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## SECOND SERIES

PRACTICAL TIGHT-KNIT BRIEFINGS INCLUDING ACTION GUIDELINES ON GOVERNMENT CONTRACT TOPICS

### REGULATING CONTRACTORS IN WAR ZONES: A PREEMPTIVE STRIKE ON PROBLEMS IN GOVERNMENT CONTRACTS

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The increasing use of contractors by the U.S. Government to provide a wide range of services to the military and other institutions in war zones has been well documented.<sup>1</sup> These contractors—sometimes referred to in scholarly literature as “private military companies” and “private military firms”—are subject to regulation under several layers of legal rules: international and domestic U.S. law, local law, and the law of war, as well as the contracts under which they operate.

At present, various institutions are actively seeking to improve the regulation of Government contractors in war zones. On the legislative front, committees in both the U.S. House of Representatives and the U.S. Senate have held hearings on Government contractors,<sup>2</sup> including private security firms, providing services in Iraq and Afghanistan.<sup>3</sup> The Democratic

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Policy Committee of the Senate has held a series of hearings, mostly critical, concerning the current contracting practices in Iraq.<sup>4</sup> Contracting in war zones has also been a recurring issue during the debates on annual defense authorization bills. For example, the House adopted a bill, “Contractors on the Battlefield Regulatory Act,” as part of the National Defense Authorization Act for Fiscal Year 2006,<sup>5</sup> although it was eventually dropped from the final Act<sup>6</sup> during the conference committee meeting. In addition, the Government Accountability Office (and formerly, the General Accounting Office), has issued several reports to Congress related to contracting in war zones.<sup>7</sup>

Both governmental and private institutions have also provided their input into improving the agency and military department regulations applicable to contractors in war zones. Over 400 comments were submitted to the draft DOD Directive “Management of Contractor Personnel During Contingency Operations.”<sup>8</sup> Twenty-six organizations and individuals submitted comments on proposed Defense Federal Acquisition Regulation Supplement provisions published in March 2004. The final rule, issued by the DOD in May 2005, provided the most comprehensive regulatory guidance so far.<sup>9</sup> The DOD issued subsequent DFARS amendments in June 2006 as an interim rule without opportunity for prior public comment.<sup>10</sup>

Other initiatives include the American Bar Association Section of Public Contract Law’s Battle Space Procurement Task Force created in 2004. The Task Force met with military officials for the purpose of drafting new DFARS provisions on command authority over the con-

tractor employees<sup>11</sup> and has communicated its proposals to the Army.<sup>12</sup> The ABA has also provided comments on the most recent changes to the DFARS.<sup>13</sup> The Professional Services Council, a trade association of various Government contractors providing services in Iraq, Afghanistan, and other foreign countries, has likewise provided its input in the process, including a joint “lessons learned” initiative with the Army Materiel Command and other Government representatives.<sup>14</sup> Similarly, the Council of Defense and Space Industry Associations, an umbrella industry group, has provided comments on various regulations.<sup>15</sup> Also noteworthy are law review articles recommending improvements in the regulation of Government contractors in war zones.<sup>16</sup>

In light of these recent developments and initiatives, this BRIEFING PAPER analyzes the current rules that regulate the operations of Government contractors in war zones and makes suggestions for their improvement. A special emphasis is placed on improving contractual provisions. After a general overview of the issues involved in regulating Government contractors in war zones, the PAPER focuses on specific areas where regulations and contractual provisions could be improved. The suggestions concentrate more on the regulations and contractual provisions, and less on management of the contract, training, and other practical aspects. Despite this emphasis, both contractors and the Government should keep in mind that the efficiency of Government contracting probably depends at least as much on those practical aspects as on the rules themselves.<sup>17</sup>



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## Existing Layers Of Regulation

Currently, various documents provide guidance to the military in contracting activities and in regulating the behavior of Government contractors. These documents range from customary international law to nonbinding agency guidance materials. As this PAPER focuses on methods for improving the existing U.S. rules and regulations regarding Government contracts (and methods for improving the contracts themselves), international law is not discussed.

The detailed rules regarding the public procurement process are contained in the Federal Acquisition Regulation, enacted jointly by the Secretary of Defense, the Administrator of General Services, and the Administrator of the National Aeronautics and Space Administration<sup>18</sup> and in individual agency and military department FAR supplements, including the DFARS. The most comprehensive policy document pertaining to the behavior of contractors in war zones is a DOD instruction.<sup>19</sup> The policy decisions contained in this instruction are reflected in the DFARS, a binding document.<sup>20</sup> The relevant DFARS provisions include a contract clause to be used in contracts requiring contractor personnel to accompany U.S. forces abroad, entitled “Contractor Personnel Authorized To Accompany U.S. Armed Forces Deployed Outside the United States.”<sup>21</sup> The latest amendments to these DFARS provisions—through which significant policy changes were made without prior public comment—were issued in June 2006.<sup>22</sup> A proposed rule issued in July 2006 would amend the FAR to address issues related to contractor personnel in a theater of operations or at a diplomatic or consular mission outside the United States not covered by the DOD clause for contractor personnel authorized to accompany U.S. forces abroad.<sup>23</sup>

As noted above, the U.S. House of Representatives incorporated rules purporting to regulate contractors in war zones in the FY 2006 Defense Authorization Act,<sup>24</sup> but those provisions were not incorporated in the Senate version.<sup>25</sup> Other bills have been proposed in Congress, but their passage does not appear imminent at the moment.<sup>26</sup> Instead of adopting

binding rules itself, Congress has directed the DOD to provide guidance to Government contractors. In the FY 2005 National Defense Authorization Act, Congress directed the DOD to issue guidance materials on the management of contractor personnel and also listed issues, mostly related to security of the contractors, that were to be addressed.<sup>27</sup> The FY 2006 defense authorization bill conference report (but not the act itself) directed the DOD to address the issue of contractors not accompanying the force. Special attention was to be paid to integrated planning by combatant commanders, contractor visibility and accountability regarding contractor performance, communication of threat information, force protection and weapons issuance, and data gathering by the military.<sup>28</sup> No such comprehensive guidance has been issued as yet.

Various branches of the DOD have issued their own guidance materials on dealing with contractors. The most detailed of such documents is the Army Field Manual, “Contractors on the Battlefield,” which provides guidance to the Army commanders and their staff, executive officers, and others involved in the planning, management, and use of contractors.<sup>29</sup> A nonbinding Army Guidebook, “Army Contractors Accompanying the Force (CAF),” provides operational guidance to the Army officials and also includes sample contract clauses.<sup>30</sup> Also providing guidance are an Army regulation from 1999 entitled “Contractors Accompanying the Force”<sup>31</sup> and various instructions on specific topics such as mortuary affairs<sup>32</sup> and personnel recovery.<sup>33</sup> The Department of the Army equivalent to the DFARS, the Army FAR Supplement, formerly contained its own clause to be inserted in all contracts that may require deployment of contractor personnel in support of military operations. However, the Army’s clause, which dated from 2003, differed from the newer DFARS clause<sup>34</sup> and has since been removed from the regulations due to obsolescence.<sup>35</sup> The Air Force also has its own instruction materials.<sup>36</sup> Finally, the Joint Chiefs of Staff have issued their own military-wide guidance material, “Doctrine for Logistic Support of Joint Operations,” covering military contractors.<sup>37</sup>

Ideally, these various documents would be consistent with one another. However, the policy documents contained conflicting rules early on,<sup>38</sup> and conflicts have become even more apparent with the recent changes in the DFARS. For example, the Army Field Manual is directly contrary to required contract clauses on questions such as the use of weapons,<sup>39</sup> force protection,<sup>40</sup> the command authority over contractor employees,<sup>41</sup> next-of-kin notification,<sup>42</sup> and medical assistance.<sup>43</sup> The division of responsibilities over force protection has become an issue in litigation on contractor liability.<sup>44</sup> The courts have so far assumed that responsibility over force protection is a military responsibility, although this assumption might change in the future based on recent changes in policy documents.

These different approaches are also apparent in contract clauses and sometimes create additional confusion.<sup>45</sup> Differences between contracting agencies extend beyond rules governing the contracting process. Contract management during the contract performance phase can also vary between agencies, requiring contractors to adapt to differing expectations of different agencies.<sup>46</sup> Even though flexibility in contracting is advisable, when the goal is to regulate similar issues in similar ways, the contract language and management should be consistent when applied to different contractors and different tasks. At the moment, similar situations may receive different treatment, sometimes for the same company contracting within different Government entities. The regulation of Government contractors in war zones should be consistent and well understood by both the contractor and the contracting agency.

## Types Of Contractors

A comprehensive regulatory scheme for Government contractors in war zones must take into account the different types of contractors that operate in the war zones. The most important of these differences are based on the type of work done and, as discussed further below, the type of contract used to govern the work.

There are two main types of contractors in war zones: (1) *contractors supporting the deployed forces* and (2) *contractors engaged in reconstruction or humanitarian aid efforts*. While some contractors have employees who are closely embedded in the military units, employees of contractors that provide reconstruction and developmental assistance may have little direct contact with military units. Some of those contractors (or their subcontractors), however, provide security services, are armed, and operate in very high-risk situations. Contractors can be employed by various Government agencies, not only the DOD, and can also be employed by coalition partners, the host nation, its agencies, or other authorities (such as the Coalition Provisional Authority in Iraq). Many of the contractors operating in war zones are subcontractors or sub-subcontractors working for a prime contractor.

There are three broad categories of contractors providing support services to the Armed Forces. Theater support contractors provide services such as recurring equipment rental or repair, minor construction, security, and intelligence services or provide one-time delivery of goods and services at the deployed location. External support contractors provide services at deployed locations, for example, under a long-term umbrella contract supplemented by specific task orders. System support contractors provide logistical support to maintain and operate weapons and other systems.<sup>47</sup> In general, services the military secures through contractors range from highly technical services such as weapons systems support, intelligence analysis, and training of Iraqi forces and security guards to relatively less technical services such as mail service, transportation, food provision, and recreational services.<sup>48</sup> Contractors engaged in reconstruction efforts are engaged in activities such as disbursing humanitarian aid, repairing and constructing infrastructure, and assisting local officials. Besides those differences, both types of contractors can support the military in either hostile or nonhostile environments, where the mutual obligations of the military and the contractors are quite different.

The Army Field Manual further distinguishes between habitual and nonhabitual relationships between contractors and the military. Habitual relationships are characterized by long-term and continuous service, where the contractor provides support services on a regular basis. An example of this type of contractor is a weapon system contractor whose employees accompany the military units during deployment.<sup>49</sup>

These significant differences between the various types of contractors are manifested in the varied nature and extent of interactions between the military (or other Government agency) and the contractors. Therefore, the mutual obligations of the contracting parties should also vary from contract to contract. No single regulation can govern all contractors operating in the war zones in a uniform way. For example, training, skills, and other requirements for contractor personnel differ from one situation to another.<sup>50</sup> Regulations and guidance materials should provide a framework for considering the issues that the Government and the contractor should focus upon when conducting contract negotiations. Thus, the main vehicle for regulating contractors' behavior should be the contract itself.

A good example of flexible guidance material is the Army Field Manual, whereas the DFARS is an example of a somewhat more rigid framework. For example, the DFARS assumes that in most situations, the contractor is responsible for providing its own logistical and security support. Government support is provided as an exception to the general rule and only when it is needed to ensure continuation of essential contractor services and the contractor cannot obtain adequate support from other sources.<sup>51</sup> The Manual, on the other hand, acknowledges that in many situations, it is more appropriate for the Government to undertake these support obligations. According to the Manual, military support is most appropriate when it is less expensive than contractor-provided support, when the military controls the support needed or is the only source of support, or when divided obligations would make the military and the

contractor compete for limited resources (e.g., local facilities).<sup>52</sup> The DFARS, as a binding rule, trumps the Manual, although its approach limits the flexibility of the contracting parties and may lead to inefficient results (including competition between the Government and the contractor for local resources).

Another consequence of the variety in the services that contractors provide in war zones and the number of the agencies that hire them is that some contractors fall under very few regulations, as the most comprehensive documents address only the more common types of contractors. For example, the relevant DFARS provisions apply to contracts that involve contractor personnel "authorized to accompany U.S. Armed Forces deployed outside the United States."<sup>53</sup> It is not always clear which contractors performing services in Iraq or Afghanistan are authorized to accompany the U.S. Armed Forces and which contractors accompany other agencies. Civic action, humanitarian assistance, and civil affairs are included in the DFARS definition of "military operations"; thus, a contractor performing these duties is covered by the DFARS if it accompanies U.S. forces.<sup>54</sup>

Even if it were clear which contractors accompany U.S. forces, there would remain little regulation over other contractors. This has prompted Congress to direct the DOD to consider the appropriate regulation of contractors not accompanying the force, especially those involved in the provision of security.<sup>55</sup> As noted above, the DOD has yet to issue this guidance. Guidance should be given to all U.S. contracting agencies dealing with contractors that would be working in a war zone and to the military in dealing with all contractors operating in the war zone.

