



Afghan road workers at weapons training, FOB Kutschbach. (U.S. Air Force photo)

## Chapter 2

# **‘Inherently governmental’ rules do not guide appropriate use of contractors in contingencies**



## ‘Inherently governmental’ rules do not guide appropriate use of contractors in contingencies

Ten years of war in Iraq and Afghanistan have seen the United States using too many contractors for too many functions with too little forethought and control. Even if every instance of contracting had satisfied the legal restrictions on contractor performance of “inherently governmental functions”—a dubious proposition at best—the Commission believes far too little attention has been devoted to the question whether all of that contracting was *appropriate* for contingency operations.

Government actions in the 1990s led to reductions in U.S. military force structure and civilian agency strength. Given a reduced force structure and a desire to

maintain levels of combat personnel, the military reduced its organic support personnel, which increased the need for contractor support.

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In addition, there was a general decline in federal agencies’ acquisition staff and agencies’ ability to perform many functions related to their core missions, even as the volume and complexity of

acquisitions were increasing. These trends often left government officials with no alternative but to enlist contractor support when a contingency developed. For

Afghan and U.S. soldiers on patrol, Pad Khwab-E Rowan, Afghanistan. (U.S. Army photo)



many purposes, then, contracting became the default option for Defense, State, and USAID, because it was the only realistic option.

Nonetheless, planning, sourcing, and requirements definition must be carried out with more attention to appropriateness and risk, including risk mitigation, than has been evidenced in the Afghanistan and Iraq contingencies. Acquisition decisions that are expedient in the short term can increase costs and constrain government’s options in the long term. Unless contingency-contracting reforms are implemented, future contingencies will continue to exhibit inappropriate levels of reliance on contractors.

**All too often, officials assume that any task deemed not inherently governmental is therefore automatically suitable for performance by contractors.**

The inherently governmental standard is insufficient, offering little or no useful guidance for deciding whether contracting for non-governmental functions is *appropriate* or prudent in contingency operations. After determining whether the inherently governmental prohibition applies, decisions to contract still need a context- and risk-sensitive consideration of appropriateness for contingency operations.

Events in Iraq and Afghanistan have shown that systematic consideration of operational, political, and financial risks must be a factor in judging appropriateness. All too often, officials assume that any task deemed not inherently governmental is therefore automatically suitable for performance by contractors.

The concept of financial risk requires a word about costs. The Commission has done research on the comparative financial costs of using contractors. Appendix F of this report lays out a method for identifying and comparing the incremental costs of military forces, federal civilians, and contractor personnel. It describes how factors such as the contingency duration, rotation policies, and local labor market affect comparisons.

Our research indicates that, under certain, limited circumstances, contractors can be a less costly option for extended contingencies. The dominant factor driving these reduced costs is lower labor rates paid to local-national and third-country national contractor employees.

So to the question “Are contractors cheaper?,” the short answer is: it depends. And because it depends upon a whole range of factors, many of them not under

direct government control, considerations of cost cannot be the driving factor in determining whether to contract or what to contract.

Moreover, national security is not a business decision. The Commission firmly believes that in matters of national security and foreign policy involving sustained combat and arduous diplomatic action overseas, considerations of cost are and must be a far less important consideration than mission accomplishment.

**Contracting that is not restricted by the inherently governmental prohibition may still be inappropriate.**

Also, and to be absolutely clear: “cost” must not be confused with “waste.” Our view that cost should not be a decisive factor in wartime contracts is absolutely no justification for tolerating waste.

The Commission looked at costs, and acknowledges that contractors can be cheaper in long wars. Nonetheless, however

costly or cheap they may be, there are still many circumstances where contractors are too risky, where contractors actually induce new risks, and where contractors are not appropriate.

In the area of operational and political risks, the Commission’s findings pay special attention to contracting for security and acquisition-management functions.

Much public and political attention has been drawn to private security contractors and to the sensitivity of engaging their services:

- Iraqi insurgents’ murder and brutalization of four Blackwater guards in 2004,
- private guards’ shooting of Iraqi civilians in Baghdad’s Nisur Square in 2007,
- the billions of dollars spent on private security contracts, and
- reports of weak oversight of subcontracting for local-national or third-country national security guards.

Acquisition management also deserves special attention because the U.S. cannot conduct contingency operations without contractor support. Agencies generally consider this function of secondary importance, as opposed to a core capability. Furthermore, agencies involve contractors in the acquisition management process without paying due regard to the risk of indirect damage. Those risks include the relationships and working knowledge a contractor develops while supporting acquisition management that may subtly bias a contracting official’s decisions,

or confer a windfall competitive advantage on the contractor for future solicitations.

The treatment of inherently governmental functions in federal statute, regulations, and policy is intended to be a critical barrier to ensure that only government personnel perform certain functions, such as waging war, conducting diplomacy, or making commitments that bind the government. The Commission believes, however, that:

- Contracting that is not restricted by the inherently governmental prohibition may still be inappropriate.
- Contracting that may be appropriate in routine, *peacetime* circumstances can be inappropriate in the urgent, volatile setting of a contingency operation.
- Contracting that in the long term may be significantly less expensive than other options (such as retaining the function in-house) may still be inappropriate in a wartime setting.



