure to institutionalize expeditionary contracting.

Lieutenant General William Phillips, deputy assistant secretary of the army (acquisition, logistics and technology), stated that he considered the Army's oversight of service contracting adequate. Mr. Edward Harrington, deputy assistant secretary of the army (procurement), said the Army was making "slow, steady forward progress."

A month earlier in a hearing before the House Defense Appropriations Subcommittee, Mr. Assad and Jeffrey Parsons, executive director of the army contracting command, touted recent successes such as the creation of JCASO and its functioning in Haiti in January 2010 and the creation of contracting support brigades within the army contracting command.⁴⁸ Another witness William Solis, GAO director of defense capabilities and management, painted a less rosy picture in the same hearing. Solis stated he wouldn't necessarily rely exclusively on data in DOD's Synchronized Predeployment Operational Tracker (SPOT) database. He pointed out the need to depend on the local populace for much of the life-support services contracted in deployed situations. He also noted inadequacy in training contracting officer representatives (COR), as well as needed training for commanders on how to deal with contingency contractors.

⁴⁷ Federal Oversight of Contracting in Southwest Asia, hearing of the Commission on Wartime Contracting, Washington D.C. (19 April 2010) broadcast on C-SPAN.

⁴⁸ Contingency Contracting is Improving, Senior Officials Tell House Panel, *The Government Contractor*, Para. 114 (31 March 2010).

CBO Report. The Congressional Budget Office responded to a Senate Budget Committee request and issued a report on contracting in Iraq and nearby countries in August 2008.⁴⁹ The CBO report was based in large measure on data collected from the updated Federal Procurement Data System. The CBO found that between 2003 and 2007 contract funding in Iraq totaled \$63 billion with an additional \$14 billion in Kuwait and about \$8 billion in other Middle East countries. About \$76 billion of this was DOD funded with the Army (\$57 billion) and Defense Logistics Agency (\$12 billion) being the primary sources of funds.

The report noted that contractor personnel were involved in many aspects of U.S. operations including logistics, construction, engineering, technical support, security, translator services, economic development and humanitarian assistance. As of early 2008 there were 190,000 contractor and subcontractor personnel in the theater. This was similar to the one to one troop to contractor ratio in the Balkans in the 1990's but much higher than in previous conflicts.

CBO provided its insights into private security companies and then raised a number of issues of general concern Congress might want to consider. CBO noted four legal concerns on the status of contractors: restrictions placed on contractors, the authority of the U.S. military over their actions; the legal status of contractors while supporting military operations; and, determining which laws govern contractor actions. CBO noted the recent changes in DOD regulations and some changes in legal jurisdiction but thought these might be subject to challenge in U.S. or international courts

Reactions to the CBO report varied. Senator Kent Conrad chairman of the committee requesting the report said outsourcing large segments of the war set a dangerous precedent.⁵⁰ He also thought increased reliance on contractors opened the doors to corruption and that vast sums of money had been misspent. Conrad also thought introducing third country nationals into a war zone created ambiguities. In contrast a statement from the Professional Services Council said data in the report debunked the idea that contractor personnel cost more than military personnel performing the same jobs.⁵¹ The CBO found that using private security contractors in Iraq during one year (2004-2005) did not differ substantially in cost from using military. In 2005 a CBO report found that over a twenty year time frame providing logistical support for deployed military forces using military personnel would cost about ninety percent more than using contractors.

Commission on Wartime Contracting. In June 2009 the Commission on Wartime Contracting issued its first interim report and shared its findings in a hearing before the House Subcommittee on National Security and Foreign Affairs, Committee on Oversight and Government Reform.⁵² The report noted a number of problems. One was heavy reliance of foreign subcontractors that may not be accountable to any U.S. authority.

⁴⁹ Congressional Budget Office, Contractor Support for U.S. Operations in Iraq (12 August 2008).

⁵⁰ CBO Examines Contractor Use In Iraq, *The Government Contractor*, Para. 303 (20 August 2008).

⁵¹ *Ibid.*

⁵² Commission on Wartime Contracting (CWC), At What Cost? Contingency Contracting in Iraq and Afghanistan (10 June 2009).

Some contracts were poorly defined and poorly executed. Acquisition staffing concerns, mainly personnel shortages, were a continuing problem. This resulted in poor oversight and management of military, diplomatic and reconstruction contracts.

The commission's report identified a number of key management issues in contingency contracting. Military and civilian acquisition workforces have not kept pace with the growth in numbers and dollar value of contracts. The military does not adequately train personnel who manage contracts and provide oversight to contract performance. Auditors are not utilized effectively. Contracting officers fail to make effective use of recommendations to withhold payments made by their auditors. Government personnel are not clear on the standards and policy related to inherently governmental functions.

A number of other issues were addressed in the report and related testimony. Among these was criticism of contractor business systems and related government oversight. This became the subject of a separate commission report.⁵³ Because the commission's charter from Congress tends to focus its attention on fraud, waste and abuse, its findings seldom question the "business as usual" model as the appropriate baseline for contingency contracting.

Alan Chvotkin, executive vice president of the Professional Services Council, pointed out that contracting challenges arising from (1) military and military related activities, (2) reconstruction, and (3) economic and developmental assistance present different "realities" that must be taken into account. The commission certainly can be selective in the issues it chooses to review but Chvotkin noted that to truly understand the nature of contracting activities in Iraq, it is necessary to understand the differences between emergency contracting during heightened military action; "contingency" contracting during periods of heightened physical security challenges; and, longer term sustainment contracting that tends to characterize the current situation. It would be a mistake to select any subset of acquisition regulations that are written for normal contracting situations and expect that they can be applied with procedural perfection to wartime contracting.⁵⁴

GAO on State's Security Contracts. Two recent GAO reports related to growth in the Department of State's use of contractors to provide diplomatic security are of some relevance to DOD. The relatively rapid expansion of State's Bureau of Diplomatic Security operations (\$200million in 1998; \$1.8billion in 2008) can be traced to the embassy bombings in Kenya and Tanzania in August 1998. The rapid expansion of the bureau's mission has required a substantial increase in staff. Contractors now make up about ninety percent of diplomatic security personnel. Using contractors allows State to rapidly place needed personnel in high-threat areas. State's limited cadre of special agents has been unable to meet the growing requirements. The State Department, according to GAO, has not viewed this situation in strategic terms and thus is faced with

⁵³ CWC, Special Report 1: Defense Agencies Must Improve Their Oversight of Contractor Business Systems to reduce Fraud, Waste and Abuse (11 August 2009).

⁵⁴ CWC Testifies On the Path Forward in Iraq, Afghanistan, *The Government Contractor*, Para. 205 (17 June 2009).

human capital deficiencies, inexperienced staff, and foreign language proficiency shortfalls.⁵⁵

In a study covering the period October 2008 to October 2009 the GAO reviewed world wide security contracts as well as a contract for static security at the U.S. embassy in Baghdad.⁵⁶ For most of the contract actions reviewed GAO found that using federal employees would cost more than contractors. In addition GAO found that hiring and training federal employees generally took longer than acquiring contractors. Moreover, State does not have sufficient in-house personnel to perform many required functions including guards, screeners, explosive ordnance detection, dog handlers or armorers. Adding government personnel would also add to supervisory and administrative cost and even the cost of construction of new housing at the embassy complex.

Congressional Research Service (CRS). A December 2009 CRS report updated previous CRS research on contractors in Iraq and Afghanistan.⁵⁷ This report noted a number of recent DOD policy and organizational initiatives most of which have already been discussed in this paper. It also noted findings of the Commission on Wartime Contracting; and, the Gansler Commission report to be discussed below.

CRS reports some of the benefits of using contractors, namely, they free uniformed military personnel to perform combat duties; provide critical support capabilities quickly; provide expertise in specialty areas not sufficiently available in the military; and, save DOD money. Insufficient contract management, however, can prevent warfighters from receiving needed support, and may undermine U.S. counterinsurgency efforts.

CRS concurs with GAO that DOD must (1) understand how and why it uses contractors, including their numbers and the types of services provided, (2) develop better contract management and oversight, and (3) establish and commit to a strategic approach that defines how contractors should be used to achieve operational success. The CRS also agrees with the Gansler Commission report and others that observe that needed improvements will require culture change.

The CRS report states that incidents involving contractors killing or abusing local nationals may have undermined U.S. counterinsurgency efforts. Poor contract management may result in a diversion of resources from critical counter insurgency efforts such as security, social services programs, and economic development and by allowing increased fraud which could undermine U.S. credibility in the eyes of the local populace.

CRS found disagreement among analysts on whether U.S. strategy and doctrine sufficiently addresses operational contracting. Some DOD officials argue that experience

⁵⁵ GAO, State Department: Diplomatic Security Service's Recent Growth Warrants Strategic Review, GAO-10-0156 (Dec. 2009).

⁵⁶ GAO, Warfighter Support: A Cost Comparison of Using State Department Employees versus Contractors for security services in Iraq, GAO-10-266R (March 2010).

⁵⁷ CRS, Department of Defense Contractors in Iraq and Afghanistan: Background and Analysis, R40764 (14 Dec. 2009).

in Iraq and Afghanistan along with Congressional attention and legislation has focused DOD's attention on the importance of contractors to operational success. Interestingly, one of the documents cited as supporting this point of view is the Quadrennial Defense Review. As noted above references in that document concerning services or operational contracting are few, lacking strategic content and essentially descriptive in nature. Also mentioned is the more substantive event of the issuance of Operational Contract Support, JP 4-10 (October 2008).