## Types Of Contracts

There are two main types of contracts governing the provision of goods and services on the battlefield: *fixed-price contracts* and *cost-reimbursement contracts*.

Under fixed-price contracts (also called firm-fixed-price contracts), the contractor agrees

to perform under the contract for a fixed price and, thus, assumes responsibility for all costs and the resulting profit or loss. Sometimes, incentive fees are provided for good performance.<sup>56</sup> Cost-reimbursement contracts are based on the idea that the Government reimburses the contractor for all allowable costs.<sup>57</sup> The cost reimbursement is then supplemented either by a fixed fee (essentially, a guaranteed profit) or a fee based on contractor performance. For example, the contract between Lockheed Martin and the Air Force for the system support of F-117 aircraft included fee incentives for improvements in fleet reliability.<sup>58</sup>

Cost-reimbursement contracts are the most commonly used type of contract in war zones because they are suitable for the volatile battlefield environment where circumstances can change rapidly.<sup>59</sup> Often, these contracts are also indefinite-delivery, indefinite-quantity contracts in which specific tasks to be performed by contractors are not identified in the contracts themselves.<sup>60</sup> Instead, as needs arise, the military issues task orders for specific duties. The most utilized type of contract in Iraq, the Logistics Civil Augmentation Program (LOGCAP), is essentially a cost-reimbursement contract. Similar general support contracts have been entered into by the Air Force (AFCAP), the Navy (CONCAP), for general support in the Balkans (BSC), and by the British army (CONLOG).<sup>61</sup> On the other hand, the U.S. Government generally hires private security companies under fixed-price contracts despite the hostile environment.<sup>62</sup>

In some situations, cost-reimbursement type contracts are unavoidable because the extent of the goods and services required depends on activities of the military, which are difficult to quantify in advance. Many contractors operating under such contracts are “embedded” to assist in operation and maintenance of computer, communication, and weapons systems. For example, the extent of weapons systems maintenance obligations depends to a large extent on the usage of those weapons, a decision taken unilaterally by the military in response to the changing conditions on the ground. The amount

of work for contractor truck drivers in Iraq similarly increases and decreases at the discretion of the military, depending on its evaluation of the security situation.<sup>63</sup>

The shortcoming of cost-reimbursement contracts from the Government’s point of view is that those contracts place more of the risk of additional costs on the Government. Also, it is difficult to create incentives (in the contract or otherwise) for the contractor to perform its functions with maximum efficiency, including engaging the most cost-effective subcontractors. Moreover, the problems are exacerbated when there is no bidding between competing contractors for specific tasks, as has often been the case with the Iraqi contracts. With indefinite-delivery contracts, the scope of the contract can be so broad that no meaningful bidding is possible; or when the scope is narrow, individual task orders can easily be deemed to be outside the scope of the contract. Being outside the scope of the general contract is an allegation regarding many specific task orders in Iraq.<sup>64</sup> These problems have led to pointed criticism by political forces<sup>65</sup> and some academics.<sup>66</sup> The DOD announced in the summer of 2006 that the largest military support contract (LOGCAP) would be replaced with a new contract where three separate bidders would compete for each specific task order.<sup>67</sup> As of early January 2007, these contracts had not been awarded.

Under fixed-price contracts, the financial risks encountered in contract performance are seemingly borne by the contractor rather than the Government because the contractor is responsible for the risk of increased costs. However, these cost savings for the Government may be illusory because the increased costs will probably be reflected in the bids submitted by experienced contractors. On the other hand, fixed-price contracts can be underbid by less experienced companies that do not accurately assess the costs related to operating in war zones. This creates an operational risk for the Government because the potential for default and poor or unacceptable performance by those companies is greater.<sup>68</sup> Fixed-price contracts may also create inflexibility

in contractual performance. Some experts have called for an increase in the flexibility in contracting and for the strict imposition of competitive bidding to alleviate these risks.<sup>69</sup>

The debate over the relative merits of fixed-price contracts and cost-reimbursement contracts brings into focus two often conflicting principles in contingency contracting—speed and transparency. On the one hand, the battlefield environment calls for rapid acquisitions with few bureaucratic barriers. On the other hand, public contracting in general requires competition, stringent oversight, and public scrutiny over the use of taxpayers' money.<sup>70</sup> Determining which of these competing interests (speed or transparency) is paramount in connection with the goods or services to be provided under a contract goes a long way toward determining which type of contract is most suitable under the circumstances. Arm's-length negotiations between well-informed parties should lead to the right decision.

### **Efficiency In Contracting & Contract Regulation**

Contracts for military support services and other services in war zones, although heavily regulated, are still contracts that must include acceptance of the terms by both sides. It is the Government's right to unilaterally require the inclusion of certain clauses in the contract, but there is no obligation on the part of the contractor to accept the contract. Alternatively, the unilaterally imposed clauses that the Government requires might increase the price of the contract, if those requirements engender greater risk and increase the cost of doing business. The basic nature of the contracting process drives the regulation of contracts for services to be performed in war zones. Allocating responsibilities and risks in advance for all contracts (e.g., requiring the contractor to obtain its own support services) will not make the contracting process more efficient because the contractor will increase the contract prices to account for the additional requirements. Arm's-length negotiations of terms can produce more efficient outcomes.

The first, and the best-known, way to increase efficiencies is to allocate the duties of the parties such that the party best suited to perform a function most efficiently will do so. When the contractor would perform services at a relatively higher cost than the Government, it is inefficient to allocate the provision of that service to the contractor. For many services, the military has a comparative advantage because of economies of scale, specialization, or preexisting infrastructure. For example, if the contractor needs to communicate between the overseas location and the United States, it may be most efficient to allow the contractor to use military communications services in areas where alternative communications channels are unavailable, unreliable, or only accessible at a very high cost.

The possibility of increased efficiency through efficient allocation of duties calls for a flexibility in regulations regarding the relative obligations and responsibilities between the military and the contractor. In some circumstances, particular services should be contracted out to the contractor, while in other circumstances, the Government itself may be in a better situation to provide the services. Regulations that inflexibly require the contractor to be responsible for certain services should be avoided.

The second way to increase efficiencies is to decrease "transaction costs," including costs of contract monitoring and enforcement. This can be achieved by streamlining the contracting process (e.g., reducing the duration of negotiations), by using relatively uniform contract clauses (so that less time is spent on training contractors, as well as military personnel who have to use the contractor support), by establishing adequate communication channels between the contractor and the supported unit, and by using other similar means. Related to those streamlining methods, it is also efficient to ensure that the contract accounts for as many contingencies as possible in advance to avoid postcontracting disputes over the meaning of the contract. Unknown or open-ended financial risks are inefficient because the contractor will have to ask a premium for assuming those risks. The premium could be avoided

if risks could be ascertained and allocated in a carefully considered contract. Finally, contracting is not efficient if one side to the contract could unilaterally change the respective duties of the parties after the contract has been agreed upon and executed. Such a change would again create open-ended financial risks for the contractor, for which a premium would be demanded. The rules currently allow for unilateral changes, giving rise to a right for the contractor to an equitable adjustment.<sup>71</sup> Still, as shown below, in certain circumstances, there are disputes over whether equitable adjustments are allowed or not. These situations create contractual inefficiencies.

The assumption that allocating risks or duties to the contractor, either through regulations or the contract itself, produces easy cost savings for the Government is misplaced. The imposition of additional risks and duties on the contractor merely operates to increase the contract price by the quantum of the risk. Contracting can be made more efficient for the Government only if risks are allocated to the party that is in a better position to manage those risks. Sometimes, this party is the contractor, but sometimes it will be the Government.

## Scope Of Contractor Activities

### ■ Permissible Activities

As noted above, Government contractors perform a wide variety of services in Iraq, Afghanistan, and in other places around the world. There is both controversy and ambiguity concerning whether these contractors should be allowed to undertake certain activities. Importantly, contractor personnel directly engaged in hostilities may lose their protected civilian status under international law and become illegal combatants.<sup>72</sup> Thus, a contractor's operation in war zones may carry with it various risks for its employees, including their losing prisoner-of-war status and their being prosecuted for war crimes when engaged in fighting<sup>73</sup> or even facing prosecution under the laws of the country in which the contractor is operating.

The current U.S. policy explicitly recognizes that contractor personnel who take direct part in the hostilities lose their law of war protections if and for such time as they take a direct part in hostilities.<sup>74</sup> The explanatory note to the June 2006 interim rule amending the DFARS explains that the mission statements of the contractors must not authorize the performance of any inherently governmental military functions, such as preemptive attacks.<sup>75</sup> The DFARS restricts contractor personnel's use of deadly force against enemy armed forces to two circumstances. First, they are authorized to use deadly force in self-defense.<sup>76</sup> Second, private security contractor personnel may use deadly force "when necessary to execute their security mission to protect assets/persons, consistent with the mission statement contained in their contract."<sup>77</sup>

Given the nature of the circumstances under which they must operate, Government contractors under the current DFARS rules may be called upon to perform functions that could be characterized as direct participation in hostilities.<sup>78</sup> The problem is that there is no clear demarcation between direct and indirect participation. It is certainly possible for the contractor to perform inherently governmental functions and to directly take part in hostilities while believing in good faith that its activities are permissible. Presumably, the Government would be in a better position to assess whether specific tasks fall outside the permitted scope of activities, and perhaps legislation in this area is warranted. (For example, a congressional bill proposing to ban contractors from engaging in certain activities, such as interrogations, was narrowly defeated in a floor vote.<sup>79</sup>) However, when performing such duties subjects the contractor to liability to third parties, it should be the Government's corresponding responsibility to provide compensation for losses incurred. Therefore, the contract should include provisions that would indemnify the contractor for any losses incurred and impose obligations on the Government to actively assist the contractor in resolving any international law-based disputes that arise from direct participation by contractor personnel in hostilities or that would incorporate

contractor personnel into the force in such a way as to preserve their status (either lawful combat and/or noncombatant such as doctors or medics).

#### ■ **Withdrawal, Evacuations & Release From Obligations**

Performing duties in war zones is an inherently dangerous activity, and contractors should take such risks into account when entering into contractual obligations. Still, as the extent of the risk is not predictable, contractors have occasionally pulled out from the war zones because of increased security concerns, although such instances are rare.<sup>80</sup> A contractor may have the legal right to do so because, as opposed to military personnel, the contractor only has a contractual duty to perform its services. Still, the contractor can be penalized for withdrawing from performance of its duties according to the contract provisions.

A different situation arises when the contractor is ordered to evacuate, suspend, or cancel the performance of its duties. Although the military has the right to order such withdrawals as part of its security function, the rules regarding contractual rights and obligations in the event of an evacuation are not completely clear.

The DFARS draws a distinction between mandatory and nonmandatory evacuation orders. In the event of a *mandatory evacuation*, the Government has to provide assistance to the contractor personnel accompanying the forces “to the extent available.”<sup>81</sup> Thus, providing assistance depends on Government discretion, since evaluation of the availability of assistance can itself be discretionary, and, more importantly, planning for the availability of assistance for contractors in the event of a potential evacuation is inherently discretionary. As mentioned above, such contingent obligations on the part of the Government can increase the contract price and cause inefficiencies, since the contractor may feel compelled to provide its own redundant security measures and evacuation assistance in case Government assistance is unavailable. The parties

should at least be able to provide contractually that the Government takes contractor requirements into account when planning for evacuation logistics.

Under the DFARS, evacuation assistance is provided only to citizens of the United States and of third countries. (Thus, no assistance is given to host country nationals and stateless persons.)<sup>82</sup> Such limitations seem unnecessary because evacuations can be local in nature (from one region to another), and host country nationals can be brought to perform duties from a completely different region. Those contractor employees would thus also require assistance in evacuations.

Furthermore, the rules do not provide guidance regarding contractual duties of the parties in the event of a mandatory evacuation or withdrawal. In many cases (e.g., provision of food for evacuated troops in the particular location), the contractor should clearly be relieved of performing its duties in the event of a mandatory evacuation. However, in other cases (e.g., weapons maintenance contract), the contractor should not be relieved of its obligations. The contract should thus clearly specify the obligations of the parties in the event of a mandatory evacuation.