Ugandan security contractor, Mosul, Iraq.  
(U.S. Navy photo)

## Current federal guidance on inherently governmental functions is not sufficient

The concept of inherently governmental functions appears in a number of sources, including the Federal Activities Inventory Reform Act of 1998 (the FAIR Act), the Office of Management and Budget’s Circular A-76, and the Federal Acquisition Regulation (FAR).<sup>1</sup> A number of functions, while not considered to be inherently governmental and which thus may be performed by contractors, are denominated as “closely associated” with inherently governmental functions, and may only be contracted after giving special consideration to using federal employees.<sup>2</sup> Not addressed are “critical functions” and the need to maintain a sufficient number of federal employees to perform them so that the government keeps control over agencies’ core missions and operations.

The published guidance reflects much thought and effort. Unfortunately, the overall result is muddled and unclear. It is riddled with exceptions, ambiguities, and ad hoc legislated interventions. The Commission does not consider it a sound

1. The FAIR Act, 31 U.S.C. 501 (note); OMB Circular A-76, revised May 29, 2003. The FAR is the core federal regulation for use by all federal executive agencies acquiring supplies and services with appropriated funds.

2. Sec. 736 of Division D of the Omnibus Appropriations Act, 2009, P.L. 111-8; 10 U.S.C. 2463; 10 U.S.C. 2330a; FAR 7-503(d).

platform from which to make risk-based or other decisions, beyond those driven by statutory or policy mandates, on what functions are appropriate to contract.<sup>3</sup>

Several laws prohibit certain functions from being contracted, notwithstanding their relationship to inherently governmental rules. These laws include:

- 5 U.S.C. 306—Prohibits contracting for services to draft strategic plans.
- 10 U.S.C. 2464—Requires Defense to maintain a core logistics capability to maintain and repair weapon systems and other military equipment by assigning government personnel and government-owned facilities “sufficient workload to ensure cost efficiency and technical competence in peacetime while preserving the surge capacity and reconstitution capabilities” defined by the secretary.
- 10 U.S.C. 2465—Prohibits, with certain exceptions, contracting for firefighting and security guards at domestic military installations.
- 31 U.S.C. 1115—Prohibits contracting for services to draft agency performance plans.

Agencies violate inherently governmental standards. The law requires Defense as well as civilian agencies to survey and report on their services contracting.<sup>4</sup> A 2009 Army base-budget survey of services contracts found some 2,000 contractor positions, expressed in full-time equivalents, performing inherently governmental functions.<sup>5</sup> If this is occurring in *base*-budget activities, a reasonable assumption

is that it also occurs in supplemental-funded activities supporting contingency operations, perhaps to a greater extent.

**Determining that a task is not inherently governmental does not mean that it is a good idea to have contractors perform that task in a contingency operation.**

It is, of course, essential that contractors not perform functions that law, regulation, or official policy reserve for government employees. But that is a basic principle applicable to all government activity, contingent or otherwise. Determining that

3. OMB Circular A-76, revised May 29, 2003. Inherently governmental functions include waging war, binding the government to take or not take action, and exercising ultimate authority over federal property and funds.

4. Sec. 807 of the National Defense Authorization Act for FY 2008, P.L. 110-181 (for Defense agencies); sec. 743 of Division C of the Consolidated Appropriations Act, FY 2010, P.L. 111-117 (for civilian agencies).

5. The United States Army, “Army FY 2009 Inventory of Contracts for Services: Enclosure 2,” undated, 1-12. The Army’s and other Defense efforts to bring such activity in-house have recently been slowed by the federal budget situation. On March 14, 2011, Under Secretary of Defense Ashton Carter and Under Secretary of Defense Robert Hale issued guidance that all in-sourcing decisions would henceforth be made case by case.

a task is not inherently governmental does not mean that it is a good idea to have contractors perform that task in a contingency operation. “Permissible” is not a synonym for “appropriate.” Deciding whether a function needed or contemplated for contractor performance *in a contingency* must involve more than applying a binary, yes-or-no filter like “inherently governmental.” For a function to be both permitted *and* appropriate for contingency contracting, the baseline inherently governmental test must be followed by consideration of other factors, the most important of which is risk.

**When officials judge that risk levels are high for a given task and that no practicable and effective risk-mitigation strategies for contractor performance are available, it is appropriate that the contract tasks be modified or canceled, or that the work be brought in-house.**

## Movement toward a more risk-based approach

The Office of Federal Procurement Policy (OFPP) within the Office of Management and Budget (OMB) has taken a helpful step in discussing risk factors as part of the considerations to be weighed in making decisions on contracting. The OFPP’s proposed policy letter on “Work Reserved for Performance by Federal Government Employees” responds to congressional direction that tasked OMB with developing a “single consistent definition” of “inherently governmental function.”<sup>6</sup>

Published in draft form in 2010 and still awaiting final release, the Office of Federal Procurement Policy letter embodies a single definition of inherently governmental, proposes evaluation criteria and risk-mitigation strategies to guide federal officials, and includes directives such as this guidance relating to critical functions and risk:

Agencies should be alert for situations where internal control of missions and operations is at risk due to overreliance on contractors to perform critical functions. ... If an agency has sufficient internal capability to control its mission and operations, the extent to which additional work is performed by federal employees [rather than contractors] should be based on cost considerations *unless performance and risk considerations* in favor of federal employee performance will clearly outweigh cost considerations.<sup>7</sup> [Emphasis added.]