Recent initiatives include establishment of a DOD task force to evaluate the interim report of the Commission on Wartime Contracting. DOD officials also told CRS other initiatives are in progress to update policy. Officials stated it could take an additional three years to update policies and regulations, integrate contractors into operational planning, and implement appropriate training.

The CRS report, like many others, contains important insights, such as when it stresses the importance of a strategic vision; the need for coherent doctrine; and the integration of contractors into operational planning. Also, like so many other reports, it drifts into the issues that garner media attention and are easy to understand by politicians and the general public but may be less important for effective mission support, on the use of contractors, than some other issues. In addition to fraud, waste and abuse, the CRS report mentions the damage that can be done to U.S. counterinsurgency efforts when contractors misbehave, or kill or injure friendly civilians. Such observations need to be leavened by accepting that uniformed soldiers can and have misbehaved and caused collateral damage. Such comments also need to be put in perspective. Department of State security contractors killed several Iraqi civilians under questionable circumstances in 2008 and certainly the media attention to the incident did not help the U.S. cause. For example from August 2004 through February 2008 when there was intense insurgency and sectarian strife in Iraq more than 19,000 DOD convoy operations were carried out. Less than 3/4th of one percent of those resulted in use of deadly force by DOD security contractors. The use of deadly force does not necessarily imply injury or death was caused in the incident.⁵⁸

Recent GAO Findings. In testimony before Congress in March 2010 a GAO official outlined recent actions and additional needed improvements in DOD's management and institutionalization of contractor support in contingency operations.⁵⁹ Among the challenges GAO noted were: providing an adequate number of personnel to conduct contract oversight and management; training personnel including non-acquisition personnel, such as commanders, on how to work effectively with contractors; improving the screening of third-country and local nationals; improving data; and, continued improvement in identifying requirements for contract support in on-going operations.

William Solis stated that DOD has been slow to implement a number of GAO recommendations, despite its agreement that implementation was needed. Solis also

⁵⁸ Testimony of P.J. Bell, Deputy Under Secretary of Defense (Logistics and Material Readiness), Senate Armed Services Com., Subcommittee on Readiness and Management Support hearing (2 April 2008).

⁵⁹ Testimony of William Solis, GAO, Director of Defense Capabilities and Management, Defense Subcommittee, House Appropriations Committee, GAO-10-551T (17 March 2010).

noted a number of actions DOD has taken, including creating a focal point (ADUSD for operational support) to improve contract management and oversight at deployed locations. He also noted issuance of the Contingency Contracting Handbook and JP 4-10. He pointed out that other guidance, including expeditionary contracting policy and an update to the DOD instruction on contractors deploying with the force, had yet to be made final.

Solis stated that DOD remained deficient in identifying contractor requirements in its future operations. He concluded that until DOD institutionalizes operational contract support by incorporating it into its guidance, training, and planning the department may continue to confront the same challenges encountered in Iraq and Afghanistan in future operations.

DOD's need to improve planning for using contractors in support of future operations was the subject of a separate GAO report.⁶⁰ This report pointed out that DOD guidance had called for operational plans to include an annex on operational contract support (Annex W) since February 2006. GAO found only four plans that contained approved Annex W's. For another thirty plans a draft Annex W existed. Most plans drafted to date include only broad statements of DOD guidance on use of contractors to support deployed forces. GAO found a mismatch between leadership and command planners' expectations of the specifics to be found in planning documents. Basic plans do not contain any assumptions specifically regarding the use of contract support. Beyond the often summary treatment in draft Annex W, non-logistics parts of the plans (e.g. communications or intelligence) fail to address contract support.

GAO noted that two DOD initiatives may improve the planning process. These are the creation of JCASO and the assignment of joint operational support planners to the various combatant commands. GAO also notes, however, that lack of institutionalization in guidance, as well as funding and staffing uncertainties, leave open to question how well they will function.

It is interesting to contrast these GAO findings with the sanguine pronouncements of DOD and Army leaders before the Commission on Wartime Contracting and Congress, as recorded above. Mr. Assad asserted that "institutionalization" had occurred and that a sense of "urgency" existed. Mr. Harrington stated that the Army was making "slow, steady, forward progress" to which "Amen" can be said to the *slow* part.⁶¹ Moreover, many of the deficiencies cited in these recent GAO reports echo GAO findings dating back to 2003 and even earlier.

One trusts that these DOD officials are not intentionally trying to mislead others. One suspects there may be elements of self delusion in their statements. Possibly, however, their attitude is a version of the old saw from Naval Sea Systems Command that "a ship costs what it costs and delivers when it delivers." In other words, the Pentagon

⁶⁰ GAO, DOD Needs to Improve its Planning for Using Contractors to Support Future Military Operations, GAO-10-472 (30 March 2010).

⁶¹ In the CWC hearing a commission member asked Mr. Harrington about a draft Army policy document that had been held up for nine months. Mr. Harrington ascribed the delay to "editorial changes."

bureaucracy will come forth with policies and guidance when and as the process runs its course. No one individual or official holds himself accountable for the timing or outcome of the process. Any of the foregoing attitudes on the part of leadership suggests culture change is highly unlikely.

B. Two actionable reports

The reports and commentaries summarized in the preceding and earlier sections may in some cases never have come to the attention of DOD policy makers or, if they did, may have been disregarded. In other cases, especially the DOD-specific GAO reports, DOD was required to respond. Implementation actions, if any, taken with respect to GAO findings were not necessarily complete or taken in timely fashion. In this section are described two quite different reports both of which resulted in substantive DOD actions or policy developments.

The Gansler commission included distinguished members and was headed by a well respected former high DOD official. DOD was required to provide Congress with information on its efforts to implement the Gansler report's recommendations and give reasons if it declined to implement any of them. The other report was a research study prepared by students at the Industrial College of the Armed Forces (ICAF) and it apparently garnered attention from, and resulted in action by, the Joint Staff because it addressed gaps in policy and doctrine that had not previously been so well articulated.

Though very different the two reports are complimentary to a considerable degree. One addresses expeditionary contracting in the Army while the other deals with joint doctrine for contingency contracting. The Gansler commission heard over one hundred witnesses. The ICAF study included nineteen interviews. Some of the individuals with the greatest firsthand knowledge were interviewed both by the Gansler commission, the ICAF study, and for this research.

Gansler Report. It does not further the purpose of this research report to attempt to summarize the entire Gansler Commission report.⁶² Indeed the very first blocked and italicized statement in the report illustrates both its strength and weakness as far as this research is concerned. The statement is: *The acquisition failures in expeditionary operations require a systemic fix of the Army acquisition system.* The report addresses institutional issues across Army acquisition and thus its formal recommendations encompass, but are not limited in focus to, expeditionary or contingency contracting. The restricted charter of the Gansler commission limited its ability to address some important issues beyond those that were Army-centric.

Part of the report's title, however, is telling with respect to the Army's response: *Urgent Reform Required.* Urgency meant implementing key recommendations in six months and all recommendations within a year. A final status briefing occurred nearly two years after the report was issued. Most commission recommendations applicable to the Office of

⁶² Commission on Army Acquisition and Program Management in Expeditionary Operations, *Urgent Reform Required: Army Expeditionary Contracting* (31 October 2007).

Secretary of Defense had been accepted and all were considered closed. Most recommendations applicable to the Army had been accepted, although some were modified by the Army as “alternative solutions.” Increasing the work force was “in progress” while all other recommended actions were deemed closed.⁶³ It should be noted that DOD was also required by Congress to implement certain policies that paralleled Gansler commission recommendations in some respects.⁶⁴ A number of recommendations may have been closed in a bureaucratic sense but did not necessarily result in effective implementation. The long-term nature of deploying an experienced, effective military and civilian acquisition workforce means many other recommendations affected by that process are “closed” more in form rather than in substance.

Outside the forty formal recommendations that were tracked and accounted for by DOD, the Gansler report contained other cogent points and recommendations. The closing paragraph of the Executive summary stated:

The Army is the DOD “Executive Agent” for contracting in Iraq and Afghanistan, but is unable to fill military and civilian contracting billets, in either quantity or qualification. Although providing contracting support to the Army and Marine Corps is not an Air Force mission, an Air Force Major General currently is in command of the Joint Contracting Command-Iraq/Afghanistan (JCC-I/A). The Air Force also provides over 67 percent of the JCC-I/A contracting resources supporting the ground forces, and is handling the most complex contract actions such as reconstruction operations.

This comment supported a recommendation contained in the briefing materials that accompanied the report (appendix D of the report). A briefing chart was titled “Recommended Model: Joint” and its first point was the need for “a uniformed, rapidly-deployable expeditionary contracting force and standing JCC.” Seemingly related was a call for flexible standby funding in the form of an adequately resourced “overseas contingency operations transfer fund” which was one of the formal recommendations that required legislation and failed to materialize.