In the event of a *nonmandatory evacuation*, the contractor has an obligation to maintain sufficient personnel in place to meet its contractual obligations, unless authorized by the Contracting Officer to leave.<sup>83</sup> The rules do not foresee mandatory Government assistance to the contractor, which is an acceptable solution as the contract may still oblige the Government to provide required assistance.

The rules do not address the situation when the availability of employees is limited due to a voluntary evacuation (possibly coupled with casualties among civilians from whom contractor employees may be drawn). Under the DFARS, the contractor must have a personnel replacement plan describing in detail how the contractor would replace employees who are unavailable for deployment or who must be replaced during the deployment.<sup>84</sup>

In sum, the rules should be much clearer in regulating the duties of the parties in case of crisis situations. Even though the contractor would be expected to obey the orders of military commanders in such circumstances, any confusion over the extent of the parties' rights and responsibilities could jeopardize the security of both the contractor and the military and compromise the mission.

#### ■ **Contract Amendment, Modification & Command Authority**

The level of risk in war zones changes quickly, requiring flexibility in specific tasks and in the procedures for making contract modifications.<sup>85</sup> However, the authority of combatant commanders and in-country program managers to divert or alter contract priorities is often unclear and has been the source of many disputes.<sup>86</sup> Contractors have complained that the dispersed command authority is especially problematic in a situation where there are not enough warranted COs deployed into the theater of combat.<sup>87</sup> Military officials have in turn expressed concern that military commanders may not be able to exercise authority over contractors when such authority would be necessary for security reasons (e.g., movement restrictions).<sup>88</sup> Even though some contracts touch upon the obligation to obey security orders,<sup>89</sup> many contracts do not.<sup>90</sup>

The general rules of Government contracting allow bilateral changes as well as unilateral changes by the CO, but the CO only, if the changes are within the general scope of the contract. In the case of a service contract, the FAR permits the CO under the contract's "Changes" clause to make unilateral changes in the description of services and in the time or place of performance.<sup>91</sup> Besides the general Government contracting rules, the DFARS clause applicable where contractor personnel are authorized to accompany U.S. forces abroad allows the CO to issue a written order making changes "in the place of performance or Government-furnished facilities, equipment, material, services, or site."<sup>92</sup> It is unclear, however, what additional authority besides the general unilateral contract modification author-

ity under the contract's "Changes" clause this provision affords.

Because of the special position of the CO, the chain of command between the military officers and contractor employees is different from the ordinary military chain of command. The contractor employees fall under their own corporate chain of command and are ordinarily not subject to direction by military personnel. The contractor is subject to contractual duties, and the Government representative in charge of relationships with the contractor is the CO and not the military commander. The CO may designate a representative to be deployed with the military unit, but both the CO and its representative are not commanding officers within the military unit. Thus, the management and control of contract performance lies with officials who are positioned outside the military chain of command.<sup>93</sup> The contractual nature of the relationship also means that the contractors cannot be compelled to stay on the battlefield when they wish to leave. The only recourse against such contractors is contractual liability.<sup>94</sup>

As originally proposed in March 2004, the DFARS clause would have granted the military commander the authority to direct the contractor to take any action, even if not covered by the contract, relating to transportation, logistical, and support requirements and, in case of an emergency, to take any action whatsoever. The counterbalance to this authority would have been the right to an equitable adjustment on the part of the contractor.<sup>95</sup> The DOD deleted those provisions before adopting the final rule in May 2005 on the basis that such command authority beyond the scope of the agreed-upon contract would be inconsistent with procurement law and policy.<sup>96</sup> The DFARS now obliges the contractor and its personnel to comply with "all applicable...[o]rders, directives, and instructions issued by the Combatant Commander, including those relating to force protection, security, health, safety, or relations and interaction with local nationals."<sup>97</sup> The DOD pins the authority of military commanders to

direct contractor employees on issues relating to force protection, security, health, and safety not upon the contract language, but rather on the sovereign authority of the commander.<sup>98</sup> If additional costs arise, the general procurement rules apply (e.g., constructive changes doctrine), or the contractor may resort to noncontractual remedies.<sup>99</sup>

However, this “solution” does not provide sufficient certainty in the relationship between the contractor and the Government. First, it is not clear what “applicable” orders the contractor is obliged to follow. At the time of contracting, the contractor must know its obligations, and open-ended obligations imposed by the Government create unpredictable financial burdens for the contractor. For example, orders related to security may carry serious financial consequences. The contractors support the position that such orders should always give rise to equitable adjustments.<sup>100</sup> Also, the line between orders that are given as a sovereign authority and orders that amount to contract modifications is blurred at best. This line is further blurred by the duty to follow orders in the contract as the DFARS currently requires. Significant practical problems arise as a result. To be assured of recovery for a constructive change in the contract, Government contractors must carefully document every direction they believe to constitute a change to the original contract terms and request written direction from the CO in a postcontract modification acknowledgement letter.<sup>101</sup> In the exigencies of war, the last thing either the Government or the contractor should want is for the contractor to spend time protecting its rights in anticipation of litigation over a constructive change. But failure to do so could be costly to the contractor. Contracts should be carefully and clearly drafted to address contract changes and the compensation issues that arise.

Thus, the DFARS rules still require considerable improvement to provide clarity and certainty concerning the relationships between the contractor and the military officers. The ABA Battle Space Procurement Task Force identified three general options for regulat-

ing the command authority of military commanders more clearly. Under the first option, the military commanders could exercise contractual authority and be given additional training on contract management. The second option is to deploy more COs on the battlefield. The third option is to make use of a contract ratification process, whereby the military commanders could direct the contractors to perform work not authorized by the contract, to be later ratified by the CO.<sup>102</sup> Another potential solution would be for the creation of a special unit (a “Contingency Contracting Corps”) that could deploy COs into contingency areas.<sup>103</sup> One or a combination of these solutions should be adopted.

Another issue related to contractual amendments not addressed by the current rules arises when the Government unilaterally adopts regulations regarding all contracts generally. Such a change in regulations may be fully warranted (e.g., to guarantee uniformity in treatment of contractors), but it may increase the cost of performance for some contractors. Therefore, provisions concerning the application or effect of such unilateral changes in regulations should be included in the contract to protect the contractor. This is especially true when the changes in rules are adopted or initiated by the DOD or through legislation (which is beyond the control of the DOD and the contractor). The contract should provide the right to an equitable adjustment in the contract price.

The final issue concerns command authority in the opposite direction—private security professionals should be allowed to issue reasonable and necessary directions to persons whom, or whose property, they are protecting. For example, under some security contracts for the protection of U.S. Agency for International Development employees, minor misunderstandings have occurred due to the belief of USAID employees that excessive security protection-related commands hamper their mission.<sup>104</sup> The authority of security providers should be regulated in detail and, at a minimum, should shield the contractors from any contractual and tort liability if their

directions are not followed and security risks or breaches materialize as a result.

### ■ Subcontracting

The current rules applicable to contractors in war zones do not specify in sufficient detail the relationships between the Government and subcontractors or the applicability of rules regulating the conduct of contractors to their subcontractors. Ambiguity in the relationship between the military and subcontractors working on its behalf in war zones is clearly undesirable. For example, whether the military has the authority to issue orders to subcontractors can be crucial in that the use of subcontractors in security functions is widespread.

Under the DFARS clause applicable where contractor personnel are authorized to accompany U.S. forces abroad, the contractor must incorporate the substance of the DFARS requirements in all subcontracts when subcontractor personnel are also “authorized to accompany U.S. Armed Forces deployed outside the United States.”<sup>105</sup> The meaning of this provision is not entirely clear.<sup>106</sup> Similar to the issue of the applicability of the DFARS provisions in general (noted above), it is not clear what “authorized to accompany the U.S. Armed Forces” means. Moreover, the substance of the DFARS requirements to be incorporated in the subcontract is not always clear. For example, there seems to be some command authority over the primary contractor (as discussed above). At the same time, the DOD position is that there is no legal relationship between the U.S. Government and the subcontractor. Any interaction between the Government and the subcontractor theoretically takes place through the prime contractor.<sup>107</sup> Thus, it is questionable whether the subcontractor is obligated to follow orders received directly from the Government. If the military can issue direct instructions to subcontractors, those instructions may constructively change the contract. The contract should make clear that changes that occur in this way are compensable. Otherwise, the contract itself may invite delays and complications while the subcontractor and general contractor stop

to create a record of the change to support a possible claim in the future. The result, in the worst case, would be that a subcontractor would refuse to comply with the military direction until the direction is transmitted through the general contractor to protect its financial interests. This process may not be possible, as a practical matter, without risking the safety of the mission. Such a situation should be avoided through a drafting process that considers these subcontractor issues and incorporates the appropriate contract language.

Finally, some DFARS rules should probably not be applied to the subcontractors at all. For example, it cannot be expected that the contractor that hires its own security subcontractor can and should limit the subcontractor’s right to carry weapons in a fashion similar to the Government restrictions on the contractor’s ability to carry weapons.<sup>108</sup> As the DFARS clearly foresees the possibility that contractors accompanying the force may (and even should) provide for their own security, armed security providers are to be expected in war zones. The rules on weapons restrictions illustrate that the applicability of rules on subcontractors should be reviewed on an issue-by-issue basis.

### Government/Military Support

A survey of military and contractor experts conducted in 2004 revealed that the Government support obligations vary from mission to mission, and that different officials have different views on what the Government support obligations should be.<sup>109</sup> The survey responses also indicated that there is “much confusion in the area of support obligations between the Government and the contractors that are performing work in the battle area.”<sup>110</sup> Since the distribution of support obligations carries strong financial consequences, responsibilities should be delineated as clearly as possible.

There seems to be at least some clarity in the general rules, as the main principle regarding Government support of contracting personnel is well-articulated—that the contractors are responsible for all support unless the

contract provides otherwise.<sup>111</sup> The rules acknowledge that the Government generally provides support to contractor personnel in certain areas such as security and emergency medical care. However, such general statements are not sufficient to efficiently distribute support obligations between the contractor and the military, and greater precision and clarity are desirable.

#### ■ Force Protection/Security

Security issues rank high on the list of priorities for contractors in war zones. Contractor employee casualties in Iraq are estimated to be greater than the total casualties suffered by any country besides the United States. The GAO estimated in July 2005 that more than 200 contractor personnel were killed in Iraq.<sup>112</sup> By one estimate, the death toll had risen to 600 by late 2006.<sup>113</sup> Due to this dire security situation, the contract price clearly rises, usually significantly, when contractors are responsible for providing their own security. According to some estimates, security costs for a typical contract in Iraq in 2004 amounted to 15–20% of the contract price, not including added costs from security-driven work delays and shutdowns, evacuating personnel, and similar indirect costs.<sup>114</sup> For some reconstruction projects in dangerous areas, security costs have amounted to well over 25% of the total contract price.<sup>115</sup> Costs for securing employees involved in providing services under different types of contracts clearly varies, but the expenditure (and thus, the contract price) is significant.

Not surprisingly, the issue of force protection is expressly regulated at least in some of these contracts. However, in many cases, the contractor has had to ensure its own security.<sup>116</sup> In some instances, the Government has not been able to provide the contractors safety equipment such as chemical protection suits, Kevlar vests, or similar items due to unavailability of the equipment.<sup>117</sup>

The coordination of intelligence and threat information between the military and contractors, especially private security contractors, has also not always gone smoothly.<sup>118</sup> As recently as May 2006, military officials serving in Iraq remained

concerned about coordination of security efforts, especially about the means of communication and information about private security companies, as well as guidance on interactions with those companies.<sup>119</sup>

Despite the high importance of security and the practical problems of providing security to contractors, the regulations in the force protection sphere have long been confusing. Different parts of the armed forces have had different guidelines. For example, while Army guidance has placed force protection responsibility with the commander, the Air Force treats force protection as a contractual matter, and the Joint Staff has viewed force protection as contractor responsibility unless contractual language provides otherwise.<sup>120</sup>

Under the DFARS, the provision of security to contractor personnel can be either the military's or the contractor's responsibility. The military responsibility arises only in locations where there is "not sufficient or legitimate civil authority" and when "the Combatant Commander decides it is in the interests of the Government to provide security" because, for example, the contractor cannot obtain effective security services, such services are unavailable at a reasonable cost, or threat conditions necessitate security through military means.<sup>121</sup> In such circumstances, the combatant commander would develop a security plan for the protection of contractor personnel.<sup>122</sup> In any case, the CO must specify in the contract the level of protection to be provided to contractor personnel.<sup>123</sup> Furthermore, in appropriate cases, the combatant commander may provide security through military means, commensurate with the level of security provided to DOD civilians.<sup>124</sup>

The contracting guidelines do not address issues related to coordination and communication duties between the military and the contractor and its security providers. In some circumstances, the contractor must have access to timely information affecting its security needs. Contracts should address the communication needs in an appropriate level of detail to ensure that Government personnel will provide critical information to the contractor in an effective and timely fashion.