The letter focuses on the inherently governmental standard, and is not designed to guide contingency-contracting decisions. But its emphasis on considering risk

6. National Defense Authorization Act for FY 2009, sec. 321, P.L. 110-417.

7. Office of Management and Budget, “Notice of proposed policy letter,” Federal Register, 75:61, March 31, 2010, 16188-16197.



and other factors beyond the baseline legal construct of inherently governmental functions is a thoughtful and helpful exercise that can be extended for particular use in contingencies.

## Risk as a factor in selecting appropriate contracting

For functions performed in a war zone, prudent decisions on contracting include assessing the level of *risk* associated with contracting, and judging whether that level is or can be mitigated to an acceptable level. When officials at Defense, State, USAID, or other federal agencies judge that risk levels are high for a given task and that no practicable and effective risk-mitigation strategies for contractor performance are available, it is appropriate that the contract tasks be modified or canceled, or that the work be brought in-house.

The U.S. government has established processes for evaluating risk that embody this approach. For example, U.S. Army Field Manual FM 5-19, “Composite Risk Management,” details a risk-assessment and control approach that starts by weighing the probability of a given hazard’s occurrence against its impact on the mission. It is a judgmental, iterative, and probabilistic process, not a mechanical application of rules:

[Once hazards were identified and assessed,] an initial risk level was determined. In this step, controls are developed and applied. The hazard is reassessed to determine a residual risk. Risk decisions are always based on the residual risk. The process of developing and applying controls and reassessing risk continues until an acceptable level of risk is achieved or until all risks are reduced to a level where benefits outweigh the potential cost.<sup>8</sup>

This process offers a good discipline for operational commanders. However, such risk analyses have not driven broad-scale, strategic contracting decisions by Defense, State, or USAID in Iraq and Afghanistan, leaving the United States ill-prepared to use contractors for the scale and duration seen in those countries.

Afghan road maintenance team, Kapisa province, Afghanistan. (U.S. Air Force photo)



8. Department of the Army, Field Manual FM 5-19, “Composite Risk Management,” July 2006, Chapter 1, 10.

When the U.S. government went to war, it did not have enough acquisition personnel, the capacity to manage and oversee contracts, adequate training on operational contract support for non-acquisition military personnel, or core contracting capabilities in crucial areas, including one of the highest-risk areas—security.

The Department of Defense “Instruction” (DoDI) on workforce mix also provides detailed risk-based guidance on choosing among military, civilian, and contractor personnel to perform specific functions. The 55-page instruction provides, among other things, that:

- “When reviewing the adequacy of critical contract services that support the Combatant Commanders’ contingency plans during the deliberative planning process of the Joint Strategic Planning System, [the Chairman of the Joint Chiefs shall] assess the risks of using contract support consistent with this Instruction and require Combatant Commanders to develop contingency plans if they have a reasonable doubt that a contractor will continue to provide essential services during a mobilization or crisis.”
- “When establishing the workforce mix, manpower planners shall review all mission requirements and design units and/or organizations to accomplish baseline operations and transition quickly and easily to support military operations (e.g., contingency, humanitarian, peacekeeping) and crises. Manpower analysts also shall use the guidance for risk assessments ... to help identify risks.”
- “Risk mitigation shall take precedence over cost savings when necessary to maintain appropriate control of Government operations and missions ... [or] to maintain core capabilities and readiness.”
- “Functions that are [inherently governmental] cannot be legally contracted” and “Functions that are not [inherently governmental] are commercial in nature.”
- “Security actions that entail assisting, reinforcing, or rescuing PSCs [private security contractors] or military units who become engaged in hostilities are [inherently governmental] because they involve taking deliberate, offensive action against a hostile force on behalf of the United States.”

U.S. soldier with residents, Nassir Wa Salaam, Iraq. (Defense photo)



- “Security is [inherently governmental] if, in the commander’s judgment, an offensive response to hostile acts or demonstrated hostile intentions would be required to operate in, or move resources through, a hostile area of operation.”<sup>9</sup>

The Defense Instruction is carefully constructed, even to the point (as seen in the quoted excerpts) of noting that an otherwise commercial activity such as security may, in effect, *become* inherently governmental under particular circumstances. Nonetheless, the Instruction is not framed as a guide to contracting decisions *for contingency operations*: the word “contingency” appears only a few times in the main narrative of the Instruction, and some of those uses refer to classifications rather than criteria for contracting decisions. Further, the implication that, within a single department, a particular task may or may not be inherently governmental, depending on circumstances, suggests that some conceptual ambiguity lies nestled in the meaning ascribed to “inherent.”

The language of the Instruction also serves as an illustration that different agencies within the federal government can reach starkly differing conclusions about the meaning of “inherently governmental.”

Consider the treatment of quick-reaction forces—usually small light-infantry or police units tasked to respond on very short notice to emergencies. The Defense guidance quoted above says, “assisting, reinforcing, or rescuing PSCs or military

Zabul Provincial  
Reconstruction Team,  
Qalat, Afghanistan.  
(U.S. Air Force photo)



9. Excerpts from Department of Defense Instruction 1100.22, “Policy and Procedures for Determining Workforce Mix,” April 12, 2010.

units who become engaged in hostilities” is inherently governmental because doing so involves offensive action. The State Department, on the other hand, has used and will use thousands of private contractors for both standard security and quick-reaction-force duties in Iraq as U.S. military forces withdraw because it does not view those tasks as inherently governmental.<sup>10</sup> USAID does not enter into this discussion: the agency has no organic security force and does not contract directly for security. Any private security for USAID-funded projects occurs as subcontracting activity by USAID’s “implementing partners” who receive grants or contracts.