Joint Acquisition Command Doctrine report. A 2006 research report, written under the auspices of ICAF, is credited by its authors with significant influence on the subsequent development on JP 4-10.⁶⁵ In support of their claim the authors assert that they effectively interacted with an interested Joint Staff and twenty-four of twenty-six recommendations contained in their report were reflected in JP 4-10, some virtually verbatim.⁶⁶

The ICAF research found that, despite lessons learned in each contingency operation going back at least to 1992, each subsequent contingency resulted in these lessons having to be relearned. The authors attributed this to a lack of a joint contingency acquisition

⁶³ Gansler briefing, Independent Assessment of [Gansler commission] Subsequent DOD Implementation Efforts (29 May 2009).

⁶⁴ Sec. 854, P.L. 109-364 (NDAA2007) codified at 10 U.S.C. 2333.

⁶⁵ Borzoo, Brockway, Short & VanderWerf, Joint Acquisition Command Doctrine, ICAF Senior Acquisition Course research report (2006).

⁶⁶ Borzoo, Brockway, Short & VanderWerf, Joint Acquisition Command Doctrine – A Success Story, *Defense Acquisition Review Journal* (1 Oct. 2009).

doctrine. This conclusion was supported by experienced senior leaders with relevant current field experience as well as acquisition policy backgrounds.

The report contained examples of a lack of coordination of contracting efforts in current operations and showed the need for an integrated contracting process. This resulted in their recommendation for a single joint contracting activity and integrated acquisition process to provide the best theater acquisition strategy. For example, LOGCAP might provide a handy solution to a problem and yet be more expensive than contracting for local resources and capabilities. Moreover, utilizing local businesses and labor may further broader U.S. policy goals in the operation.

The research rightly pointed out that contingency contracting occurs in a dynamic environment that may start with high risk operations, where active combat is taking place, and transition to lower risk states that evolve into a sustainment operation. Acquisition strategy should transition along with the evolving operational environment. This may affect choice of the appropriate contract type and affect the efficiency and availability of alternative sources to meet requirements. A theater-based joint contracting activity is in the best position to advise the Joint Task Force commander on the appropriate strategy.

The research report advocated certain changes to FAR/DFARS contracting regulations. Some recommended changes included: flexibility in funding thresholds; modification of property purchase requirements; and changes in solicitation timelines. It was also recommended that combatant commanders obtain advance regulatory waivers to assure adequate contracting flexibility as part of the operational planning process. These waivers would be automatically granted upon plan implementation. This recommendation was not made part of JP 4-10. Instead the authority of the director of procurement and acquisition policy in this regard was recognized.

Like the Gansler commission report, the ICAF report recommended strengthening the role of the Defense Contract Management Agency (DCMA) in supporting in-theater contract administration. This was one of the Gansler commission recommendations that was expressly rejected by DOD. In fact DOD appears to be in the process of reducing DCMA's role in expeditionary contracting.

The ICAF research noted the importance that Head of Contracting Activity (HCA) authority should be resident in-theater. The HCA should have the authority to issue warrants and certificates of appointments for necessary contract management functions in the theater. In an attempt to have a unified contracting effort in theater, all contracting personnel in the theater should be operationally assigned to the joint contracting activity.

C. Other perspectives

Views from Washington. A few illustrations may highlight the importance of having an in-theater and integrated, strategic view of the impact of contract actions. Host country

nationals in Iraq are being hired for security through the auspices of local tribal leaders.⁶⁷ These tribal leaders are not associated with the host country police or military. Their hiring may arguably undercut the credibility of those institutions which it is U.S. policy to build up.

Moshe Schwartz, author of the Congressional Research Service report cited above, notes the strategic implications of whether security services should be contracted on a country-wide basis or for individual forward operating bases (FOB).⁶⁸ Acts of contractors can influence the fight and affect the hearts and minds of the local populace. What are the risks of a macro versus micro approach to such issues. He points out that there are over 10,000 private security contractors in Iraq.

With regard to oversight, Swartz asserted that boots on the ground are needed to make decisions. This is not necessarily a matter of contract administration but operational necessity. More integration is needed between the contractor and military. There is a need to understand short-term policy needs versus nation building. Some policy requirements being imposed from the U.S. just do not fit neatly in an environment of working with illiterate tribesmen or, even if literate, those who have no interest or intent to comply with U.S. record keeping requirements.

In October 2009 Dov Zakheim, former undersecretary of defense (comptroller), testified before Congress about defense procurement in current operations.⁶⁹ Though he was speaking in a broad context his comments are pertinent to a discussion of expeditionary contracting:

The fundamental issue facing [DOD] “after more than eight years of war is that it still does not have a coherent system for addressing the urgent needs of operational commanders in the field...” The procurement system “simply is not agile enough to enable commanders to respond quickly and in the most effective way possible, to the demands of countering” unanticipated battlefield developments such as the use of improvised explosive devices (IEDs). The enemy “employs easily obtainable off-the-shelf technology to undermine the effectiveness of U.S. military operations...” Yet DOD has made no permanent changes in its acquisition, programmatic and budgetary systems to account for the growing sophistication and flexibility of the threat.”⁷⁰

A General Officer observed concerning his experience of contracting in Iraq: “There are things Commanders in the field see as problems that people in DC don’t think are problems – we should listen to the Commanders.”⁷¹

The author included a case study of rough and ready contracting in Kosovo in 1999 in a previous research report.⁷² This type of rough and ready, small purchasing is done under

⁶⁷ Remarks of Marcia Bachman, ABA Public Contract Law Section, Battlespace Com. (15 Jan. 2010, teleconference). These transactions sometimes involve direct cash deals with a government contracting officer and sometimes are subcontracts.

⁶⁸ Remarks of Moshe Schwartz, (note 41).

⁶⁹ Testimony before House Armed Services Committee (8 Oct 2009).

⁷⁰ *Id.* reported in *The Government Contractor*, Para. 352 (14 Oct. 2009).

⁷¹ Gansler commission report, p.3 (note 62).

⁷² Dunn (note 13), pp. 52-55, 63.

FAR/DFARS but, basically, entirely as an exception to normal FAR rules. The skill set necessary to be successful, in the environment described in the case study, has little to do with the skills and training contracting officers receive as part of normal FAR training. However, contracting adapted to local situations and chaotic circumstances is not limited to small dollar value purchases as an interim measure before the LOGCAP contractor arrives.

Frontline contracting. RADM (ret.) David Oliver was a member of the Gansler commission and served as the Director of Management and Budget for the Coalition Provisional Authority (CPA) in Iraq, June-November 2003.⁷³ In the chaos after the initial combat operations in Iraq, in 2003, Admiral Oliver found that FAR contracting rules simply did not fit the situation. Effective competition could be obtained using methods entirely different than those prescribed in the FAR. Timelines prescribed in the FAR were inappropriate to the situation. Using his own initiative Admiral Oliver decided that when contracting with Iraqi dollars, FAR rules were not applicable and applied contracting techniques appropriate to the situation rather than a slavish adherence to FAR. This applied to multi-million dollar efforts and not primarily to small purchases.

Contracting techniques can have important strategic consequences. Admiral Oliver illustrated the point by referring to restoration of the Iraqi electrical system. Electrical power is inherently important but in Iraq it has special importance since water pressure in Iraq is not maintained via pressure obtained from elevated water tanks. Absent electrical power urban residents are also without water. The CIA had identified electrical power as the most important factor in restoring the economy and society. Saddam Hussein managed to restore electrical power after the first Gulf War within a month. In 2003 contracted efforts to restore power took far longer and initially involved rolling blackouts. This single deficiency went a long way to undermining U.S. and coalition credibility with the Iraqi people.

Admiral Oliver relates that, due to periodic electricity blackouts infant deaths in intensive care in Iraqi hospitals soared. Emergency generators were urgently needed. Admiral Oliver directed that a request for proposals be solicited over the internet with a 48-hour response time. The contract was awarded within 72 hours. There followed a protest (based on the requirement that the generators be capable of operation at an ambient temperature of 140 degrees F. vice the protestor's 125 degree standard) from an American company against the award to Siemens, which had won. Admiral Oliver personally overruled the protest and wrote his reasons across the first page of the contract. He had started his working day at 0530 when the temperature was 105 and recently noted a thermometer reading of 135.

Subsequently, the contracting operations of the CPA were subjected to criticism. This included criticism by the Special Inspector General for Iraq Reconstruction (SIGIR); criticism which the head of the CPA, Ambassador Paul Bremer, rejected as having a "major flaw" in its "failure to understand and acknowledge" the context of CPA

⁷³ Oliver e-mail to Navy JAG Office (3 May 2008); Oliver also related that the experienced Army Colonel (O-6) assigned as CPA contracting officer "could not get a contract awarded in less than six months."

operations.⁷⁴ At the same time, the director of defense procurement noted the unusual circumstances existing in Iraq; circumstances that made following normal contracting rules and providing traditional oversight difficult or impossible.⁷⁵ Audits to normal standards under the conditions prevailing in the early days of Operation Iraqi Freedom (OIF) were also considered to be impossible.⁷⁶ With Admiral Oliver's departure CPA contracting reverted to slower, less innovative but more routine practices; which comforted officials in Washington but weakened support for the U.S. mission.