The security plan is one step in the process of providing adequate and efficient protection to the contractor employees. When a contractor is closely embedded in military units, taking contractor force protection requirements into account in the military planning process as a whole seems more appropriate than requiring the contractor to provide its own security. This can make overall security programs more efficient by eliminating wasteful duplication and more effective by avoiding inconsistent security activities on the ground. Poorly coordinated security<sup>125</sup> efforts by multiple parties creates unnecessary risks (e.g., security forces accidentally treat each other as hostile combatants).

The central feature of the DFARS—shifting the responsibility for security in most cases to the contractor—causes several problems and was one of the most criticized aspect of the DFARS amendments.<sup>126</sup> Most importantly, in many instances, the contractors are not in a position to provide their own force protection. Efficient force protection often requires proactive, predictive responses to enemy and terrorist action.<sup>127</sup> Contractors would not be able to undertake such actions without risking a possible determination that they had engaged in illegal warfare. Usually, the military can offer direct force protection only for those contractors that have close relationships with the military forces, and not for those contractors that are involved in reconstruction efforts and hired by other agencies or by the Iraqi government. Even in those latter cases, however, the military can and should take the needs of contractors into account when developing an overall security plan.

As mentioned above, the military commanders can issue general orders relating to security to contractors. Force protection rules that contractors must obey include procedures for use of facilities, restrictions on the purchase of items from local markets, limitations on movement inside and outside of the military unit, and obligations that contractor employees undergo medical procedures, wear specific clothing, and follow other such rules.<sup>128</sup> However, it is not completely clear how far those gen-

eral orders can go and how the responsibility for costs associated with such orders is allocated. For example, consider transportation contractors. Contractors could be obliged to follow rules relating to route choice, types of vehicles to be used, communication devices, use of protective clothing and equipment, intervals between vehicles, times of day when travel is allowed, and so on.<sup>129</sup> Different contractors themselves may have different practices, meaning that additional military orders may increase the cost to some contractors more than others. For example, the use of ballistic helmets and vests is mandatory for all KBR employees, but not all contractors have adopted such rules. (In some cases, using certain equipment is actually not recommended because this would draw excessive attention and actually increase the risks of attack.)<sup>130</sup> The contract should make clear the types of orders that the contractors must follow, as some of the requirements can increase the cost of performance significantly.

Under the DFARS, contractor personnel are authorized to wear “military-unique organizational clothing and individual equipment (OCIE) required for safety and security.”<sup>131</sup> The DFARS provides that OCIE will be supplied by the deployment center or combatant commander, if necessary, “to ensure the safety and security of Contractor personnel.”<sup>132</sup> However, the regulations do not address the situation that occurs when the military believes that such equipment is not necessary, but the contractor believes that it is. In a cost-reimbursement type contract when the equipment is publicly available, the question is whether such costs are reimbursable. When the equipment is not available to ordinary citizens because of military rules, the question becomes whether the contractor can require the military to provide the equipment. The rules leave the determination of necessity completely to the military, creating a significant potential source of dispute. A related question is whether the contractor employees can be required to wear such protective equipment. The current regulations do not seem to provide such command authority to the military beyond general (limited) command authority over contractor

personnel, and this issue may require treatment in the contract.

A special challenge regarding the security of contractors is presented by the large number of private security companies operating in war zones. Currently, those security companies coordinate their activities with the military in Iraq through Reconstruction Operations Centers (ROCs) run by a private contractor and staffed by military and contractor personnel. The private security company may, for example, file with the ROCs its convoy route plans and then receive intelligence information about those routes. The private security company may also request military assistance from the ROCs if its convoy comes under attack.<sup>133</sup> The centers use sophisticated global positioning systems to track convoys and to warn them of potential hazards and threats.<sup>134</sup>

It has been debated whether participation in ROCs should be made mandatory for the private security companies to enhance overall security. Some companies would prefer to keep their routes confidential, believing that total confidentiality ensures better security and protects their business interests.<sup>135</sup> The contract between the security company and the Government agency employing the company should specify the relative obligations in this regard and contain language giving the military commander coordination authority over contractors.<sup>136</sup> The contract could also specify the duty of the Government to establish ROCs and to provide such security information.

In the field of contractor security, there are three general suggestions to be made. First, it should not be assumed that the contractor is in a good position to provide for its own security. Security provision is not as simple as hiring a private security company. Rather, it involves active and sometimes proactive efforts to provide a safe working environment. As discussed above, proactivity on the part of private security forces may raise questions concerning the legality of such activity and the legal status of the participants.

Second, the regulations, contracts, and those managing contractor security should consider

the security needs of all contractors, as well as the security-related activities of all private security firms. Members of the military need to know about the activities of private security companies. For example, the GAO recommended in 2005 that the DOD develop a training package for private security companies for military units deploying to Iraq. Although the DOD agreed with the recommendation, no action had been taken at least through mid-2006.<sup>137</sup>

Third, contracts should address various security issues even when the military does not assume the duty to provide security to the particular contractor. For example, if the military requires the contractor employees to either carry arms for self-defense or undergo security training, those duties must be spelled out in the contract.<sup>138</sup> Most importantly, coordination, cooperation, and communication between the contractors, their security providers, and the military may significantly reduce security risks and costs as well.

#### ■ Logistics & Basic Support

Any contractor's employees need basic services such as food, lodging, transportation, clothing, laundry and bath, refuse collection, water and sewage, electricity, mail, e-mail, phone, and other communications, banking, and religious and recreational services. The allocation of these basic service responsibilities between the contractor and military should be provided for in the contract. Contracts generally do seem to assign the responsibilities between the contractor and the military for the basic support services, even when all of the areas listed above are not covered.<sup>139</sup>

Nevertheless, there has been confusion over who has the responsibility to provide such services, and, sometimes, due to inadequate planning, contractors do not receive adequate services. For example, often military units have sufficient tents and other standard equipment only for themselves.<sup>140</sup> In some situations, contractors have been promised billeting, but it later turned out that billeting was not available, resulting in extra costs for the military.<sup>141</sup> The difficulty in obtaining transportation services further illustrates the issues that the

well-considered contract should cover. Transportation within the theater of operations can be difficult, as roads may be dangerous, and/or under military control, and transportation equipment and fuel are difficult to obtain. Different contracts provide for different solutions to these transportation needs—some require contractors to obtain their own transportation, while others provide for Government support.<sup>142</sup> In practice, contractor personnel are usually afforded transportation in military vehicles but are not provided their own vehicles for necessary transportation.<sup>143</sup> There have been instances when the military has refused to provide transportation at the last minute.<sup>144</sup> The contract remains the main instrument to regulate such situations, and thus the contractual provisions should be drafted carefully to account for this critical service.

Under the DFARS, the main principle regarding Government support of contracting personnel is that the contractors are responsible for all support unless the contract provides otherwise.<sup>145</sup> The DFARS thus assumes that generally the Government does not provide support. Moreover, the DFARS does not specify the areas of support that should be considered when contracting.

As in the case of force protection, the rules should not assume that the contractor is in the better position to provide its own support services. In many instances, it is more efficient for the Government to provide support to the contractors. For example, providing food and meals to contractor personnel along with the military units could well be the most efficient solution, especially if it is difficult to obtain food locally. Government support of this variety may avoid problems under cost-reimbursement contracts where the Government would be obligated to reimburse the contractor for support services that may be the most adequate “outside” services under the circumstances, but that the military could provide much more cheaply. This solution could also preempt disputes that might otherwise arise if the contract made the contractor responsible for its own support, but the Government decided it would prefer to provide its

own (cheaper) services.<sup>146</sup> Also, when contractor employees, especially those who are closely embedded in the military units, have living conditions significantly different from those of the soldiers, tensions might surface that could otherwise be avoided.

When the responsibility for transportation is left to the contractor, numerous problems arise, such as local licensing restrictions, unavailability of vehicles suitable for military operations, unavailability of repair parts for those vehicles in the actual location of the supported military unit, and restrictions on the locations to which leased vehicles can be taken.<sup>147</sup> The contractor can sometimes overcome those difficulties by additional expenditures, but this may not be the most efficient solution, since the military will eventually cover the costs as reflected in the contract price. Furthermore, when the contractor is responsible for its own logistical support, coordination between military units and the contractors can be difficult. Contractors can end up being in a different place at a different time from the unit they are supposed to support. Similar coordination problems occurred often in at least the early parts of the Iraq conflict.<sup>148</sup>

Thus, in the case of logistics and basic services support, the division of responsibilities should be carefully considered and then clearly provided for in the contract to avoid difficulties that may arise in ensuring support services are available for the contractor and its personnel. In addition, the contract should specify the consequences of the military’s failure to provide support as foreseen in the contract. When the contract is of the cost-reimbursement type, it might specifically provide that the contractor’s additional costs due to unprovided support are reimbursable. A fixed-price contract might equally provide that the contractor is entitled to an equitable adjustment under such circumstances.<sup>149</sup>

#### ■ Medical & Dental Care

The DFARS foresees that the Government is responsible for providing a basic level of medical care, beyond which any Government-provided care is not authorized unless specified in the

contract.<sup>150</sup> The basic level of care includes resuscitative care, stabilization, short-term hospitalization at level III military treatment facilities, and assistance with patient movement in emergencies where loss of life, limb, or eyesight could occur.<sup>151</sup> However, the contractor must reimburse the Government for any costs associated with such treatment or transportation.<sup>152</sup>

The purpose of the cost-reimbursement rule of the DFARS is unclear. It is most likely that the cost of the medical treatment would be borne by the Government in any event as the contractors include their projections of medical costs or even more likely, costs of medical insurance, as part of the contract price. Medical insurance should also be an allowed cost under cost-reimbursement contracts. If insurance is available for the contractor's personnel, the cost may be greater than if the Government provided the services directly. If not, the contractor in a fixed-price contract may find it difficult, if not impossible, to accurately project medical costs in bidding for the contract. When price is a controlling factor in awarding a contract, the net result may be the award of a contract to a naïve or unprepared contractor that could find itself unable to perform in the face of unanticipated medical costs. It is difficult to establish a level playing field when all the risks of a potentially significant contingency are shifted to a contractor that has little ability to project or control those costs during performance. The ultimate result may be distractions (or worse) for both the contractor and the Government.

The cost-reimbursement rule is also not appropriate in all cases, as the field hospitals are not prepared to account for the costs of individual treatments and do not have standard billing practices. These hospitals are just not in the position to accurately quantify exposures or to efficiently request reimbursement from the contractors.<sup>153</sup>

Finally, contracts should regulate issues relating to medical malpractice liability when the Government does provide medical services. Currently, applicable regulations do not provide guidance on this issue.

### ■ Insurance Of Contractor Personnel & Property

Under the Defense Base Act,<sup>154</sup> all U.S. citizens working on a Government contract abroad must be provided with basic workers' compensation insurance coverage. The War Hazards Compensation Act<sup>155</sup> further requires that the Government provide compensation for harms suffered through war risks. This compensation is provided both when the Defense Base Act insurance is available (the insurance carrier can claim reimbursement from the Government) and when it is not available (the injured person claims compensation directly from the Government).<sup>156</sup>

The mandatory insurance coverage in itself is a reasonable rule, and the Government will ultimately bear the costs of procuring the insurance as part of the contract price. However, the current rules and practice do not ensure that the insurance coverage is obtained in the most efficient way, as coverage in war zones is significantly more expensive than that in non-war zones.