These disparities in definitional treatment illustrate that the rules on inherently governmental functions do not produce predictable and consistent results on the legal baseline of permissibility, much less offer guidance on what is appropriate for contracting in contingency operations.

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## Characteristics of risk in contracting for a contingency

The observations and research of the Commission have identified a number of risk factors that should be considered as a guide in determining what is appropriate to contract for in a contingency. The following list does not purport to be definitive or exhaustive, for there is no apparent standard for judging that all risks have been identified, even conceptually. Indeed, presuming that one has identified all possible risks is itself likely to be a risky thing to do. Nonetheless, some risk factors within the broad areas of operational, political, and financial risks are apparent, including risks to:

- U.S. goals and objectives, such as from behavior that injures innocent members of the local population or outrages their sensibilities;
- federal civilians’ or military personnel’s safety, if contractors’ presence or performance creates unsafe conditions or invites attack;
- managerial control, such as relying on contractors to monitor other contractors with no means for government to check their work;

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10. See Commission Special Report 3, “Better planning for Defense-to-State transition in Iraq needed to avoid mistakes and waste,” July 12, 2010. See also Patrick F. Kennedy, Under Secretary of State for Management, Commission hearing, June 6, 2011, transcript, 57: “Even in those circumstances [reference to question about a force having to shoot its way into a situation to rescue people], security is not inherent in the government.”

- maintaining agencies' critical organic or core capabilities;
- critical knowledge or "institutional memory" as federal personnel rotate in and out of theater so that government must rely on long-serving contractors for area or subject-matter expertise;
- government's ability to control costs, waste, fraud, abuse, and conflicts of interest; and
- mission, such as from contractors walking off the job or being unable to perform when there is no timely back-up available.

These and other risks can assume greater or lesser salience depending upon the circumstances in which a contractor would be operating. As an example, recruiting local nationals as private security guards in an area where local sympathies are divided entails higher risk to the safety of U.S. and allied personnel than in a neutral or friendly area. If risk mitigation, such as stricter vetting and more vigorous human-intelligence gathering, could not reduce the residual risk to an acceptable level, decision makers would then consider not using contractors, modifying their use, or canceling or postponing the mission.

Situational risk factors that could affect risk assessment include:

- operating in a combat zone or insurgent-threat area;
- lack of effective federal oversight in the area of operations;
- presence of a culture of corruption;
- a host government incapable of enforcing the rule of law;
- inadequate accounting, financial, and business systems among contractors and subcontractors; and
- lack of legal accountability for foreign prime contractors and subcontractors.

These situational factors should be considered along with the risks discussed earlier as part of the decision on what is appropriate for the government to contract for in a particular contingency. If mitigation or control measures leave the residual risks of using contractors at a level that outweighs the expected benefits, then government needs timely and deployable options to support the contingency mission.

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### ► RECOMMENDATION 1

## Use risk factors in deciding whether to contract in contingencies

Heads of agencies involved in a contingency should:

- issue and ensure implementation of policy guidance for using risk factors such as those listed above, as well as those described in the Office of Federal Procurement Policy draft policy letter of March 2010 and Department of Defense Instruction 1100.22, to provide guidance on what functions are *appropriate* to contract for in a contingency setting;
- provide funding and direction for agencies involved in contingency operations to identify a trained, experienced, and deployable cadre for stabilization-and-reconstruction functions in areas of contingency operations so that the government has an alternative to contracting for performance of critical or sensitive functions; and
- provide a strategic plan for deploying these cadres that includes provisions for mandatory deployability of civilian members, and is supported by a back-up capability for rapidly making temporary hires for large-scale or long-term contingency operations.

**Heavy reliance on contractors can easily introduce risk into the area of acquisition management.**

## Contractors and risks to proper acquisition management

The government often employs contractors to help evaluate or otherwise support its management of other contractors. Doing so, however, can give rise to potential or actual organizational conflicts of interest (OCI) that must be avoided or mitigated.

The Federal Acquisition Regulation (FAR) requires contracting officers to analyze planned acquisitions to identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible, and to avoid, neutralize, or mitigate significant conflicts before contract award.<sup>11</sup>

Common sense, good judgment, and sound discretion are required in deciding whether a significant potential conflict exists and, if it does, in developing an appropriate means to resolve it. The two underlying principles are to avoid

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11. FAR 9.504.

conflicting roles that might bias a contractor's judgment, and to prevent a contractor's acquiring an unfair competitive advantage.

The risk of organizational conflicts of interest need not be a significant problem if handled appropriately. OCI can, however, be a problem when the contracting officer is overloaded and his or her support staff are themselves predominantly contractors, as has often been the case in the Iraq and Afghanistan contingency operations.