BG Stephen Seay who headed OIF contracting in 2004-2005 did not have the freedom from the FAR that RADM Oliver selectively exercised for the CPA.⁷⁷ Early in 2004, however, BG Seay reviewed the statutes applicable to Iraqi reconstruction and saw first hand the vital need to rebuild infrastructure and put Iraqi's back to work. Significant indefinite delivery/indefinite quantity contracts were in place. If additional contracts and subcontracts could be viewed as for the acquisition of commercial items, considerable flexibility could be obtained under FAR and reconstruction and recovery could be expedited. General Seay had HCA authority which gave him considerable authority. However, he felt compelled to request additional authority from higher headquarters in order to implement a strategic view of the situation and implement commercial item contracting. He took, as a grant of necessary authority, a reply message that said "You have all the authority you need."

General Seay found a number of deficiencies in Iraq contracting when he arrived. A lack of program management and contract oversight were evident. Oversight can be pretty basic. Someone must know what the contractor is expected to perform, or deliver and check that it gets done. His experience with operational contracting in Iraq convinced him that authorities and efficiencies must be available "off the shelf," and not requested as permissions or waivers.

Seay thought the case for developing a joint acquisition doctrine was compelling, in light of all the unlearned "lessons learned" from previous conflicts. A joint contracting activity that could control and allocate all contracting resources in a theater would allow a rational work load allocation and setting priorities. Seay also thought LOGCAP and in-theater contracting should be included in operational plans. In addition to joint doctrine and integration of contracting into operational planning Seay also saw the need for improvements in resourcing and training.

While heading the OIF contracting effort, the Joint Contracting Command-Iraq was created under General Seay's direction in early 2005; however, the concept began in June 2004 with the arrival and approval of Ambassador Negroponte and General Casey. General Casey's support further enhanced contracting authority and facilitated access to commander's funds to support local Iraqi efforts and increase business opportunities for Iraqis. JCC-I evolved into the Joint Contracting Command-Iraq/Afghanistan (JCC-I/A)

⁷⁴ Special IG Faults CPA Oversight of \$8.8 Billion, *The Government Contractor*, Para. 64 (9 Feb. 2005).

⁷⁵ Diedre Lee (note 4).

⁷⁶ Prof. Steven Schooner (note 5).

⁷⁷ Stephen Seay, BG U.S. Army (ret.) interview (14 March 2010); see also report and article at notes 65 and 66 which contain references to General Seay's views.

which was commanded by Army Major General John Urias beginning in mid-2005. MG Urias made important contributions to strengthening the coordination and functioning of the JCC-I/A staff, some of which are recorded in Appendix. Urias was succeeded by Air Force Major General Darryl A. Scott in 2006.

MG Scott was in command of JCC-I/A during a period when many of the current DOD policies concerning expeditionary contracting came into effect, and has also observed their implementation since leaving active duty.⁷⁸ Like BG Seay, MG Scott supports the concept of a standby joint contracting command for future operations; recommending its inclusion in doctrine, planning, resourcing, and training. He also believes a new rule set, or significant modifications to FAR/DFARS are needed. The institutional response to the Gansler commission's recommendations, while positive, do not solve the problem of being prepared for the next contingency.

⁷⁸ Darryl Scott, telephone interview (15 Feb. 2010).

IV. PROBLEMS IN THE INSTITUTIONAL ENVIRONMENT

A. Defense Logistics – Who is in charge?

Before focusing on issues specific to contracting, perhaps we should inquire, “Defense logistics: Who is in charge, the military department or the combatant commander?” A brief exploration of this question is probably in order, since the obvious dispersion of contracting authority in and out of the area of responsibility and the apparent reticence of DOD to vest the combatant commander with enhanced contracting authority may, in part, rest on a fundamental tension between the authority of military departments and the combatant commanders that has never been fully resolved.

The Secretaries of the Military Departments (specifically the Secretary of the Army in this case) have the following authority:

Subject to the authority, direction and control of the Secretary of Defense and subject to the provisions of chapter 6 of this title, the Secretary of the Army is responsible for, and has the authority necessary to conduct, all affairs of the Department of the Army, including the following functions: ***

(3) Supplying.

(6) Servicing.

(10) Maintaining.

(11) The constructing, outfitting, and repair of military equipment.

(12) The construction, maintenance, and repair of [real property assets]. (10 U.S.C. 3013)

This statutory charter and additional authorities give the Service Secretaries broad discretion in areas involved in or impacting logistics. However, the authority contains a proviso, namely, that it is “subject to chapter 6 of this title.”

The chapter 6 in question deals with combatant commands. Section 165 of chapter 6 expressly states each Service Secretary “is responsible for the administration and support of forces assigned by him to a combatant command.” This responsibility is subject to the authority of the Secretary of Defense and “subject to the authority of commanders of combatant commands under section 164 (c) of this title...”

Section 164 (c) gives combatant commanders, subject only to the authority of the President and Secretary of Defense, functions that include: “(A) giving authoritative direction to subordinate commands and forces to carry out missions assigned to the command, including authoritative direction over all aspects of military operations, joint training, and logistics; (B) prescribing the chain of command to the commands and forces within the command; (F) coordinating or approving those aspects of administration and support (including control of resources and equipment, internal organization, and training) and discipline necessary to carry out the missions assigned to the command...”

The statutory authority delineated above would seem to give combatant commanders clear authority “over all aspects...of logistics” and “control of resources and equipment...necessary to carry out the missions assigned...” A complete treatment of this subject is beyond the scope of this paper. Suffice it to say that combatant commanders do not exercise the unfettered authority over logistics suggested by the quoted statutory language.⁷⁹ According to one commentator there is a lack of integration that “results in service program offices, material commands, and inventory control points writing logistics support contracts independently, without considering how to integrate logistics support in the theater of operations and how to handle the ensuing management challenges facing the combatant commander. The presence of contractor personnel in the theater may place the responsibility for their force protection, clothing, housing, medical care, and transportation on the combatant commander, but he lacks the overarching doctrine needed to address the multitude of issues that result from the presence of contractors.”⁸⁰

Although perhaps not focused on the logistics disconnection between the institutional Army and the combatant commander, a succession of Army chiefs of staff have called for a revolution in military logistics as an essential element of the Army’s revolution in military affairs or Army transformation.⁸¹ Commentators suggest the Army has fallen short. “The Army is not in the midst of a revolution in military logistics. Although the Army has revolutionized specific processes, logistics transformation has generally been characterized by...evolution...reaction...or adaptation.”⁸² The failure, noted in previous sections of this paper, to adequately address support contracts in operational planning for logistics, and other areas where contracted support is important, may be part of an underlying tension of not understanding who is really responsible or “in charge.”

Before leaving this subject, one other comment may be worth making. The military services often tout their “Title 10 authority” to say in essence that their logistics or contracting or whatever other subject happens to be at issue is their exclusive business and whoever may be questioning their actions (joint staff, OSD staff, or defense agency) has no authority in the matter. However, as the statutes cited above illustrate, Title 10 authority of the services may be expressly subject to other authorities, and, in the final analysis, the Secretary of Defense “has, authority, direction and control of the Department of Defense” of which the military departments are a part.⁸³

B. People and Training

As will be more fully discussed below, the federal procurement system generally, and the defense procurement system in particular, is highly regulated. About ninety-nine percent

⁷⁹ Paparone, “Who Rules Logistics? Service versus COCOM Authority,” *Army Logistician* (Nov/Dec. 2005).

⁸⁰ McPeak and Ellis, “Managing Contractors in Joint Operations: Filling the Gaps in Doctrine,” *Army Logistician* (Mar./Apr. 2004).

⁸¹ Anderson & Farrand, A Revolution in Army Logistics?, *Army Logistician*, 19 (July/August 2007).

⁸² *Ibid.*, 23.

⁸³ 10 U.S.C. 113 (b).

of the content of a federal procurement contract is determined by regulation, before the parties to the contract ever begin to negotiate. A fair amount of this is driven by law, but government-wide procurement regulations (FAR), defense procurement regulations (DFARS), and subordinate organization directives add considerably to the complexity and arcane nature of the system. A typical defense contract has many dozens of clauses and related representations, certifications, and attachments.

The highly-regulated nature of the system has far reaching impacts, but it is felt most directly by the contracting officers and contracting specialists who are charged with the daunting task of assuring that every contract clause, permission and approval required by law and regulation, applicable to their contracts, has been included.⁸⁴ An unfortunate result of this has been described:

If you have a system of contracting or administration where everything is written out on what a fellow should do, and there isn't any room for judgment or discretion...over a period of time, you tend not to get good people that are doing your administration or carrying out your contracts.⁸⁵

An additional problem long known, but highlighted in the context of expeditionary contracting by the Gansler report, has been that contract numbers (actions and dollars) have been rising dramatically while the acquisition workforce has been declining. The acquisition workforce means more than just contracting specialists but they have been included in the decline. The Gansler commission found Army contracting offices understaffed and their personnel under certified. Several of the commission's recommendations were aimed at this problem. This has resulted in action to remedy the situation by authorizations to hire new personnel.

Adding numbers to the workforce addresses only part of the problem found by the Gansler commission. According to Vernon J. Edwards:

The problem is not just quantity, but also quality. It is an open secret that the current workforce is not entirely up to the job of conducting contracting operations efficiently, effectively and in compliance with law...CO's [contracting officers] do not fully understand the Government's complicated rule system and rely too much on agency attorneys to tell them the rules...

The hiring surge is injecting people into a system that is not ready to receive them or to develop and retain first-rate professionals...

The Government's primary approach to workforce revitalization, which is to overwhelm the workload problem with numbers, will result in needlessly higher labor and training costs, suboptimal worker performance and suboptimal retention rates among the best new hires.⁸⁶

⁸⁴ FAR 1.602-1(b).