Insurance companies typically reserve the right to cancel coverage without notice, and, if they do, contractors must acquire new policies in the middle of the engagement. In addition, insurance companies often exclude coverage for persons carrying a weapon or engaging in high-risk activity.<sup>157</sup> Coverage also may be denied when the individual is being transported on military transportation.<sup>158</sup> Moreover, many insurers exclude risks associated with war or terrorist activities.<sup>159</sup> The situation is especially problematic when small business subcontractors are involved, as for them acquiring insurance can be prohibitively expensive.<sup>160</sup> Yet, the use of small businesses in subcontracting is a general requirement of Government procurement policy, and there is little possibility to waive the small business involvement requirement in defense contracts.<sup>161</sup>

One way of reducing the costs of insurance is through a Government-coordinated or -operated program under which several contractors can pool their insurance coverage, reducing insurance costs.<sup>162</sup> The USAID and the State Department have already introduced their

Defense Base Act insurance programs, securing contractor insurance rates that are significantly lower than the rates that an individual company can obtain in the open market.<sup>163</sup>

Another issue is the extent to which the contractors operating under cost-reimbursement contracts can purchase supplemental insurance for their employees. To secure the services of qualified personnel, insurance beyond the basic coverage may be required. There have been disputes between contractors and the military about when those extra costs are justified and thus reimbursable under the cost-reimbursement type contracts.<sup>164</sup> Such issues should be regulated in the contract.

#### ■ Entry & Exit Permits

Contractors' experience in Kuwait has indicated that local visa regulations can be quite burdensome and distract from efficient performance of the contract duties. For example, contractor personnel who entered Kuwait through the commercial airport were required to leave the country every 30 days for at least 24 hours.<sup>165</sup> The DFARS, at the same time, provides that it is the responsibility of the contractor to ensure that deploying personnel have all necessary passports, visas, and other documents required to enter and exit a theater of operations.<sup>166</sup> A contractor's compliance with both requirements drives the cost of the contract up with no benefit to the Government or the contractor. A better solution would be a more flexible rule that would allow the U.S. Government to lighten visa requirements for its contractor personnel through negotiation with the host country authorities. The problem and increased costs could also be circumvented through contract provisions allowing contractor personnel access to military transportation and airports. The point is that regulation of contractors should be sufficiently flexible to allow contracts to provide solutions to such problems.

#### ■ Contract Management

Private security contractors operating in war zones have reported a lack of CO support.

There are often too few COs, and they are deployed in the theater of operations for only a short period of time.<sup>167</sup> For example, the U.S. Government has only twice as many personnel overseeing contractors in Iraq as it had in the Balkans in the 1990s despite the fact that there are at least 15 times as many contracts.<sup>168</sup> A lack of CO support is especially problematic in war zones because the constantly changing risk and other conditions often require frequent contract modifications, the authority over which is vested in COs only.<sup>169</sup>

It has also been noted that military personnel (including CO representatives) sometimes lack adequate training in their interactions with contractors.<sup>170</sup> For example, military commanders have not known that they normally need to issue orders relating to contractors through the CO, and not directly.<sup>171</sup> This lack of familiarity with the management of contractors does not only cause inefficiencies, but may also cause security risks.

Those contractual management shortcomings are not easily overcome by amending regulations or contractual provisions. Instead, training, planning, communications, and coordination need to be improved. For example, training for military personnel who would have to interact with or manage contractors should be an inherent part of predeployment training.<sup>172</sup> It has also been noted that the contracting workforce in the military is already undergoing improvement.<sup>173</sup>

## Standards For Contractors & Contractor Personnel

#### ■ Screening Of Contractors & Qualified Bidder Lists

Currently, no rules require the screening of prospective contractors before they engage in the bidding process. At the same time, establishing standards for contractors, especially in certain fields (such as security), could be useful. Such standards and lists would save time in the bidding process, since the analysis of individual bidders can be time consuming, and, in many instances, contractors need to

be hired quickly. Qualified bidder lists may also be useful for reconstruction contractors that seek subcontractors to provide security, as guidance on suitable security providers would help the contractors make a more informed judgment in the selection process.<sup>174</sup> Therefore, the contractor trade associations and the GAO have suggested the establishment of a list of qualified firms that meet Government standards, especially in the private security industry.<sup>175</sup> Another solution that has been suggested would be to require potential war-zone contractors to be accredited by an independent third party.<sup>176</sup>

Establishing standards for contractors is not without its problems. As with any Government-mandated standards, they tend to restrict competition. Also, the State Department has been reluctant to issue mandatory standards and qualified bidder lists because it believes that those standards could result in contractors asserting that any security failures that may occur were the fault of poor governmental standards.<sup>177</sup>

Even if qualified bidder lists were not established, the establishment of a central clearinghouse containing information on the potential contractors, especially of potential security providers, could improve and expedite the contracting process significantly.

#### ■ Screening & Training Of Contractor Personnel

In the absence of a formal screening mechanism for prospective contractors, the contracts themselves have typically provided mandatory requirements for contractors' employees, such as a requirement for certain levels or types of experience.<sup>178</sup> Contracts for the support of weapons systems usually require personnel with U.S. citizenship, whereas basic maintenance contracts (e.g., for food and housing services) allow noncitizens to provide such services.<sup>179</sup> The existence of such qualifying standards can be useful to avoid incompetent or unreliable contract performance. Also, contracts sometimes provide for a required level and/or prior and continuous training. However, many contracts have not specified the type of training that contractor employees were required to

receive, which has led to problems.<sup>180</sup> For example, the contracted Abu Ghraib prison interrogators allegedly did not possess sufficient experience and qualifications—it has been reported that 35% of the interrogators did not have any formal training in military interrogation policies and techniques.<sup>181</sup>

The DFARS obliges contractors to conduct “all required security and background checks” before deploying personnel in support of U.S. Armed Forces.<sup>182</sup> Also, the contractor must ensure that personnel have all special area, country, and theater clearances.<sup>183</sup> The contractor further must ensure that all of its personnel have received personal security training.<sup>184</sup> If specified in the contract, the contractor must also provide personnel training.<sup>185</sup> All deployed personnel must meet the “minimum medical screening requirements and have received all required immunizations as specified in the contract.”<sup>186</sup> If any theater-specific immunizations and/or medications are not available to the general public, then the Government must provide them at no cost to the contractor.<sup>187</sup>

With some contracts, it is difficult to ensure that all personnel have required qualifications. This is especially so when the deployment is on short notice in a country that has previously had no significant U.S. military presence. Contractors cannot be ready for any and all deployments outside the United States. For example, background checks on potential employees are easier to conduct on citizens of advanced democracies; however, as Government contractor personnel are often hired locally, thorough background checks are necessarily more difficult to conduct. For example, many countries' governments have inadequate records concerning its citizens.<sup>188</sup> This indicates the need for flexibility in devising employee qualification rules, as local employees may need to be hired for reasons of cost-effectiveness.

The regulations should remain flexible in the amount of training required for each particular task, as those tasks vary significantly. For example, training requirements for gate guards do not need to be on the very highest

level.<sup>189</sup> Furthermore, mandatory standards, combined with the requirement of using the same standards for subcontractors, do not adequately take into account the fact that many subcontractors are hired locally, where requirements such as law enforcement experience or minimum educational requirements may be difficult to fulfill. Often, the local workforce comprises as much as 80% of the on-the-ground employees.<sup>190</sup> However, for specific contracts (e.g., personal security contracts to protect high Government officials), training and experience requirements should be extensively regulated.<sup>191</sup>

#### ■ Use Of Weapons By Contractor Personnel

Before the Iraqi conflict, very few contractors in conflict zones carried weapons or were authorized to do so.<sup>192</sup> Even now, most contractors providing support services remain unarmed.<sup>193</sup> Yet, there are contractor employees who carry weapons. At the same time, security companies arm their employees as do some subcontractors. Thus, carrying weapons has become a widespread practice in war zones.

The DFARS allows contractor personnel to carry weapons only if the combatant commander and the CO authorize them to do so.<sup>194</sup> The Government officials also determine whether the weapons and ammunitions will be contractor-owned or will be furnished by the Government.<sup>195</sup> If carrying weapons is permitted, then the contractor must provide adequate training, ensure that the personnel are not barred from possession of firearms by U.S. law, and ensure all guidance and orders of the combatant commander regarding the weapons and ammunition are obeyed.<sup>196</sup>

The DFARS further specifies that liability connected with the use of any weapon rests solely with the contractor and its employees.<sup>197</sup> As with many other clauses that purport to shift the risk of potential liability completely and inexpensively to the contractor, the real consequences of this liability allocation are not certain. First, the contractor is likely to purchase liability insurance that will be reflected in the contract price. Second, there can be a conflict between provisions shifting liability to the con-

tractor and provisions allowing for indemnification of contractors by the Government. Third, liability to third parties may be precluded under the immunity provided by the Government contractor defense. (The second and third issues are discussed further below.)

#### ■ Discipline Of Contractor Personnel

Congress has recently adopted changes in the Uniform Code of Military Justice purporting to subject contractor personnel accompanying the armed forces to the military justice system not only in times of “declared war,” but also during a “contingency operation.”<sup>198</sup> Previously, contractors could be liable for criminal acts under the Military Extraterritorial Jurisdiction Act (or in some circumstances, under the War Crimes Act), but were to be prosecuted in the federal court system. Such prosecutions have rarely taken place.<sup>199</sup> Under the DFARS, the contractor has the duty to inform its non-host country personnel of potential liability under MEJA and the War Crimes Act, but not under the UCMJ. (The changes in the UCMJ are more recent than the latest DFARS amendments, again illustrating the conflicts between various documents.)<sup>200</sup>

It is still uncertain what the exact consequences of subjecting contractors to the military justice system might be, but it seems that the military would acquire the direct authority to discipline contractor employees. The expanded application of the UCMJ will certainly precipitate a long series of constitutional and other issues that will need to be resolved to determine the ultimate application and scope of this change. Furthermore, the military justice system contains a number of rights that should be made available to contractor personnel such as assigned military counsel and other judicially protected rights. While the expansion of UCMJ jurisdiction may seem like a good fix to commanders on the ground, it could create a complexity that only exacerbates their problems. It remains to be seen how this situation will unfold—the implementation, however, may well be fraught with substantial confusion and uncertainty. Previously,

it was the duty of the contractor to discipline its employees, up to removal from the place of duty and termination of employment. Military commanders could not directly impose disciplinary measures on the contractor employees.

The main instrument for the military commanders to discipline contractors has traditionally been the power of removal. Under the DFARS, the Government, at its discretion, may order the removal and replacement (at the contractor's expense) of any contractor personnel who "jeopardize or interfere with mission accomplishment" or who "fail to comply with or violate the contract."<sup>201</sup> In most cases, this ultimate disciplinary measure should be sufficient to motivate the contractor to discipline its own employees to avoid the costs related to replacement of removed personnel. The Government's complete discretion to remove contractor personnel without the corresponding obligation to provide compensation, however, raises serious questions. For example, there are no provisions that prohibit the removal power for discriminatory reasons. It may not be appropriate to allow the contractor to contest the removal in advance, as delays in removing personnel could jeopardize the mission. However, the contractor should be allowed to contest the removal after the fact, with the right to receive compensation for increased costs if the removal was unwarranted. Such disputes should be resolved in the same manner as any other contractual disputes since unlimited Government discretion may shift unpredictable risks and costs to the contractor.

## Liability Of Contractors & The Government

### ■ Liability Among Contractors & The Government

There have been several incidents in which military personnel have fired upon private security companies that were serving reconstruction contractors and in which private security company personnel have fired upon military personnel ("blue on white violence").<sup>202</sup> The private security companies operating in war zones

are especially vulnerable to such mistaken engagements, as they often employ local employees, who may be mistaken for insurgents.<sup>203</sup>

The military is usually immune from tort-based lawsuits by contractors themselves or by family members of injured contractor personnel.<sup>204</sup> Moreover, the DFARS clause applicable where contractor personnel are authorized to accompany U.S. forces abroad provides that "the Contractor accepts the risks associated with required contract performance" in "dangerous or austere conditions."<sup>205</sup> The exact scope and meaning of this provision is not entirely clear, but it could arguably be interpreted to limit the liability of the Government even further in blue on white violence circumstances. Contractors, however, are not necessarily immune from liability to the military under tort law.

Such limitations on military liability may not be the most efficient solution to dealing with the inherently dangerous conditions, as potential risks may simply raise contract prices. The Government could manage these costs by waiving tort immunity to some extent contractually, for example in the event of grossly negligent or willful behavior. Such liability would not necessarily have to be based on ordinary tort liability and could potentially be resolved in a nonjudicial forum as specified in the contract.