Heavy reliance on contractors can, for example, easily introduce risk into the area of acquisition management. Several instances of potential organizational conflicts of interest were identified in Iraq and Afghanistan. In each case, mitigation was attempted. But the appearance of conflicts of interest and the potential for problems were there:

- The U.S. Army contracted with Serco, Inc. in February 2007 to act as an independent stateside contractor to plan and develop performance work statements to compete future work among three competing contractors under the Army's Logistics Civil Augmentation Program (LOGCAP), a worldwide support contract. A contract clause prohibited Serco from working in any capacity under a LOGCAP IV contract. However, a Serco subcontractor, Military Professional Resources Inc. (MPRI), was drafting statements of work for both LOGCAP and non-LOGCAP work. MPRI could have been placed in a position to favor itself when developing performance work statements for requirements that it might have performed under the LOGCAP program as a subcontractor. After an inspector general identified the problem, Serco discontinued the subcontract with MPRI.<sup>12</sup>

In Afghanistan, the firm Aegis Defense Services was selected in 2009 to support the Armed Contractor Oversight Directorate (ACOD), with an Aegis contractor serving as deputy director and having day-to-day responsibility for managing the directorate. Aegis's responsibilities included working with the Afghan Ministry of Interior on investigations of PSC escalation-of-force incidents. The military's request for expedited assignment of four field-grade officers for ACOD went unfilled for months, leaving Aegis effectively in charge of making decisions on potential competitors' conduct.

Discovering this situation during theater travel, Commissioners concluded and reported that it created a potential conflict of interest if Aegis were to begin providing security for Defense. The government notified Aegis of the potential conflict, and offered Aegis the chance to be able to compete for

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12. DoD IG Report No. D-2011-032, "Logistics Civil Augmentation Program Support Contract Needs to Comply with Acquisition Rules," January 7, 2011, 1, 9-10.

future security work by withdrawing from the ACOD support contract in Afghanistan. The company withdrew, effective November 15, 2009.

- The U.S. government contracted with Virginia-based CACI International in 2004 to provide operations-support services to the Joint Contracting Command Iraq/Afghanistan (JCC I/A). Attempts to increase the JCC I/A's military staffing levels and to recruit volunteers had failed, so dozens of CACI employees were added and performed work that government contract specialists would normally have done.

By way of organizational-conflict-of-interest risk mitigation, CACI undertook not to compete for other JCC I/A solicitations, and to "firewall" the JCC I/A-support group from other CACI operations.<sup>13</sup> With the government's approval, this CACI business segment continued to act as part of a larger organization that competed for other contracts in theater. The Commission has reservations, however, whether such firewall arrangements can be effective.

These examples illustrate how easily potential or actual organizational conflicts of interest can arise, and to suggest that the urgency of contingency operations requires a vigilant and effective risk-identification, risk-mitigation, and OCI-enforcement process. When, however, organizational conflict of interest cannot be avoided or mitigated to an acceptable level, the work must not be done by contractors.

A somewhat different example—contractor work performed in the United States in support of the Afghanistan and Iraq operations, rather than in theater—illustrates a combination of problems that were not mitigated in advance. The case involves a \$285.5 million contract awarded in 2009 by Army Contracting Command to Science Applications International Corporation (SAIC) for follow-up maintenance support for the Army's Mine Resistant Ambush Protected (MRAP) vehicles. According to the inspector general of the Department of Defense, Army, and Joint Program Office officials

inappropriately allowed the contractor to perform inherently governmental functions, such as disciplining DoD employees, and to have organizational conflicts of interest, such as helping prepare requirements for the follow-on contract that the contractor bid on and won. ... This greatly increased the risk for potential waste or abuse on the contract.<sup>14</sup>

The use of contractors to manage other contractors reveals a failure of government to provide for a sufficient contingency workforce.

13. Dr. Terry Raney, Senior Vice President, CACI International, Inc., Commission hearing, April 19, 2010, transcript, 126.

14. DoD IG Report D-2011-081, "Contract Management of Joint Logistics Services in Support of Mine Resistant Ambush Protected Vehicles Needs Improvement," July 11, 2011, i.



The use of contractors to manage other contractors reveals a failure of government to provide for a sufficient contingency workforce. Personnel shortages are not sufficient justification for contracting for high-risk functions after a crisis develops. Congress and federal agencies are responsible for structuring the U.S. peacetime workforce to deal with projected mobilization and crisis demands. Securing a standing capability to deploy at the start of a contingency would reduce contract waste, fraud, and abuse, which were a significant problem in the early days of the operations in Iraq and Afghanistan, as well as help to avoid or mitigate potential organizational conflicts of interest.

► **RECOMMENDATION 2**  
**Develop deployable cadres for acquisition management and contractor oversight**

Agency heads should:

- Provide funding and direction to establish a trained, experienced, and deployable cadre for acquisition-management and contractor-oversight functions in areas of contingency operations so that the government has an alternative to relying on contractors for acquisition management and oversight.

**Determining whether an instance of static, personal, or convoy security is appropriate for contracting out in a contingency environment depends upon factors in addition to the inherently governmental construct.**

## Appropriate use of security contractors in contingencies

The government uses security contractors in three main ways:

1. *Static* security for sites like embassies and consulates, for military forward operating bases (FOBs), and for construction sites;
2. *Personal* security details for diplomats and other government personnel, and for other persons requiring special protection; and
3. *Convoy* security for movement of personnel and goods.

Direction regarding the performance of security functions in a contingency came with the enactment of the National Defense Authorization Acts for FY 2008 and 2009, as well as in the 2006 version of DoDI 1100.22, "Guidance for Determining Workforce Mix," which delegated decisions on the use of armed contractors

to the Combatant Commands (COCOMs)—years after the start of the Iraq and Afghanistan contingencies.<sup>15</sup>

In January 2006, Defense's general counsel issued a legal opinion concluding that the use of PSCs to protect U.S. personnel and property in Iraq and Afghanistan was appropriate. This opinion states that it would be inappropriate to use armed security contractors in "situations where the likelihood of direct participation in hostilities is high."<sup>16</sup>

The "likelihood" caveat in the Defense legal opinion underscores the Commission's belief that determining whether an instance of static, personal, or convoy security is *appropriate* for contracting out in a contingency environment depends upon factors in addition to the inherently governmental construct. Those factors include the type of security, risk of the specific mission, situational conditions, the current or potential kinetic environment, and host-nation stability.