⁸⁵ James T. Ramey, Atomic Energy Commission, quoted in Nagle, *A History of Government Contracting*, George Washington University Press (1992).

⁸⁶ Edwards, Feature Comment: Throwing People at the Problem – Massive Hiring Will Not Revitalize the Acquisition Workforce, *The Government Contractor*, Para. 288 (19 Aug. 2009).

Edwards has no high expectations for the training the newly hired members of the acquisition workforce will receive. According to Edwards the Defense Acquisition University and Federal Acquisition Institute need to be revitalized:

They need new management and more money...The quality of the educational institution should reflect the quality of the new hires, who have more formal education than the current generation. The new educational programs must be intellectually sophisticated and professionally rigorous...⁸⁷

The situation with regard to expeditionary contracting is even more challenging than the general situation just described. Assuming the new hire is a quick learner and rises to the journeyman level of his profession, he will discover that what he has learned about normal federal contracting does little to prepare him for the environment that was encountered in the first days of operations in Kosovo.⁸⁸ It certainly will not prepare him with the business judgment and courage demonstrated by Admiral Oliver in Iraq in 2003 or General Seay in 2004. Yet those are the type of conditions expeditionary contracting personnel may well encounter.

As has been pointed out earlier in this paper, in contingency contracting decisions on whether to contract for security FOB, by FOB or country-wide, have strategic implications for U.S. interests and mission accomplishment. An expeditionary contracting officer must be able to intelligently participate in discussions of such issues, and even frame the discussion if necessary. When operating in an environment in which virtually all the normal contracting rules are waived, a contracting officer needs to be aware of local business practices and use business judgment in his dealings. Using “business judgment” in this context does not mean doing a precise price analysis but exercising judgment in the context in which he is operating. In Admiral Oliver’s case he sought the advice of Iraqi officials in determining that the 140 degree F. standard was reasonable, and then used his common sense by observing that he was sweating in a temperature ten degrees higher than the standard the protester asserted was reasonable for operation of its generator.

Training and experience, even long experience in normal federal contracting, will not prepare the acquisition workforce for the challenges of the kinds of environments encountered in Somalia, Kosovo, Afghanistan or Iraq in the early days of those operations (or even dealing with tribal leaders in Afghanistan today). Absent a long career in many different contracting environments, only specialized training involving problem solving, independent thinking, and operations in varied conditions is likely to equip acquisition personnel with the skills needed in the most challenging scenarios that may be encountered in expeditionary contracting.

David J. Berteau of the Center for Strategic and International Studies, and a member of the Gansler commission, has stated that while efforts have been made to improve training they have been inadequate.⁸⁹ Efforts have gone beyond training contracting specialists to

⁸⁷ *Ibid.*

⁸⁸ Note 72 is a reference to a case study of contingency contracting in Kosovo in 1999.

⁸⁹ David J. Berteau, telephone interview (17 Feb. 2010).

include Army units receiving pre-deployment training at the National Training Center. Berteau believes the fidelity of this training needs to be improved.

C. Procurement system - “business as usual” trumps operational needs

The basic legislation governing defense procurement is the Armed Services Procurement Act dating from 1947 and amended numerous times.⁹⁰ The original intent behind the statute, modeled in part on war emergency legislation, was captured in a line from its legislative history: “During the war, the interest of the Government has been aided time and time again, by procurement officers’ having broader authority than that permitted by the permanent laws and interpretations.”⁹¹ President Truman, when a Senator, discovered evidence of fraud, waste and abuse in war contracts; and, as President, pressed for a restrictive regulatory scheme for the new statute. Subsequently, the Armed Services Procurement Regulation (ASPR) was issued in which all “procurement personnel are enjoined to follow strictly the standards and requirements set forth...”⁹²

The ASPR not only required strict compliance with its rules but Congress began to enact additional rules. These were often a response to real or perceived scandals or mismanagement. By 1972 the Commission on Government Procurement found a “mass and maze” of regulations. In 1977 ASPR became the Defense Acquisition Regulation (DAR) and in 1984 the government-wide Federal Acquisition Regulation (FAR) was issued.⁹³ These were attempts to consolidate and simplify the regulatory scheme. The basic FAR is augmented by agency supplements. In the 1990’s acquisition reform came into vogue and numerous acquisition reform laws were passed. Regulatory reform was also attempted. The DFARS was trimmed and the material deleted from the “regulation” found its way into “guidance” (PGI), whose difference from regulation was more theoretical than real. Despite the changes over the years, the procurement regulations remain complex and prescriptive. There is little of the “broader authority” for procurement officials, contemplated by the original Armed Services Procurement Act, in the procurement system today.

One result of this is that if “there isn’t any room for judgment or discretion...you tend not to get good people...carrying out your contracting.” Operational personnel who rely on contracts for support often get frustrated by the seeming slow and unresponsive reaction of the procurement system, even when procurement officials appear to be trying to help. The problem is not always merely the people but is systemic. “If someone were asked to devise a contracting system for the federal government, it is inconceivable that one reasonable person or a committee of reasonable people could come up with our current system...It reflects the collision and collaboration of special interests, the impact of

⁹⁰ Codified at 10 U.S.C. chapter 137.

⁹¹ Nagle, 469 (note 85).

⁹² *Ibid.*

⁹³ Title 48 Code of Federal Regulations.

innumerable scandals and successes, and the tensions imposed by conflicting ideologies and personalities.”⁹⁴

The procurement system has engendered some unhealthy trends of which one is the inbred and isolated nature of the defense market it has created:

During the forty years of the cold war, a body of laws, regulations, and practices has developed that control the many daily procurement actions between DOD and its suppliers. Although each may have a valid historic rationale, the result is that there are only a few firms skilled in conducting defense business, and they may be totally isolated from, and uncompetitive with, their commercial counterparts.⁹⁵

During the April 19, 2010, hearings of the CWC, commission co-chair Michael Thibault commented on acquisition workforce issues by recalling his own experience as deputy director of the Defense Contract Audit Agency (DCAA). DCAA had seen its audit workforce shrink by nearly half and was encountering problems with a growing workload. As an alternative to re-growing the workforce it was suggested that outsourcing to major audit firms could fill the capability gap. DCAA duly prepared a contract solicitation for a large audit, professional services contract. It received *no* proposals in response to its solicitation. Chairman Thibault made no comment on the implications of his statement. The implication is obvious: major defense contractors are not in a position to supply C.P.A. services on a large scale and C.P.A. firms do not want to encumber themselves with all the specialized accounting and business systems that are necessary in DOD cost reimbursement contracting.

According to FAR 1.102 one of the guiding principles of federal contracting is to promote competition. DOD’s specialized business systems, accounting rules and other arcane practices actually limit competition to just a few firms, in many DOD efforts; whether these be hardware development competitions or major support service contracts, such as LOGCAP. In extreme cases, such as the one just given, DOD’s specialized contracting rules eliminate not only competition but all potential bidders.

One of the recurring bug-a-boos of defense procurement is the allegation that fraud, waste and abuse are costing the taxpayers millions of dollars. New programs or policies to eliminate fraud, waste and abuse appear periodically. No credible source has ever suggested that fraud, waste and abuse account for anything approaching 18 percent of the DOD contracting dollar. However, that is the added cost that the firm of Coopers and Librand found was attributable to complying with DOD-specific contracting rules.⁹⁶ A subsequent GAO review of DOD acquisition reform efforts found that they had little impact on the cost premium found by Cooper and Librand.⁹⁷ Other studies, most of which were less disciplined than the Coopers study, placed the cost premium in a range from ten to fifty percent, usually above eighteen percent.⁹⁸ A verifiable affordability problem in defense procurement is larger than losses to crooks and those who do not follow the rules.

⁹⁴ Nagle, 519 (note 85).

⁹⁵ Gansler, *Defense Conversion*, MIT Press, Cambridge (1995).

⁹⁶ Coopers&Librand, *The DOD Regulatory Cost Premium: A Quantitative Assessment* (1994).

⁹⁷ GAO, *Efforts to Reduce the Cost to Oversee and Manage DOD Contracts*, NSAID-96-106.

⁹⁸ Lovell et al., *An Overview of Acquisition Reform Cost Savings Estimates*, RAND (2003).

It is the cost burden of following DOD unique contracting rules. In virtually every case these rules have been imposed without any credible cost benefit analysis.

Inordinate attention to fraud, waste and abuse as a primary problem in the procurement system may result in more than a benign over reaction to a problem that is being and has been managed in the normal course of events. The risk exists that acquisition professionals:

Rather than transforming, learning, and challenging themselves...could be preoccupied with 'ferreting' out waste, fraud and abuse...'exposing mismanagement,'...'complying with rules and procedures' in a mode of 'hunkering down' and 'keeping out of trouble.'⁹⁹

Despite the hodge-podge, near irrationality of the defense procurement system; its corrosive division of the national industrial base into defense and non-defense sectors; its cost burden; its many "one size fits all" approaches; and, its stifling, creativity-killing rules, the system has numerous proponents; including most procurement officials that advise top leadership and management in the office of secretary of defense, the military departments and many subordinate components. Many of these officials have spent their entire careers in federal procurement and can hardly imagine a finer system. Some point out that the federal procurement system has social and economic goals that transcend mere efficiency in contracting. This argument tends to ignore the fact that many socio-economic programs implemented by the procurement system duplicate similar programs administered outside the procurement system, at the federal or state level, or both. Their argument, that hard and fast rules are needed to guarantee competition, is demonstrably false. Despite this the procurement system has adherents of almost religious zeal to whom the criticisms in this paper will appear as rank heresy, and be dismissed out of hand.