The best method of solving this liability problem, of course, would be to avoid such incidents altogether. An example of a step taken in this direction is the cooperation between the American, Iraqi, and British private security company trade associations. They have recently produced wallet cards for U.S. military personnel containing basic information on private security companies to minimize the risk of friendly-fire incidents.<sup>206</sup> The DOD has supported this project, and it is expected that the wallet cards will be distributed in the near future.<sup>207</sup>

### ■ Liability Of Contractors To Third Parties/ Indemnification

Contractors in war zones may also theoretically be liable to third parties under any number

of plausible scenarios. Such contractors have been sued for negligently performing their duties and for intentional torts such as battery.<sup>208</sup> In some cases, the contractors have succeeded in winning dismissal of the lawsuits before entering the costly discovery or trial stages of the litigation. For example, defendants have successfully employed the political question doctrine,<sup>209</sup> as well as the Government contractor defense.<sup>210</sup> However, some claims against contractors have progressed to the initial discovery stage.<sup>211</sup> In one instance, some discovery has been ordered by a state court, over the defendant's jurisdictional objections.<sup>212</sup>

The most rational behavior on the part of contractors may be to insure themselves against potential liabilities because the extent of liability to a potential claimant can be too great for self-insurance. The Government has required contractors to carry third-party liability insurance in certain circumstances, for example on fuel trucks in Iraq, which naturally has a significant impact on the cost of fuel transport.<sup>213</sup> The problem is that commercial liability insurance on activities on the battlefield is either unavailable or very expensive. The necessity to secure expensive liability insurance naturally increases the price of the contract accordingly.

Under Public Law 85-804,<sup>214</sup> enacted in 1958, and Executive Order 10789,<sup>215</sup> the Government is authorized to include an indemnification clause in contracts providing compensation to the contractor in the event of liability to third parties incurred while performing contractual duties involving "unusually hazardous" risks (the "Indemnification Under Public Law 85-804" clause).<sup>216</sup> In addition, the FAR authorizes the inclusion of a third-party liability indemnification clause in cost-reimbursement type contracts (the "Insurance—Liability to Third Persons" clause).<sup>217</sup> The indemnification under both provisions is contingent upon various factors such as lack of bad faith or willful behavior in connection with the loss.<sup>218</sup> However, authorization of indemnification under Public Law 85-804 raises practical problems.<sup>219</sup> At the same time, indemnification under the

FAR "Insurance—Liability to Third Persons" clause is permitted only in cost-reimbursement contracts (and not in fixed-price contracts),<sup>220</sup> a situation that should be reconsidered.<sup>221</sup>

Government contractors performing duties in war zones should request the inclusion of a reimbursement clause in their contracts, either under Public Law 85-804 or under the FAR "Insurance—Liability to Third Persons" clause, whenever such an option is available under the current rules. Such a clause would not necessarily increase contract costs for the Government because the contractor would otherwise be required to purchase costly insurance against third-party liability. The cost of the insurance would be either reimbursed under the cost-reimbursement type contract or included in the price calculations of the fixed-price contract.

Contractors operating in Iraq currently enjoy immunity from local judicial process by virtue of Order 17 of the Coalition Provisional Authority.<sup>222</sup> This order grants contractor personnel immunity from Iraqi jurisdiction "with respect to acts performed by them pursuant to the terms and conditions of a Contract or any sub-contract thereto."<sup>223</sup> However, it is uncertain how long this immunity might last, as the Iraqi sovereign government has the authority to withdraw such immunity. In fact, after recent accusations of wrongdoing by the military, the Iraqi government expressed negative views on the continued viability of these immunity provisions.<sup>224</sup> At the same time, there is no Status of Forces Agreement in place between the United States and Iraq (nor is there any similar agreement between the United States and Afghanistan) specifying the laws and regulations that govern the actions of U.S. forces deployed inside the host nation's borders or those of contractor personnel who support deployed U.S. forces. Contractors have expressed concern about this uncertainty, since it may significantly increase their costs when Iraqi courts become functional and begin hearing cases on civil and criminal liability of contractors and their employees.<sup>225</sup> The contractors should anticipate the changing circumstances and request contractual indemnification from the

Government when immunity from Iraqi courts' jurisdiction ends.

### Contract Oversight & Accountability

Much of the public criticism over contracts and the contracting process in Iraq is based on the scarcity of publicly available information about the contracts and the process. Therefore, it has been suggested that information regarding contracts and contractual performance should be made public or subjected to scrutiny by third parties on a much wider basis than is currently the case.<sup>226</sup>

More widespread availability of such information is problematic, however. The contractors may have a special interest in not disclosing the financial information regarding contract performance.<sup>227</sup> Because they are under competitive pressure from other companies, they may not want to disclose information that might give potential competitors a competitive advantage.<sup>228</sup> Besides competition concerns, publishing extensive information could also negatively affect the security of contractor employees on the battlefield. Therefore, any public disclosure of information related to military

contracts should be made only after careful consideration of the security implications and, even then, redacted and otherwise restricted as necessary.

The second area where military contracting has been under much scrutiny is in the accounting of costs by the contractors. Again, drawing conclusions about the appropriate level of disclosure based on traditional accounting rules is problematic. Traditional audit and reporting requirements may be inadequate for battlefield situations. For example, a functioning banking system has been virtually nonexistent in Iraq and many transactions are strictly cash based. Documentation for such transactions often cannot meet the strictest reporting standards.<sup>229</sup> Also, the traditional cost accounting standards may not be appropriate for such an unstable environment.<sup>230</sup> Cultural differences also play a role, as contractors have experienced difficulty obtaining written bids from local subcontractors where written bids are rare in the local economy.<sup>231</sup> Although calls for the application of stricter accounting rules is understandable, doing so might not necessarily make the contracting process or performance under the contract more efficient.

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## GUIDELINES

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These *Guidelines* are intended to assist policymakers and Government officials, as well as Government contractors, in understanding the issues involved in negotiating and performing contracts when the contractual duties are to be performed in war zones. The *Guidelines* also provide suggestions to the Government for improving current regulations regarding contractors in war zones. They are not, however, a substitute for professional representation in any specific situation.

1. Contractors should take into account that the Government regulates contractors in a variety of different documents and that those documents are inconsistent with one another, sometimes in significant respects. For its part, the Government should continue to develop consistent, flexible guidelines for Government contractors in war zones. The Government should

consider greater flexibility in rules and regulations so that contracting parties are free to select the best type of contract and contract terms in relation to the different types of contractors and services to be provided. The Government should not attempt to regulate all contracts and contractors in a strictly uniform way.

2. Contractors and the Government benefit mutually when the right type of contract is used to govern the contractual relationship and when those contracts are well considered and well drafted. Generally, fixed-price contracts are more suitable when the contingencies of contract performance are well understood in advance of performance—a rarity, perhaps, in war zones. On the other hand, cost-reimbursement contracts are more generally suitable when the scope and extent of the services to be provided are difficult to ascertain in advance. Both types of contracts

have strengths and weaknesses that must be addressed in the negotiation and drafting process.

3. Contractors and the Government benefit mutually from a contract that accurately details the mutual obligations of the parties to the contract. The Government should begin the process by carefully drafting solicitation documents that enable contractors to submit well-considered bids. Where a meeting of the minds is accomplished, the Government can be more confident of performance under the contract and the contractor can be more confident of a secure and financially rewarding engagement.

4. Although the DFARS rules generally allocate contractual responsibilities away from the Government to the contractors, in many cases those duties can be reallocated to the Government in the contract. Contractors and the Government should reallocate duties whenever the Government is in a better position to bear the burden of those responsibilities most effectively and efficiently. Special attention should be paid to medical and dental care, insurance of contractor personnel, and entry and exit permits. Other responsibilities that contractors should carefully consider in connection with the contract include evacuation services, OCIE (especially safety equipment), and other logistical and basic support (e.g., communications, food, and transportation).

5. Contractors should consider that under the current DFARS, it is the contractor who is generally responsible for providing its own security. Since this allocation of responsibility is often impractical, the issue of security provision should be negotiated especially carefully in the contracting process. The Government should consider as a matter of general policy whether it would be better served by retaining central responsibility over security provision for contractors accompanying the armed forces and, perhaps, reconsider the DFARS current default allocation accordingly.

6. Contractors and the Government should take the “chain of command” into account and carefully draft contract provisions concerning the parties’ mutual rights and obligations with respect to contract modification

(including equitable modification issues), safety-related orders, evacuation orders, removal of employees, and other instances in which contractor employees may receive instructions, orders, or commands from Government or military officials.

7. Contractors should carefully assess whether the performance of particular contractual obligations could be characterized as the direct participation by their personnel in hostilities, which may result in the loss of civilian protections. Contractors should negotiate guarantees or other assurances from the Government to protect against liabilities or risks resulting from any direct participation by their personnel.

8. Contractors should inform their employees that under recent changes to the Uniform Code of Military Justice, employees can be prosecuted in the military justice system. Contract terms should be negotiated to provide for situations where contractor employees are subjected to the military justice system—for example, provision of military training of contractor employees in UCMJ compliance and employee assistance of military counsel.

9. Contractors should take into account the possibility of being sued in U.S. courts for acts performed in war zones that result in injury to third parties, notwithstanding the existence of potentially viable defenses (e.g., the Government contractor defense). Contract terms should be negotiated dealing with the question of contractor indemnification for any third-party liability. The Government can and should apply Public Law 85-804 indemnity provisions as appropriate.

10. Contracting agencies should receive training in selecting the most efficient clauses for the particular situation with guidance and input from the military or agency personnel that will use the contractor services. Moreover, the Government should ensure that sufficient number of COs are trained and on the ground to make contract modifications quickly and effectively as required.

11. The Government should consider consolidating contract negotiation and oversight

into one theater group. This group could apply resources to contracts as needed with offices situated in different geographic locations. This approach would require consistent contract administration across all agencies and may be unworkable at this time, but consistent contract negotiation and oversight should be a goal to work toward.

12. Policymakers should be constructively reluctant to make details of war-zone contracts and contract performance widely available despite calls for greater transparency in the process. Public disclosure of such information may negatively affect the security of contractor employees and military personnel as well as prospects for success of the mission.

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- 48/ GAO, *Vital Services*, *supra* note 40, at 7.
- 49/ Army Field Manual, *supra* note 29, at 1-10.
- 50/ Letter from Jenner & Block to Defense Acquisition Regulations Council 1 (May 24, 2004), available at [http://emissary.acq.osd.mil/dar/dfars.nsf/40d9d4f429f73a4e8525699600776f78/69cd583e00bef0e885256ea7005234c1/\\$FILE/Jenner%20Block.pdf](http://emissary.acq.osd.mil/dar/dfars.nsf/40d9d4f429f73a4e8525699600776f78/69cd583e00bef0e885256ea7005234c1/$FILE/Jenner%20Block.pdf).
- 51/ DFARS 225.7402-3(b).
- 52/ See Army Field Manual, *supra* note 29, at 5-4.
- 53/ DFARS 225.7402-1.
- 54/ See DFARS 252.225-7040, para. (a).
- 55/ See H.R. Rep. No. 109-360, at 764-65 (2005) (Conf. Rep.).
- 56/ See FAR subpts. 16.2, 16.4. See generally GAO, *Poorly Structured Incentives*, *supra* note 7, at 4-5. The disadvantage of performance-based fees is the often subjective nature of determining whether performance has been sufficient to justify an extra award. *Id.*
- 57/ See FAR subpt. 16.3. See generally Manos, *Government Contract Costs & Pricing* (Thomson-West 2004 & Supp. 2006); Arnava, "Government Contract Cost Recovery," *Briefing Papers No. 01-6* (May 2001).
- 58/ See Dunn, *Contractors in the 21st Century "Combat Zone" 75-76* (Apr. 2005), <http://www.nps.navy.mil/gsbpp/ACQN/publications/FY05/CM-05-020.pdf>.
- 59/ Novak, *Going to War With Defense Contractors: A Case Study Analysis of Battlefield Acquisition 191* (Mar. 2004) (unpublished thesis, Air Force Institute of Technology), available at <https://research.maxwell.af.mil/papers/ay2004/afit/AFIT-GAQ-ENV-04M-08.pdf>.