The presence and scale of risks can be highly context-sensitive. In Afghanistan, for example, the difficulties of vetting and overseeing Afghan personnel hired for security tasks in a zone of contingency operations have been illustrated by incidents of attacks and fatalities inflicted on U.S. and other allied personnel with the participation or support of security contractor employees—and at least one episode of Afghan security guards huddling in their beds while insurgents attacked the U.S. combat outpost they were hired to guard.<sup>17</sup>



Fuel trucks ablaze, Oruzgan province, Afghanistan. (Photo courtesy of DCMA)

It should be noted that members of the Afghan military and police have also inflicted U.S. fatalities. Given that avoidable risks of operational, fiscal, and

15. Secs. 832, 853, National Defense Authorization Act for FY 2009, P.L. 110-417; sec. 862, National Defense Authorization Act for FY 2008, P.L. 110-181.

16. Department of Defense, Deputy General Counsel Charles A. Allen, memorandum, "Request to Contract for Private Security Companies in Iraq," January 10, 2006.

17. MSNBC News, "Afghan security contractor accused of killing US soldiers," March 21, 2011. The report said a recently hired guard with Tundra Security Group opened fire on a group of U.S. soldiers at Forward Operating Base Frontenac in Argandab Valley, killing two and wounding four before being shot to death. Associated Press, "Probe: Afghan Troops Ran, Hid During Deadly Attack," June 10, 2011. The story details an October 3, 2009 insurgent attack on Combat Outpost Keating in which eight U.S. soldiers were killed and 22 wounded, and includes reports on the conduct of both Afghan soldiers and Afghan security guards.

political failures fall directly on the U.S. government and its policy objectives, the Commission believes that risk assessments for using security contractors should be a standard, regularly updated exercise, and that agencies involved in contingency operations should formally agree on general principles for using security contractors.

As Iraq and Afghanistan show, the environments are dynamic and numbers of contractors and the scope of their missions can change dramatically from one year to the next. This is in contrast to labeling any one type of security as inherently governmental, assigning a “bright line” to that function, and prohibiting the U.S. government from contracting for such a service in future contingencies.

In a war zone, as troop limitations and expanded agency missions drive manpower decisions, a risk-based determination process of whether a function should or

**A realistic risk assessment must consider whether contracting for these services, currently performed with limited government oversight, is acceptable and whether risk can be brought to acceptable levels.**

should not be contracted may take a back seat to mission accomplishment. As the Under Secretary of State for Management remarked, “The surge capability is, in my mind, what contracting is for ... to be able to grow the work when you have a particular need and then to shrink that work back for the benefit of the mission and the American taxpayer.”<sup>18</sup>

State’s Bureau of Diplomatic Security has limited employee resources, yet in Iraq must significantly expand its security workforce to develop its countrywide presence as Defense continues to withdraw troops and resources. Contractors will supply much of the increased workforce.

A realistic risk assessment must consider whether contracting for these services, currently performed with limited government oversight, is acceptable and whether risk can be brought to acceptable levels. Lack of proximity to contracting and oversight authorities and to trained or experienced personnel in theater makes this a difficult challenge for State and especially for USAID, with its numerous and widely dispersed projects. The Commission has expressed concern in hearings and special reports about State’s ability to manage and oversee a major expansion of its contracting activity. A similar concern applies with more force to USAID, which has an even smaller acquisition staff than State,

18. Patrick F. Kennedy, Under Secretary of State for Management, House of Representatives Committee on Oversight and Government Reform, Subcommittee on National Security, Homeland Defense, and Foreign Operations hearing, “U.S. Military Leaving Iraq: Is the State Department Ready?,” March 2, 2011.

no organic security forces, and no direct contractual relationships with security contractors that its implementing partners may engage.

State and Defense have made significant progress in implementing standards and processes for the selection, training, equipping, accounting for, coordinating, monitoring, and investigating private security contractors and their activities. The Commission is concerned whether similar risk-mitigation strategies will be applied to security subcontractors for USAID implementing partners.

USAID pursues hundreds of projects in Iraq and Afghanistan for traditional reconstruction and development goals, as well as “stabilization” goals linked to political/military objectives. These efforts have entailed work dispersed among many remote locations, often in areas of lethal insurgent activity or at least constant threat of attack. USAID does not contract directly for security, and some of its implementing partners work without security. But security is an issue. As GAO has noted, “U.S. officials cited poor security as having caused delays, disruptions, and even abandonment of certain reconstruction projects.”<sup>19</sup> USAID’s inspector general told the Commission that the agency had cited security as “the overriding risk confronting USAID’s ability to manage its assistance activities” as early as 2003, then elaborated as recently as 2009:

In addition to causing operating and program costs to increase, the lack of security imposes significant constraints on USAID’s ability to monitor its programs. USAID officials are unable to make routine site visits, and their official counterparts are often reluctant to be seen meeting with Americans. Normal branding procedures (e.g., ensuring that USAID’s logo is readily visible at project sites and on delivered commodities) are sometimes bypassed in order to protect the implementers and the beneficiaries. USAID-funded vehicles have been damaged or destroyed by insurgents, and implementing partners and host country officials have been the targets of threats, kidnappings, and murders.<sup>20</sup>

Delays, abandonments, threats, and attacks all create an environment which contributes to waste. But this outcome is to be expected if U.S. policy departs from the maxim of “clear, hold, build.” There may be powerful geopolitical or humanitarian reasons to launch large-scale reconstruction projects in unsecured or contested areas, but obtaining cost-effective contracting is not one of them. As the Special Inspector General for Iraq Reconstruction (SIGIR) told the Commission at its first hearing:

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19. GAO Report GAO-10-932T, “Afghanistan Development: USAID Continues to Face Challenges,” July 15, 2010, 4.