Most important for purposes of this research is the resistance that has been erected to efforts to enhance the authority of the combatant commander that might undercut the traditional role of the contracting officer, or centralize contracting lines of authority closely with the authority of the combatant commander. Contracting tradition and lore win out over the imperatives of unity of effort and unity of command on the battlefield. Contractors that constitute part of the Total Force, and who are virtually a component of the military, need to be integrated with military operations and aligned with the chain of command of the responsible commander.

DOD's resistance to an increased role for the combatant commander is not limited to contracts supporting theater operations. DOD has also limited the role of the combatant commander in helping define the requirements for defense capabilities needed to accomplish his mission.¹⁰⁰ DOD continues to under-play the needs of the combatant commander, such as when it recently rejected a recommendation of the Defense Science Board to create a rapid acquisition and fielding agency. The stateside acquisition community, and the leaders it advises, appear essentially satisfied with the system as it

⁹⁹ Kettl & Kellman, Reflections on 21st Century Government Management, IBM Center for the Business of Government (2009).

¹⁰⁰ GAO, Defense Acquisitions: Perspectives on Potential Changes to Department of Defense Acquisition Management Framework, GAO-09-295R (27 Feb. 2009).

exists, and appear to see no need for any changes, save possible incremental fine tuning of the current system.

In MG Scott's opinion, the biggest failure of DOD's contingency contracting policy has been its inability to build effective joint doctrine on how to command and control contracting and contractors in ways that hold commanders equally accountable for mission outcomes and stewardship of contract resources.

In the view of MG Scott the normal contracting system is really not operationally oriented. The practitioners of the normal system are checkers rather than operators. The system "bent when it had no choice" but traditional contracting practitioners are more comfortable with normal processes rather than embracing the realities of contingency contracting.¹⁰¹ Ambassador Karl Eikenberry thought an "Afghanistan first" strategy, as far as sourcing was concerned, was extremely important to further U.S. interests. General Scott relates that this could only be implemented after a huge struggle, and even then contracting traditionalists on his staff were reticent to implement the approved policy.

It has been argued that the FAR has sufficient flexibility to get the job done with respect to expeditionary contracting. However, this flexibility primarily comes through exceptions granted to the normal way things are done; it is the exceptions that get things done not the basic FAR. The Gansler commission observed:

It should come as no surprise that expecting an inexperienced contracting officer to learn how to adapt and implement exceptions to the [FAR] and [DFARS] in a high pressure environment with demanding time-critical priorities will result in mistakes, adverse actions and ultimately delays.¹⁰²

It should indeed come as no surprise that neither inexperienced nor experienced contracting officers will undergo instant culture change in order to operate effectively in an expeditionary environment. Yet culture change for organization and individuals is exactly what is needed. Contract oversight in the sense of monitoring contract performance so that war fighters, or (in the case of reconstruction) the local populace gets what the contract calls for, is important. After the fact auditing for costs, in circumstances where nickel and dime level accuracy cannot be expected, also requires culture change. Auditors must be experienced and confident enough to take into account exigent circumstances, and not assume that peacetime standards make sense in every situation.

The incompatibility of normal procurement rules, combined with the business-as-usual attitude of contracting officials in Washington, is dramatically illustrated in the case of bid protests and the automatic suspension provision of the bid protest regulations. Under the bid protest regulations, a protest filed before award results in an automatic suspension of contract award until the suspension is withdrawn or the protest case is decided. This has the potential to, and actually has, seriously delayed the receipt of vital supplies and services in the combat zone. This can compromise the war effort and cost lives. There is a seldom-used national security override provision that allows the award to go forward, if

¹⁰¹ Scott interview (note 78).

¹⁰² Gansler report, 16 (note 62).

suspension is determined to be contrary to the interests of national security. Unfortunately, cases have occurred where officials in Washington failed to defend against protests or to override suspensions of contract awards vital to U.S. operations in Iraq and Afghanistan.¹⁰³

¹⁰³ Dunn, 64-65, 91 (note 13) provides an example and case citations applicable to Iraq. An example from Afghanistan was discussed in the CWC hearing (note 47).

V. RECOMMENDATIONS

As the research documented in the body of this report has pointed out, despite its glacial pace of development, top-level policy in DOD directives and other policy documents now cover most of the policy issues affecting expeditionary contracting that need to be addressed at that level. Ambiguities within and conflicts between documents remain, and a number of them have been discussed in this report. These and other lapses can be addressed in periodic revisions, which are now in progress at DOD's own volition or being forced by Congressional actions. Rather than gaps in the policies that have been assembled, the main problem area is the tilt against a strong command and control doctrine for contract support operations and the tendency to accept business-as-usual processes as appropriate for operational contracting, when the evidence indicates otherwise. These tendencies are pervasive throughout the policy documents and necessarily affect policy implementation.

The Army's inadequate staffing, training and personnel policies affecting expeditionary contracting were explored by the Gansler commission and some key improvements are being made. However, these are generally long-term and only partial solutions. The Commission on Wartime Contracting has criticized the slow pace of the Army's staffing increases but it is not clear that the Army has the will or ability to hire, properly train and utilize people more quickly than it is doing. The Army is DOD's executive agent for expeditionary contracting, but neither the Army nor DOD more broadly are prepared to "hit the ground running" in the next contingency, as called for in the Gansler report.

Meanwhile, thanks to heroic efforts, personnel assigned to the joint contracting command and other contracting personnel supporting Iraq and Afghanistan, are, according to MG Scott, "making it work," and effective battlefield support is being provided in those areas of active operations. Unfortunately, too much attention is being paid to the current, evolved state of affairs as a model for the future, and there is too much pressure to force a "normal," or "business as usual," template as the standard by which success is measured there.

The appropriate vision for how DOD should prepare for contracting support in future contingencies is to accept the possibility that circumstances may be very stressful and that the locale of operations may be primitive, from a number of points of view, including the business environment. The early days and months in Iraq and Afghanistan are more appropriate as test scenarios than the past year in either location.

These observations are the predicate for the recommendations below. Training and personnel issues have been studied and commented upon repeatedly. Recommendations below regarding them are limited to those believed particularly pertinent to stressful expeditionary operations and the need to combine civilian experience with military deployment practices. More detail will be devoted to key recommendations regarding joint contracting command standby capability and a new contracting rule set for expeditionary contracting. These are deemed the premier recommendations of this report and are in need of immediate attention.

N.B. Not expressly included in these recommendations but certainly heartily endorsed is an unimplemented Gansler commission recommendation for “legislation to provide flexibility in funding – [to] enable flexibility through an adequately resourced contingency operations transfer fund. This would be a defense transfer fund without ‘color of money’ or fiscal year limitations with DOD responsible for providing Congress with insight via reporting...” The model for this is the congressionally-approved Balkans “Overseas Contingency Operations Transfer Fund.”

A. Standby joint contracting command

The idea of a rapidly-deployable, joint contracting command was contained in the Gansler commission report.¹⁰⁴ Such an organization needs the capability to “hit the ground running.” However, the joint contracting command recommendation was never included in the list of tracked and monitored recommendations. A Joint Theater Contracting Command/Center (JTCC) is also discussed in the ADUSD (PS) Concept of Operations in the following language:

A JTCC is a temporary organization that is stood up by a [combatant commander] to provide contracting during combat operations, post-conflict operations, and contingency operations. The JTCC is led by a senior commissioned officer with appropriate acquisition experience and qualifications to act as head of contingency contracting...in theater. The JTCC can execute contingency contracting for a single [combined/joint operations area], multiple CJOAs, or an [Area of Responsibility]...The JTCC...is normally organized around a designated service component’s existing contract [command and control] construct for contingencies and operations...[In] a JTCC, the lead service component is augmented by other partners (another service, [combat support agency], interagency, or multinational partner) to ensure synchronized, integrated action, and unity of effort.¹⁰⁵

The Concept of Operations describes the mission of JTCC as coordinating with the theater head of requirements definition and program management, to provide strategic theater-level operational contingency contract management. The JTCC is to integrate and synchronize all aspects of theater and operational-level contracting support, management and execution. When so directed, the JTCC can serve as lead office for all contingency contracting in support of the joint force mission. It synchronizes and coordinates the activities of subordinate contracting offices and other contracting entities operating in the Area of Responsibility, including interagency and international.

The idea of a *standby* Joint Contracting Command or JCC differs somewhat from the JTCC described in the Concept of Operations, and incorporates the idea that a JCC must be able to hit the ground running. The standby JCC exists in cadre form in each combatant command. Since it is a standby organization it makes sense that much of its personnel strength should be drawn from the reserve component. Conceptually the JCC cadre should be able to activate JCC’s in small, medium or large size. A large JCC might be comparable to JCC-I/A.

¹⁰⁴ Gansler report, 98, 105 (note 62).

¹⁰⁵ Concept of Operations, 59-60 (note 21).