- 60/ See FAR subpt. 16.5.
- 61/ See generally Dunn, *supra* note 58, at 42–50; Australian Strategic Policy Institute, *War and Profit: Doing Business on the Battlefield* 10–11 (2005).
- 62/ Private Security Firms: Standards, Cooperation and Coordination on the Battlefield: Hearing Before the Subcomm. on National Security, Emerging Threats, and International Relations of the H. Comm. on Government Reform, 109th Cong. 1 (June 13, 2006) (testimony of Ignacio Balderas, Director, Triple Canopy Board of Directors); Letter from Crowell & Moring to Defense Acquisition Regulations Council 2 (May 24, 2004), available at [http://emissary.acq.osd.mil/dar/dfars.nsf/40d9d4f429f73a4e8525699600776f78/8e4118160eeb1f6d85256e9f0049cd88/\\$FILE/SFX326A.pdf](http://emissary.acq.osd.mil/dar/dfars.nsf/40d9d4f429f73a4e8525699600776f78/8e4118160eeb1f6d85256e9f0049cd88/$FILE/SFX326A.pdf) [hereinafter Crowell & Moring Comments].
- 63/ Wynne Testimony, *supra* note 8, at 19.
- 64/ GAO, *Interagency Contracting: Problems With DOD's and Interior's Orders To Support Military Operations* 7–9 (GAO-05-201, Apr. 29, 2005); GAO, *Contract Management*, *supra* note 7, at 5–6.
- 65/ See, e.g., U.S. House of Representatives, Committee on Government Reform—Minority Staff, *Special Investigations Division, Dollars, Not Sense: Government Contracting Under the Bush Administration* (June 2006), available at <http://www.democrats.reform.house.gov/Documents/20060711103910-86046.pdf>.
- 66/ See Dickinson, *supra* note 1, at 199–207; Dickinson, *supra* note 16, at 411–13.
- 67/ Witte, “Army To End Expansive, Exclusive Halliburton Deal,” *Wash. Post*, July 12, 2006, at A1; 48 GC ¶ 248(f).
- 68/ See Isenberg, *A Government in Search of Cover: PMCs in Iraq* 15 (2006), <http://www.basicint.org/pubs/Papers/pmcs0603.pdf>.
- 69/ See Green, “Alternatives for the Future of Contingency Contracting: Avoiding a Repeat of the Mistakes of Iraq,” 35 *Pub. Cont. L.J.* 447, 454 (2006).
- 70/ See generally *id.* at 447–48.
- 71/ See generally Nash & Feldman, *Government Contract Changes* (Thomson-West 3d ed. 2007).
- 72/ See Schmitt, “Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees,” 5 *Chi. J. Int'l L.* 511, 535–36 (2005).
- 73/ *Id.* at 520.
- 74/ DFARS 252.225-7040, para. (b)(3)(iii).
- 75/ 71 Fed. Reg. 34,826, 34,826 (June 16, 2006).
- 76/ DFARS 252.225-7040, para. (b)(3)(i).
- 77/ DFARS 252.225-7040, para. (b)(3)(ii).
- 78/ See Schmitt, *supra* note 72, at 536–46.
- 79/ See Hulse, “Senate Rejects Harder Penalties on Companies, and Ban on Private Interrogators,” *N.Y. Times*, June 17, 2004, at A12.
- 80/ Miller, “U.S. Contractor Pulls Out of Reconstruction Effort in Iraq,” *L.A. Times*, Dec. 22, 2004, at A1.
- 81/ DFARS 252.225-7040, para. (m)(1).
- 82/ DFARS 252.225-7040, para. (m)(1).
- 83/ DFARS 252.225-7040, para. (m)(2).
- 84/ DFARS 252.225-7040, para. (h)(2).
- 85/ Brooks Testimony, *supra* note 46, at 5.
- 86/ Professional Services Council, *Iraq Contracting Lessons Learned: Media Briefing* 6 (Nov. 11, 2004), available at <http://www.pscouncil.org/pdfs/IraqContractingLessonsLearned.pdf>.
- 87/ Soloway Testimony, *supra* note 14, at 6.
- 88/ GAO, *Vital Services*, *supra* note 40, at 28.
- 89/ Air Force Contract Augmentation Program (AFCAP) Statement of Work ¶ 8.2.2, available at [http://www.publicintegrity.org/docs/wow/Contract-Afcap\\_F08637-02-D-6999.pdf](http://www.publicintegrity.org/docs/wow/Contract-Afcap_F08637-02-D-6999.pdf) (“the contractor and his personnel will be expected to take whatever prudent measures are recommended by the Government (including evacuation) for specific locations”).
- 90/ GAO, *Vital Services*, *supra* note 40, at 28 (pointing out that contracts do not contain language mandating contractors to follow general orders on restrictions on travel or limits on the use of alcohol).
- 91/ See FAR 43.201, 52.243-1, 52.243-2; see also ABA Task Force, *supra* note 12, at 6. See generally Nash & Feldman, *supra* note 71.
- 92/ DFARS 252.225-7040, para. (p).
- 93/ See, e.g. ABA Task Force, *supra* note 12, at 2–4.
- 94/ See generally McCullough & Pafford, “Contractors on the Battlefield: Emerging Issues for Contractor Support in Combat & Contingency Operations,” *Briefing Papers* No. 02-7, at 13 (June 2002).
- 95/ 69 Fed. Reg. 13,500, 13,502 (Mar. 23, 2004) (proposed DFARS 252.225-70XX(p), (q)).
- 96/ 70 Fed. Reg. 23,790, 23,800 (May 5, 2005).
- 97/ DFARS 252.225-7040, para. (d)(4).

- 98/ 70 Fed. Reg. at 23,794.
- 99/ *Id.* at 23,800.
- 100/ See, e.g., Crowell & Moring Comments, *supra* note 62, at 4–5.
- 101/ See FAR 43.104. See generally Nash & Feldman, *supra* note 71.
- 102/ ABA Task Force, *supra* note 12, at 3–4; see also Crowell & Moring Comments, *supra* note 62, at 4–5 (stating that the security contractors prefer giving ranking military commanders the same authority as COs and would accept ratification process).
- 103/ See Soloway Testimony, *supra* note 14, at 6; Green, *supra* note 69, at 451–52.
- 104/ Private Security Firms: Standards, Cooperation and Coordination on the Battlefield: Hearing Before the Subcomm. on National Security, Emerging Threats, and International Relations of the H. Comm. on Government Reform, 109th Cong. 29 (June 13, 2006) (statement of Robert B. Rosenkranz, Vice President, DynCorp International LLC).
- 105/ DFARS 252.225-7040, para. (q).
- 106/ See Crowell & Moring Comments, *supra* note 62, at 6–7.
- 107/ See DOD, Section 1206 Public Law 108-375 Report 12 n.26 (undated), available at <http://www.fas.org/irp/agency/dod/1206report.pdf> (last visited Jan. 7, 2007).
- 108/ See DFARS 252.225-7040, para. (j).
- 109/ Novak, *supra* note 59, at 65–77.
- 110/ *Id.* at 78.
- 111/ DFARS 252.225-7040, para. (c)(3).
- 112/ GAO, Actions Needed, *supra* note 7, at 1.
- 113/ McCullough & Edmonds, “Riding Into the Valley of Death: Contractors Join Soldiers in Harm’s Way, But Without the Same Protections,” *Legal Times*, Nov. 6, 2006, at 38.
- 114/ Professional Services Council, *supra* note 86, at 11; GAO, Actions Needed, *supra* note 7, at 29.
- 115/ GAO, Actions Needed, *supra* note 7, at 32.
- 116/ Contractor Support in the Department of Defense: Hearing Before the Readiness Subcomm. of the H. Comm. on Armed Services, 108th Cong. 22 (June 24, 2004) (Testimony of Tina Ballard, Deputy Assistant Secretary of the Army (Policy and Procurement), Department of Army) (“It was very clear in all of our contract solicitations and meetings with industry that the contractors were responsible, in the case of construction, for providing their own security.”).
- 117/ Soloway Testimony, *supra* note 14, at 11.
- 118/ *Id.* at 8.
- 119/ GAO, Actions Still Needed, *supra* note 7, at 8–10.
- 120/ GAO, Vital Services, *supra* note 40, at 25.
- 121/ DFARS 252.225-7040, para. (c)(1)(i).
- 122/ DFARS 252.225-7040, para. (c)(1)(i).
- 123/ DFARS 252.225-7040, para. (c)(1)(ii).
- 124/ DFARS 252.225-7040, para. (c)(1)(iii).
- 125/ Professional Services Council, *supra* note 86, at 8.
- 126/ See, e.g., ABA Comments, *supra* note 13, at 8 (arguing that the previous rule should be reinstated to “restore the presumption that the Government will provide security for its contractors”); CODSIA DFARS comments, *supra* note 15, at 4–6 (arguing that security and force protection should primarily be the responsibility of the military); Letter from Herbert L. Fenster, McKenna Long & Aldridge, to Laurieann Duarte, General Services Administration, and Amy Williams, Defense Acquisition Regulations System (Aug. 9, 2006) (arguing that shifting security-related duties on contractors exposes them to unpredictable risks); McCullough & Edmonds, *supra* note 113, at 38–39.
- 127/ Army Field Manual, *supra* note 29, at 6-1.
- 128/ McCullough & Edmonds, *supra* note 38, at 2.
- 129/ Hornstein, “Protecting Civilian Logisticians on the Battlefield,” *Army Logistician*, July–Aug. 2006, at 14, 16.
- 130/ *Id.* at 16.
- 131/ DFARS 252.225-7040, para. (i)(2).
- 132/ DFARS 252.225-7040, para. (i)(3).
- 133/ Briefing Memorandum from Robert Kelley & Robert Briggs for the House of Representatives Committee on Government Reform, Hearing on Private Security Firms: Standards, Cooperation and Coordination on the Battlefield 6–7 (June 8, 2006).
- 134/ Brooks Testimony, *supra* note 46, at 6.
- 135/ Kelley & Briggs, *supra* note 133, at 10.
- 136/ See DOD, *supra* note 107, at 6.
- 137/ GAO, Actions Still Needed, *supra* note 7, at 9–10.

- 138/ See ABA Task Force, *supra* note 12, at 7.
- 139/ See, e.g., AFCAP Task Order # 5134, Air Traffic Control Support, Bagram AB, Afghanistan ¶ 6.0 (July 29, 2003), available at [http://www.publicintegrity.org/docs/wow/RMS\\_AFCAP\\_5134.pdf](http://www.publicintegrity.org/docs/wow/RMS_AFCAP_5134.pdf); Contract No. S-LMAQM-00-D-0027, Task Order 2002-006, Personal Protective Services, American Embassy, Kabul, Afghanistan ¶ 11 (Sept. 6, 2002), available at <http://www.publicintegrity.org/docs/wow/KBRKAbulembassy.pdf>; Performance Work Statement CJTF-7 C2, Interrogation Operations Support ¶¶ 16, 18, 20 (Aug. 14, 2003), available at [http://www.publicintegrity.org/docs/wow/CACI\\_ordersAll.pdf](http://www.publicintegrity.org/docs/wow/CACI_ordersAll.pdf).
- 140/ Harrington, *Issues Facing Weapons Systems Contractors Deployed in Support of Contingency Operations 10* (2005), available at <http://www.strategicstudiesinstitute.army.mil/pdf/files/ksil7.pdf>.
- 141/ Public Comment of Sharon Wisniewski, US Army TACOM, DFARS Case Number 2003-D087, Contractors Accompanying a Force Deployed (April 16, 2004), available at <http://emissary.acq.osd.mil/dar/dfars.nsf/40d9d4f429f73a4e8525699600776f78/a19cf6a756a3214c85256e78006fa6a6?OpenDocument>.
- 142/ Harrington, *supra* note 140, at 8.
- 143/ *Id.*
- 144/ *Id.* at 9.
- 145/ DFARS 252.225-7040, para. (c)(3).
- 146/ See, e.g. U.S. House of Representatives, Committee on Government Reform—Minority Staff, Special Investigations Division, *supra* note 65, at 53 (providing an example where contractor employees refused to move from a hotel to military-provided tents).
- 147/ Harrington, *supra* note 140, at 9.
- 148/ McPeak & Ellis, “Managing Contractors in Joint Operations: Filling the Gaps in Doctrine,” *Army Logistician*, Mar.–Apr. 2004, at 6, 7 (“properly coordinating contractor support and the flow of arriving contracting materiel often has been a significant theater logistics concern”).
- 149/ Crowell & Moring Comments, *supra* note 62, at 7.
- 150/ DFARS 252.225-7040, para. (c)(2)(i)–(iii).
- 151/ DFARS 252.225-7040, para. (c)(2)(i).
- 152/ DFARS 252.225-7040, para. (c)(2)(ii).
- 153/ See Army Field Manual, *supra* note 29, at 5-8 (stating that sometimes, reimbursement of medical costs from contractor employees is “not practicable or cost effective”).
- 154/ 42 U.S.C.A. § 1651–1654.
- 155/ 42 U.S.C.A. § 1702 *et seq.*
- 156/ See generally Memorandum from Kathryn T.H. Szymanski on Workers’ Compensation Clauses for Overseas Performance (undated), available at <http://www.afsc.army.mil/gc/files/DBAIns.pdf> (last visited Jan. 7, 2007).
- 157/ Professional Services Council, *supra* note 86, at 10.
- 158/ Army Field Manual, *supra* note 29, at 5-5.
- 159/ Private Security Firms: Standards, Cooperation and Coordination on the Battlefield: Hearing Before the Subcomm. on National Security, Emerging Threats, and International Relations of the H. Comm. on Government Reform, 109th Cong. 5 (June 13, 2006) (statement of Alan Chvotkin, Senior Vice President and Counsel, Professional Services Council).
- 160/ Professional Services Council, *supra* note 86, at 5 (pointing out the high cost/risk of doing business in Iraq for small companies).
- 161/ *Id.*
- 162/ See, e.g., *id.* at 12; ABA Task Force, *supra* note 12, at 7 (the DOD “should encourage insurance pooling arrangements”).
- 163/ Soloway Testimony, *supra* note 14, at 10.
- 164/ *Id.* at 10–11.
- 165/ Harrington, *supra* note 140, at 8.
- 166/ DFARS 252.225-7040, para. (e)(1)(iii).
- 167/ See Brooks Testimony, *supra* note 46, at 5; Schooner, *Iraq Contracting: Predictable Lessons Learned 4* (Sept. 10, 2004) (statement before the S. Democratic Policy Committee) (“insufficient contract management resources have been applied in Iraq”).
- 168/ Singer, “Outsourcing War,” *Foreign Affairs*, Mar. 1, 2005, at 119.
- 169/ Brooks Testimony, *supra* note 46, at 5.
- 170/ GAO, *Vital Services*, *supra* note 40, at 29–30.
- 171/ *Id.*
- 172/ *Id.*
- 173/ See Jones, “Reshaping the Contingency Contracting Military Workforce,” *Army Logistician*, May–June 2006, at 7.
- 174/ GAO, *Actions Still Needed*, *supra* note 7, at 14. See generally “Responsibility vs. Qualification: A Close Distinction,” 20 *Nash & Cibinic Rep.* ¶ 47 (Oct.