20. Donald A. Gambatesa, Inspector General, USAID, statement, Commission hearing, February 2, 2009, 2.

A successful reconstruction program requires a balancing of security, political, and economic interests. Reconstruction cannot proceed on a large scale without the requisite security to protect those responsible for implementing and overseeing projects. When embarking on a contingency relief and reconstruction operation, the U.S. government should analyze whether and at what costs those security risks can be mitigated. Projects should only proceed when senior leaders determine that the strategic objectives they seek to fulfill outweigh the risk of failure and the costs of mitigating security risks.<sup>21</sup>

Officials who take into account the operational and fiscal implications of providing the level and duration of security required to complete and operate a project might well decide to cancel, postpone, or modify it before the associated costs and risks outweigh the presumptive benefits.

## Conditions influence appropriate use of contractors

Compared to the scope of contracting in reconstruction or logistics programs, contracted security providers are relatively small in number. However, any incident involving an armed private security contractor has immediate impact, with even minor incidents generating extensive media and host-nation attention.

Even if permitted by U.S. or host-nation laws, using contractors to provide security functions in specific contingency operations may not be the best decision based on conditions and risk. President Karzai's decree to restrict the use of PSCs may influence the decision to contract security services even if this is not expressly prohibited by the government of Afghanistan.<sup>22</sup> Concerns of waste, fraud, and indirect insurgent funding in convoy contracts in Afghanistan increase the risk to the mission of using PSCs. In these cases contracting for services is not appropriate unless the potential benefits outweigh the associated risks.

Risk evaluations include assessments of PSC use-of-force incidents, illegal activity, and implementation of procedures for coordinating, monitoring, reporting, and investigating contractor movements and incidents. Options available to mitigate risk are necessarily contingency-specific.

Situations vary among contingencies. A core set of mitigation steps, however, could be applied to all contingencies, including:

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21. Stuart Bowen, Jr., Special Inspector General for Iraq Reconstruction (SIGIR), statement, Commission hearing, February 2, 2009, 4.

22. President Hamid Karzai, Presidential Decree 62, "Ordinance of the President of the Islamic Republic of Afghanistan About Closing Security Companies," August 17, 2010.

- clarifying legal accountability under U.S. and host-nation laws,
- defining agency roles and responsibilities for oversight of all PSCs,
- drafting sufficient policies and procedures,
- securing appropriate funding to sustain management and oversight positions, and
- deploying trained or experienced staff in the field to monitor performance.

Additional risk mitigation can be adapted from lessons learned in previous or current contingency operations, including the establishment of interagency PSC coordination centers such as the Defense-managed Contractor Operations Cell (CONOC), clear incident-reporting guidance, and doctrine for interagency and bilateral investigations of incidents. Reforms implemented since 2007 have contributed to decreasing security contractor incidents, yet continued improvement is required.

## Risk considerations for contract security in Afghanistan

The scale and intensity of U.S. contingency operations in Afghanistan, the challenging security environment, and the Afghan government's policy toward private security contractors all warrant a discussion of contract security issues in that country.

As of June 30, 2011, Defense had over 15,000 private security contractor personnel working in Afghanistan, more than double the count of June 2009. Of these,

- over 13,000 were Afghan nationals,
- nearly 1,300 were third-country nationals, and
- about 700 were U.S. nationals.<sup>23</sup>

About 12,000 additional private security contractors and subcontractors were working in Afghanistan supporting State and USAID as of fall 2010.<sup>24</sup>

**Concerns of waste, fraud, and indirect insurgent funding in convoy contracts in Afghanistan increase the risk to the mission of using PSCs. In these cases contracting for security services is not appropriate unless the potential benefits outweigh the associated risks.**

23. Deputy Assistant Secretary of Defense (Program Support), "Contractor Support of U.S. Operations in the USCENTCOM Area of Responsibility, Iraq, and Afghanistan," July 7, 2011. The numbers are about 4,000 lower than the previous quarter's report as a result of licensing issues with the Afghan government and compliance with Presidential Decree 62.

24. GAO Report 11-1, "Iraq and Afghanistan: DOD, State, and USAID Face Continued Challenges in Tracking Contracts, Assistance Instruments, and Associated Personnel," October 1, 2010, 21.

The security landscape in Afghanistan is in flux. In response to the Afghan government's decree of August 17, 2010, the country's Ministry of the Interior issued a "bridging strategy" implementation plan on March 15, 2011.<sup>25</sup> The bridging strategy addresses implementation of President Karzai's decree, exempting private companies that provide security for diplomatic organizations. Otherwise, PSCs will be unable to provide security for development or reconstruction projects after March 2012, and for international-forces' convoys and sites after March 2013.