The cadre of the standby JCC, who may have dual assignments in the organization of the combatant commander, engage in planning for future operations, and identify training opportunities for their augmenting reserve personnel. The reservists could be individual (I.M.A.) reservists; however, it may also make sense to establish one or more reserve units to centrally manage the standby JCC reserve force.

Planning for JCC operations includes surveying the business practices and technological capabilities of potential targeted locales. For example, will it be possible to obtain effective competition through the means of internet solicitations. Are banks and other financial institutions likely to be available? Will language skills and cultural sensitivity be important? To what extent will the local economy be able to support joint force needs? Is it strategically important to contract with local businesses? This type survey and planning should help identify the personnel skills and technical capabilities needed by the JCC when it deploys.

As discussed below, one of the ways to obtain the necessary skill levels for the reserve portion of the standby JCC is to make reserve participation a condition of employment for certain civilian positions (e.g., selected GS-1102 positions) and then assign those reservists to the standby JCC. Likely candidate positions are those already encumbered by reservists or new positions being added as part of the general build up of the acquisition work force. Designating fewer than ten percent of relevant acquisition positions as “reserve-required” would create a large pool of personnel to be mobilized if needed.

An important aspect of having an existing organization which focuses on its potential activation and the important mission it will perform, is the need to grow a culture that rejects the notion that creativity is anathema and that business-as-usual is good enough. Organizational development and culture change will be aided by operating under a separate set of contracting rules, as discussed in the next recommendation.

As noted below, it is vitally important that the head of the standby JCC be designated an HCA. Under DFARS 218 this, in turn, authorizes him to act as head of agency for a limited number of crucial functions, most notably setting the limits for simplified methods of acquisition – essentially broad exceptions to normal FAR contracting rules.

B. Expeditionary contracting rules

It is impossible to predict when or whether the legislative changes recommended in this section will be enacted or, if legislative changes are made, what exact form the legislation will take. Pending such changes the standby JCC and other operational contract support organizations will be operating under existing procurement laws. Planning for future operations and culture change must take place under that regime. It is essential, however, that the maximum flexibility be wrested from the existing system, prior to the activation of a standby JCC.

In addition to planning to utilize the flexibility available under simplified acquisition methods, other waivers, exceptions and deviations may be necessary, and should be

sought in advance. One problem encountered in Iraq was that minor construction and maintenance of facilities contracts were sometimes awarded as cost-reimbursement contracts, due to risks incident to the security environment. This, in turn, led to the government obtaining title to equipment and material used by the vendor. Upon closeout of those contracts, the government was faced with a property management burden with respect to the material acquired; material that was often of essentially no value to the government. Waivers and deviations from the standard approach should be sought, so that decisions can be made that are in the government's interest under the particular conditions.

Some socio-economic rules and country-of-origin requirements are potential candidates for requests for waivers. Other areas that may need attention may well come to light in the planning process mentioned in connection with the recommendation relating to the standby JCC.

The FAR approach to contracting has been discussed above. The FAR approach is to tightly regulate each transaction. This is in strong contrast to the commercial approach to the purchase and sale of goods under Article II of the Uniform Commercial Code (UCC). The UCC seeks to facilitate the transaction and guide the parties to commercially-reasonable outcomes. Although the UCC establishes a baseline of regulations, most of these can be overridden by agreement of the parties to the transaction; other provisions exist only as "gap fillers" to provide coverage when the parties failed to include necessary terms in their contract.

The legislative proposal for a set of contingency contracting rules has, as its primary intent, the vesting of broad authority in the Secretary of Defense and combatant commanders to execute contractual instruments that may be required in circumstances that cannot be entirely predicted ahead of time. It authorizes, but does not require, the issuing of contracting regulations to supplement the basic legal authority created. If regulations are issued, they should be simple and easily understood, and their purpose should be to *facilitate* transactions that are *fair and reasonable* under the circumstances, rather than to *regulate* and *control* transactions.

The following recommended legislative language can be placed in an appropriate location in title 10, U.S. Code, possibly added as a new section 169 of chapter 6 of that title. The public law enacting this provision should state that it is effective upon enactment.

Sec. 169. The Secretary of Defense and the commanders of combatant commands may enter into and perform such contracts, leases, cooperative agreements, or other transactions as may be necessary in carrying out operations under this section with any person, firm, association, corporation, nonprofit institution, agency or instrumentality of the United States, or, of a foreign government, on such terms as the secretary or commander may deem appropriate.

(a) Operations covered by this section include (1) contingency operations as defined in section 101 of this title; (2) operations involving the deployment of elements of the Armed Forces outside the United States for the provision of humanitarian assistance, disaster relief, support of law enforcement (including immigration enforcement), and

operational training exercises related to any of the foregoing operations; and, (3) other operations designated by the Secretary of Defense.

(b) Chapter 137 of this title; title 41 United States Code (except section 11 thereof); subchapter V, title 31, United States Code; and, other laws of the United States specifically applicable to the procurement of supplies and services do not apply to this section. Provisions of law authorizing and regulating advance payments and indemnification apply.

(c) The Secretary of Defense may delegate authority under this section. Combatant commanders may delegate their authority under this section to senior contracting officials of their command including senior contracting officials of subordinate joint commanders. Senior contracting officials receiving delegated authority may re-delegate authority to qualified subordinates by granting warrants to exercise this authority in whole or part.

(d) The Secretary of Defense may prescribe regulations for the exercise of authority granted under this section. Combatant commanders may prescribe regulations for the exercise of this authority within their commands *provided* such regulations are not inconsistent with any regulations that may be prescribed by the Secretary of Defense. Title 5, United States Code, section 553 (a) (2) is applicable to such regulations.

(e) The following principles apply to this section:

(1) To the maximum extent practicable competitive procedures appropriate to the circumstances shall be utilized in awarding contracts for the purchase of goods or services;

(2) To the maximum extent practicable goods and services shall be purchased only from sources known to be trustworthy and reliable;

(3) High standards of ethical conduct, honesty and fair dealing are expected in all transactions;

(4) Whenever possible solicitations and purchases of goods and services shall be conducted so as to facilitate the participation by United States business concerns and, in a manner that allows substantive participation by small business concerns.

(f) A combatant commander may exercise the authority of the secretary of a military department under section 2373 of this title using any funds available to the commander. Purchases may be made in quantities necessary to conduct effective field testing.

(g) Solicitations, contract instruments, or regulations, as the case may be, shall provide for (1) an administrative procedure to protest the solicitation or award of a contract for supplies or services; and, (2) an administrative procedure to challenge a decision with respect to the interpretation, or administration of a contract for the purchase of goods or services, or, an alleged breach of contract.

(h) The authority granted by this section is in addition to any other authority of the Secretary of Defense. Unless the context clearly dictates otherwise provisions of this section shall be construed as grants of authority rather than imposing procedural restrictions.

C. Personnel

The Gansler commission report made numerous recommendations with respect to personnel policy in the context of Army expeditionary contracting. It is not the purpose here to repeat those recommendations. The instant recommendation is believed to complement the Gansler recommendations and provide a partial solution to part of the problem identified in the Gansler report.

It is recommended that selected civilian acquisition positions require, as a condition of employment, that their incumbents be members of the military reserve. This recommendation was mentioned as part of the standby JCC recommendation, but it is not intended that it be limited to the standby JCC concept. It is deemed to have broader application. Civilian acquisition specialists who are reservists brought on active duty could be used in a variety of ways. They could be deployed under circumstances other than the standby JCC or they could back-fill stateside military positions of uniformed personnel that are deployed.

As suggested above, the most likely candidate positions for this are positions already filled by reservists or new positions added to an organization. These positions could be widely spread throughout the acquisition community, so that no one organization is hard hit by reserve activations among its civilian work force.

It is understood that the action recommended may require coordination with the Office of Personnel Management, and a determination might be made for legislative authorization. It is recommended that the coordination and study that may be necessary to effectuate this recommendation be undertaken expeditiously.

D. Training

The skills required for the kind of planning and contracting applicable to personnel to be assigned to standby joint contracting commands, or other positions that will operate outside normal FAR rules, are not being addressed in current training. Moreover, it is doubtful that the experts assigned to the Defense Acquisition University and other training establishments of the federal contracting community possess the knowledge or skills required to develop and present such training.

If DOD takes operational support contracting seriously, and if the recommendations resulting from this research, or something substantially similar, are put into effect, DOD will need to make resources available to acquire the expertise to develop and execute training necessary, in a culture significantly different from the culture associated with the traditional, over-regulated acquisition system.

It is recommended that DOD commission a study of the personal characteristics and skills needed to conduct contracting in a relatively unregulated environment, where strategic issues, local conditions, and business details all need to be integrated, and sound

business judgment applied. New methods and institutions for delivering the training required may be needed.