- 2006); "Prequalification: Can It Be Used To Improve the Procurement Process?," 10 Nash & Cibinic Rep. ¶ 16 (Apr. 1996).
- 175/ Professional Services Council, *supra* note 86, at 12.
- 176/ Dickinson, *supra* note 16, at 413.
- 177/ Kelley & Briggs, *supra* note 133, at 9.
- 178/ See Dickinson, *supra* note 16, at 405 n.143 (referring to a work order requiring human intelligence advisors to have at least 10 years of operational experience and knowledge of Army interrogation procedures).
- 179/ GAO, *Vital Services*, *supra* note 40, at 6.
- 180/ Dickinson, *supra* note 16, at 405.
- 181/ *Id.*
- 182/ DFARS 252.225-7040, para. (e)(1)(i).
- 183/ DFARS 252.225-7040, para. (e)(1)(iv).
- 184/ DFARS 252.225-7040, para. (e)(1)(v).
- 185/ DFARS 252.225-7040, para. (e)(1)(vi).
- 186/ DFARS 252.225-7040, para. (e)(1)(ii).
- 187/ DFARS 252.225-7040, para. (e)(1)(ii).
- 188/ Brooks Testimony, *supra* note 46, at 5; GAO, *Actions Still Needed*, *supra* note 7, at 10–13.
- 189/ Brooks Testimony, *supra* note 46, at 5.
- 190/ See *id.* at 3.
- 191/ Letter from Alan Chvotkin, Senior Vice President and Counsel, Professional Services Council, to the Honorable David Price, U.S. House of Representatives (May 2, 2005), available at <http://www.pscouncil.org/pdfs/CongPriceLtr-2May05.pdf>.
- 192/ Soloway Testimony, *supra* note 14, at 9.
- 193/ Hornstein, *supra* note 129, at 15.
- 194/ DFARS 252.225-7040, para. (j)(1).
- 195/ DFARS 252.225-7040, para. (j)(2).
- 196/ DFARS 252.225-7040, para. (j)(3).
- 197/ DFARS 252.225-7040, para. (j)(4).
- 198/ 10 U.S.C.A. § 802(a)(10) (as amended by National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 552, 120 Stat. 2083, 2217 (2006) (subjecting persons "serving with or accompanying an armed force in the field" to the Uniform Code of Military Justice); see 49 GC ¶ 18(a).
- 199/ See generally Vainshtein, "UCMJ v. MEJA: Two Options for Regulating Contractors," *J. Int'l Peace Operations*, Jan.–Feb. 2007, at 11.
- 200/ DFARS 252.225-7040, para. (e)(2).
- 201/ DFARS 252.225-7040, para. (h)(1).
- 202/ GAO, *Actions Still Needed*, *supra* note 7, at 9; GAO, *Actions Needed*, *supra* note 7, at 27.
- 203/ Brooks Testimony, *supra* note 46, at 6.
- 204/ See Speros, *supra* note 11, at 312.
- 205/ DFARS 252.225-7040, para. (b)(2).
- 206/ Brooks Testimony, *supra* note 46, at 6.
- 207/ *Id.*
- 208/ See generally Rakowsky, Note, "Military Contractors & Civil Liability: Use of the Government Contractor Defense To Escape Allegations of Misconduct in Iraq and Afghanistan," 2 *Stan. J. Civ. Rts. & Civ. Liberties* 365, 389–98 (Aug. 2006) (providing a summary of pending cases against military contractors).
- 209/ See *Fisher v. Halliburton, Inc.*, 454 F. Supp. 2d 637 (S.D. Tex. 2006) (dismissing a claim against a contractor by a truck driving employee who sustained injuries when his convoy was attacked); *Smith-Idol v. Halliburton*, No. H-06-1168, 2006 WL 2927685 (S.D. Tex. Oct. 11, 2006) (same); *Whitaker v. Kellogg Brown & Root Inc.*, 444 F. Supp. 2d 1277 (M.D. Ga. 2006) (dismissing claims by the estate of a passenger of a truck who drowned after falling off the truck owned by a contractor after the truck hit the railing of a bridge); *Smith v. Halliburton Co.*, No. H-06-0462, 2006 WL 2521326 (S.D. Tex. Aug. 30, 2006) (dismissing a case against defendant Halliburton Co. where plaintiff alleged that Halliburton was negligent in providing security services in Iraq, and that because of the negligence a U.S. citizen died in a suicide bomber attack). In the last case, the court had previously refused to dismiss the case based on the Government contractor defense, requiring the parties to conduct jurisdictional discovery. See *Smith v. Halliburton Co.*, No. H-06-0462, 2006 WL 1342823 (S.D. Tex. May 16, 2006).
- 210/ See Memorandum of Defendants CACI International Inc. and CACI Premier Technology, Inc. in Support of Their Motion for Summary Judgment, No. 1:05-CV-01165 (D.D.C. Aug. 4, 2006) (moving for summary judgment based on Government contractor defense in a case involving claims filed by Abu Ghraib prisoners against contractors who were allegedly involved in torture). The district court refused to rule on the issue on the motion to dismiss stage. See *Saleh v. Titan Corp.*, 436 F. Supp. 2d 55 (D.D.C. 2006); *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10 (D.D.C. 2005). See generally Rakowsky, *supra* note 208.

- 211/** See, e.g., *Lessin v. Kellogg Brown & Root*, No. H-05-01853, 2006 WL 3940556 (S.D. Tex. June 12, 2006) (refusing to apply both political question doctrine as well as Government contractor defense in a case where plaintiff was stuck in the head by a ramp assist arm of a truck belonging to a contractor while plaintiff helped to repair the truck); *Carmichael v. Kellogg Brown & Root Servs.*, 450 F. Supp. 2d 1373 (N.D. Ga. 2006) (refusing to dismiss claims by an injured passenger in a truck owned by a contractor after the truck driver allegedly negligently lost control over the truck); *McMahon v. Presidential Airways, Inc.*, No. 6:05-CV-1002ORL28JGG, 2006 WL 3085606 (M.D. Fla. Sept. 27, 2006) (denying the motion to dismiss on both political question as well as Government contractor defense). In the last case, plaintiffs were the estates of U.S. soldiers killed while serving in Afghanistan, and the defendants were air transport companies providing air transportation and operational support services to the DOD. The case arose of a transport plane crash in Afghanistan where several U.S. servicemen were killed, allegedly because of the defendants' negligence. *Id.* at \*1. See also *Potts v. Dyncorp. Int'l LLC*, No. 3:06cv124-WHA, 2006 WL 3590171 (M.D. Ala. Dec. 12, 2006) (refusing to grant leave to amend the answer to assert the political question defense in a case where contractor employee allegedly negligently drove a truck at an excessive speed and consequently lost control over it).
- 212/** See *Petition for a Writ of Certiorari, Blackwater Sec. Consulting, LLC. v. Nordan*, No. 06-857 (U.S. Dec. 20, 2006). The case was remanded to the state court after still ongoing jurisdictional disputes. See also *Nordan v. Blackwater Security Consulting, L.L.C.*, 382 F. Supp. 2d 801 (E.D.N.C. 2005) (granting the motion to remand), *aff'd*, 460 F.3d 576 (4th Cir. 2006), *cert. denied*, No. 06-857, 2007 WL 560208 (Feb. 26, 2007). The plaintiffs were the estates of four security personnel who provided security services in Iraq. They were allegedly given too little time, and provided too little support by the defendant, Blackwater for a mission near Fallujah. They became lost and ended up in the middle of Fallujah, where they were ambushed, thereafter shot, beaten, burned, and disfigured. 382 F. Supp. at 804-05.
- 213/** Soloway Testimony, *supra* note 14, at 4.
- 214/** 50 U.S.C.A. §§ 1431-1435; see FAR 52.250-1 (containing the text of the clause to be inserted into the contract). See generally Mullen, "Extraordinary Contractual Relief Under Public Law 85-804," *Briefing Papers* No. 02-13 (Dec. 2002).
- 215/** 23 Fed. Reg. 8897 (Nov. 14, 1958).
- 216/** 50 U.S.C.A. § 1431; see FAR 52.250-1 ("Indemnification Under Public Law 85-804").
- 217/** FAR 28.311-1; FAR 52.228-7 ("Insurance—Liability to Third Persons").
- 218/** See FAR 52.250-1, para. (d); FAR 52.228-7, para. (e)(3).
- 219/** See *Iraq Reconstruction: Reliance on Private Military Contractors: Hearing Before the H. Comm. on Oversight and Government Reform*, 110th Cong. 8 (Feb. 7, 2007) (statement of Alan Chvotkin, Senior Vice President and Counsel, Professional Services Council) ("Providing contractors with indemnification under Public Law 85-804...is viewed by many inside and outside of DoD as too burdensome or unpredictable, and certainly not consistently applied across a broad range of even related circumstances.").
- 220/** FAR 28.311-1.
- 221/** See ABA Task Force, *supra* note 12, at 8.
- 222/** Coalition Provisional Authority Order No. 17 (Revised), Status of the Coalitional Provisional Authority, MNF—Iraq, Certain Missions and Personnel in Iraq, CPA/ORD/27 June 2004/17, available at [http://www.cpa-iraq.org/regulations/20040627\\_CPAORD\\_17\\_Status\\_of\\_Coalition\\_Rev\\_with\\_Annex\\_A.pdf](http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf). Even though the Coalition Provisional Authority no longer exists, the regulation remains effective "until rescinded or amended by legislation duly enacted and having the force of law." Law of Administration for the State of Iraq for the Transitional Period, art. 26(C) (Mar. 8, 2004), available at <http://www.cpa-iraq.org/government/TAL.html>.
- 223/** Order No. 17, *supra* note 220, at § 4.3.
- 224/** *Finer & Partlow, "Iraqi Leaders Question U.S. Troops' Immunity," Wash. Post*, July 6, 2006, at 13A.
- 225/** *Dunn*, *supra* note 58, at 54.
- 226/** See *Dickinson*, *supra* note 16, at 406-09.
- 227/** Professional Services Council, *supra* note 191.
- 228/** *Isenberg*, *supra* note 68, at 14.
- 229/** *Wynne Testimony*, *supra* note 8, at 43.
- 230/** Professional Services Council, *supra* note 86, at 5; *Soloway Testimony*, *supra* note 14, at 5; see also ABA Task Force, *supra* note 12, at 6 ("application of peacetime audit standards to in-theater support contracts must be evaluated for change").
- 231/** *Soloway Testimony*, *supra* note 14, at 5.