APPENDICES

I. PERSONAL CONTACTS/INTERVIEWS

Marcia Bachman, Office of General Counsel, U.S. Air Force (teleconference, 1/15/2010)

David J. Berteau, Center for Strategic and International Studies, (telephone interview, 2/17/2010)

Douglas Brooks, International Peace Operations Association (telephone interview, 1/18/2010)

Alan Chvotkin, Professional Services Council (interview, 1/19/2010)

James J. Dunlap, U.S. Agency for International Development (interview, 1/12/2010)

Jacques Gansler, University of Maryland, former USD (AT&L) (interview, 3/10/2010)

Gary Mostek, Department of Defense (interview, 1/28/2010)

David Oliver, EADS-North America, former director of management and budget, CPA (e-mail exchanges, April 2010)

Darryl Scott, Boeing Co., former commander JCC-I/A (telephone interview, 2/15/2010)

Stephen Seay, Seay Business Solutions LL.C., former commander JCC-I (interview, 3/14/2010)

Stan Soloway, Professional Services Council (interview, 1/19/2010)

Allison Stanger, Middlebury College (presentation, Q&A, 1/12/2010)

Moshe Schwartz, Congressional Research Service (teleconference, 1/15/2010)

In addition to the personal contacts above and sources cited in the text the author's views were also influenced by personal contacts with the director of defense procurement and acquisition policy and other senior officials of DOD in the context of the author's service on the Defense Science Board task force on urgent operational needs (2009) and on other occasions; and, by interactions with Army officers attending the senior service school fellows program at the University of Texas (2007, 2008, 2009).

II. ABBREVIATIONS

ABA	American Bar Association
ADUSD (PS)	Assistant Deputy Under Secretary of Defense (Program Support)
BG	Brigadier General
BSC	Balkan Support Contract
CBO	Congressional Budget Office
CJOA	Combined/Joint Operating Area
CJCS	Chairman, Joint Chiefs of Staff
CO	Contracting Officer
CPA	Coalition Provisional Authority
CRS	Congressional Research Service
CWC	Commission of Wartime Contracting
DCAA	Defense Contract Audit Agency
DCMA	Defense Contract Management Agency
DFARS	Defense Federal Acquisition Regulation Supplement
DOD	Department of Defense
DODD	DOD Directive
DODI	DOD Instruction
FAR	Federal Acquisition Regulation
FOB	Forward Operating Base
GAO	Government Accountability Office
HCA	Head of Contracting Activity
ICAF	Industrial College of the Armed Forces
ICRC	International Committee of the Red Cross
JCASO	Joint Contingency Acquisition Support Office
JCC	Joint Contracting Command
JP	Joint Publication

J-STARS	Joint-Surveillance and Target Attack Radar System
JTCC	Joint Theater Contracting Center
LOGCAP	Logistics Civil Augmentation Program
MEJA	Military Extraterritorial Jurisdiction Act
MG	Major General
NDA	National Defense Authorization Act
OSD	Office of the Secretary of Defense
PGI	Procedures, Guidance & Information
PSC	Private Security Company
RADM	Rear Admiral
SIGIR	Special Inspector General, Iraq and Afghanistan
SPOT	Synchronized Predeployment Operational Tracker
UAV	Unmanned Aerial Vehicle
UCC	Uniform Commercial Code
UCMJ	Uniform Code of Military Justice

III. COMMENTS ON JOINT CONTRACTING COMMAND – IRAQ/AFGHANISTAN

The comments below were kindly contributed by MG Darryl A. Scott, U.S.A.F. (ret.) currently corporate vice-president contracting and pricing for the Boeing Company. They are included here as of potential value to officials charged with implementing a standby JCC concept who look for positive examples and pitfalls from previous experience. The words are those of MG Scott with deletions shown by ellipses. The author has taken the liberty of making editorial changes and injected some comments noted in *italics*.

General Scott: MG John Urias...was JCC-I/A commanding general from Jan 05 to Feb 06. He made several important contributions to the evolution of contracting support in large scale contingencies. He was responsible for bringing Afghanistan support contracting into the JCC. Although he was not able to achieve full unity of command, it was a tremendously important step.

MG Urias also built a joint/general staff for the command (J-1, J-3, J-4/8, and J-6) and developed the concept of operations on how to use it. This was a HUGELY important and grossly underappreciated development. Without an effective Joint Staff it is impossible to exercise agile, responsive contracting command and control to support the needs of field commanders.

The JCC-I/A J-Staff became the focal point for our participation in the Combined/Joint Task Force boards and panels that assisted Multi-National Force-Iraq and Combined Forces Command-Afghanistan commanders in developing and implementing their campaign plans.

Most non-contingency contracting staffs focus on resources (budgets, staffing, training, tool support) and pre-award transaction processes that are above CO level oversight, process quality, and policy enforcement. They are not designed to be accountable for broader (i.e., C/JTF) mission outcomes. The J-Staff provided a focal point within the JCC to establish mission accountability.

The foresight of MG Urias allowed MG Scott to benefit from his work and build on it to develop the next phase of a contingency contracting concept of operations.

Before recounting his own experience at JCC-I/A MG Scott notes: DoD's biggest failure in contingency contracting policy has been its failure to build effective joint doctrine for how to "command and control" contracting and contractors in ways that hold commanders equally accountable for mission outcomes and good stewardship. Peacetime rules almost seem to assume the two are at odds.

MG Scott begins his account of his tenure as commander JCC-I/A with an anecdotal illustration to address the preceding comment: Upon arriving in late January 2006 JCC-I/A has two small but powerful contracting staffs under what the Army called Principal Assistants for Contracting (PARC) and an embryonic but quite capable J-Staff. *Resourcing tasks would be much more efficiently handled by the J-Staff (J-1, J-4/8, J-6) for a relatively small Command than by two PARC staffs.* I had to hammer pretty hard on one of my PARCs to get him to give up resourcing. This allowed PARCs to operate with much smaller staffs and concentrate on operating effective transaction processes.

Unfortunately, it was soon apparent that the PARC's focus on transactions prevented them from being effective in broad mission accountability. *General Scott provided an example of ineffective support for the Iraqi national police immediately following the bombing of the Golden Mosque which ignited increased sectarian violence.* It turned out that the purchase request had been funded with two "colors of money" reconstruction and support for equipment. One PARC had authority to spend one "color" and the other PARC could only spend the other "color" so the purchase request ping-ponged between the two staffs for literally months. Washington had created the problem of staffs with different colors of money thinking it would make reporting to Congress on the two appropriations were spent easier.

Each PARC considered spending money for which he had no authority a violation of the Anti-Deficiency Act (not true), which was a key management control item stateside, and therefore it would be improper for

them to execute. Neither acted as if they considered the need to get more police on the streets quickly to be in any way more important than insuring we did not get dinged for a process violation. Neither staff had any process to identify a potential customer mission failure, much less prevent one.

These folks were not lazy or incompetent. All wanted to believe they were customer focused. They were steeped in peacetime processes and had never been taught appropriate techniques for managing in large scale contingencies. Add to this micro-management from Washington and to-the-penny auditing and they never had a chance to get it right.

As HCA MG Scott disestablished the two “color of money” PARCs and stood up PARCs for Iraq and Afghanistan. He also fine tuned and evolved the J-Staff as established by MG Urias. The result was an amazing reduction in contract lead times and a staff that was “situationally aware.” However, more ‘help’ soon arrived from Washington. MG Scott’s reconstruction PARC, an Army contracting colonel, rotated and was replaced by a colonel program manager. Washington’s theory being acquisition corps colonels were interchangeable. Not being certified MG Scott could not pass his (Army) contracting authority through him and had to vest the new colonel with tactical control while assigning process responsibility to a GS-15 civilian contracting officer, assisted by a lieutenant colonel- a kludge that worked.

The program manager colonel actually proved a benefit by establishing new relationships with the multi-national force and maneuver headquarters, beyond only logisticians, that JCC-I/A had not previously had. We gave the PM colonel a different kind of staff, one that focused on tactics, techniques and plans rather than processes which allowed us to position resources (our own and contractors) to respond to change to changing tactical situations in 8 to 48 hours vice 45 days in the old days. He focused on tactical outcomes in support of operational commanders.

Lessons were learned from the experience with the PM colonel that were applied in both Iraq and Afghanistan. When the PM colonel rotated his replacement – a contracting colonel – got two staffs one for operations and one for his PARC responsibilities.

MG Scott states all was working well, incredibly well. By the time General Petraeus started the ‘surge’ JCC-I/A could support the encampment – barracks, command posts, utilities, equipment, support services – of an Iraqi army brigade of 4,000 troops anywhere in the country in 55 days. Then it began falling apart. Why?

The folks who knew how to do it rotated home. Likewise JCC-I/A’s multi-national command partner LTG Odierno’s III Corps HQ was replaced by LTG Austin’s XVIII Airborne Corps, great soldiers, but they had not been there when we built up the capability and they had no one at home to exercise and train with.

AUTHOR INFORMATION



Richard L. Dunn is a private consultant providing advice on the implementation of technology in the military and civil sectors through innovative means; he analyzes laws, policies and practices and their impact on national security and on the development and deployment of technology. Mr. Dunn served as Visiting Scholar and Senior Fellow at the University of Maryland (2000-2007). He was General Counsel of the Defense Advanced Research Projects Agency (1987-2000). Previously he was with the Office of General Counsel, National Aeronautics and Space Administration; private legal practice and served nine years on active duty with the U.S. Air Force. Mr. Dunn has been appointed to serve on several task forces of the National Academy of Science and Defense Science Board. He has law degrees from the University of Maryland and George Washington University (Highest Honors) and a bachelor's degree *cum laude* from the University of New Hampshire. He has published numerous articles on legal subjects; written research studies on contractors on the battlefield; and, also published articles on military history. He is a member of the editorial advisory board of The Government Contractor magazine. Mr. Dunn and his wife Karen reside in Edgewater, Maryland.

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