The Afghan government's plan is that functions prohibited to foreign PSCs will be assumed by an Afghan government-controlled Afghan Public Protection Force (APPF). The U.S. government supports the bridging strategy and creation of the APPF, but has conditioned its support on the APPF's ability to assume responsibility and on the Afghan government's establishing acceptable administrative procedures.<sup>26</sup>

Considering the risks and appropriateness of contracting for private security in Afghanistan requires noting the distinctions among static security, personal security, and convoy security.

## Security for bases, camps, and diplomatic posts

Static security for bases, camps, and diplomatic posts involves considerations different from those applicable to convoy security.

The biggest threat is from insurgent attempts to target bases and camps in order to inflict casualties on U.S. forces. Other kinds of problems arise from relying upon Afghan PSCs who recruit local nationals. A Pashtun PSC guarding a base or camp in a contested Pashtun area may have pro-insurgent personnel in its workforce. However, bringing in guards from other areas may cause suspicion and friction among the local civilians. The Afghan Presidential Decree 62 mandates that static security ultimately will be provided by an entity under Afghan governmental control. A later decree exempted foreign diplomatic security.

These considerations suggest selective phasing out of PSCs in the most at-risk positions, regions, and contexts. At forward camps in insurgent-controlled areas

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25. Ministry of the Interior, Afghanistan, "The Bridging Strategy for Implementation of Presidential Decree 62, (Dissolution of Private Security Companies)," March 15, 2011.

26. Special Inspector General for Afghanistan Reconstruction (SIGAR), Audit Report 11-1SP, "Analysis of Recommendations Concerning Contracting in Afghanistan, as Mandated by Section 1219 of the Fiscal Year 2011 NDAA," June 22, 2011, 14.

where there is a significant likelihood of well-planned enemy attacks, military forces should provide static security.

At the other end of the spectrum, PSCs may serve well to guard outer areas and perimeter gates for forward operating bases in completely uncontested areas. Deciding which PSCs to use requires a challenging calculation involving the risks of different kinds of PSCs and the application of the Karzai decrees. The problem is not merely that third-country nationals (TCNs) may be costlier than Afghans. Using TCNs may erode local support by removing employment opportunities for local Afghans. Using PSCs for static security in low-risk areas serves its classic function of freeing up troops for combat operations. That said, improvements are needed in PSC vetting, training, arming, weapons control, oversight, and management. For example, during March 2011 travel in Afghanistan, Commission members and staff learned of drug paraphernalia and ingredients for improvised explosive devices having been found in hired guards' possession.

Afghan decree limiting foreign security firms. (Afghan government document)

Afghanistan requires a risk-based analysis, with selective phasing-out of private security in the riskiest areas. In some roles, however, if the benefits associated with PSC use are outweighed by the risks, reform rather than phase-out is the reasonable approach.

## Personal-security details

So long as the U.S. military continues its minimal participation in personal-security missions, the State Department has no practical alternative to using contractors. State's Bureau of Diplomatic Security has only about 1,800 Diplomatic Security agents world-wide, and cannot meet all of the Department's security needs amid the Afghan insurgency without contractor support.

Changing State's personal-security practices in Afghanistan would entail heavy burdens, at least in the near term. But change in this function does not appear urgent. When the Karzai government demanded changes to reduce the presence of foreign private-security companies, it exempted personal-security details used by the Department of State. Otherwise, an agreement between the International Security Assistance Force and the Afghan government calls for phasing out PSC performance of personal-security missions by 2012 and turning responsibility over to the Afghan Public Protection Force. It is uncertain whether this process will be completed on schedule.





There is room for improvement. Many important reforms made in Iraq have not been implemented in Afghanistan. They include reliable incident-reporting mechanisms for all PSCs and compliance with arming-authorization and host-nation regulations. Documentary requirements such as arming authorizations and rosters are far from complete. The ACOD in Afghanistan does not function at the same level as the ACOD has in Iraq. Many other inadequacies and needed reforms could be cited. These improvements were useful in Iraq, and need to be better applied in

**Afghanistan requires a risk-based analysis, with selective phasing-out of private security in the riskiest areas.**

Afghanistan and in future contingencies.

## Convoy security

Convoy security in Afghanistan has several features that suggest PSCs should be phased out or at least sharply restricted for that function.

The Commission has previously noted that “contractors who perform movement security in Iraq and Afghanistan are likely to traverse hostile environments and enter into or generate high-risk situations.”<sup>27</sup> That concern primarily involved potential (and actual) civilian casualties, as well as alienation of the local population that could undermine U.S. and allied political initiatives and increase sympathy for the Taliban. An additional concern in Afghanistan is that convoys have become vulnerable to extortion, generating payments that flow to local warlords or to insurgents who control or contest a particular stretch of road.<sup>28</sup> On high-volume roads, insurgents concentrate their efforts to target convoy traffic.

The U.S. military has already limited its use of private security for convoys, furnishing its own security for convoys carrying critical material such as ammunition or military vehicles. Also, American forces provide security when convoy contractors identify certain routes as particularly hazardous enemy-controlled roads.

27. Commission second interim report, “At what risk? Correcting over-reliance on contractors in contingency operations,” February 24, 2011, 17.

28. This issue, as embodied in the Department of Defense’s Host Nation Trucking Program, was explored at length by the then-majority staff of the U.S. House Subcommittee on National Security and Foreign Affairs, House Committee on Oversight and Government Reform. See U.S. House Committee on Oversight and Government Reform, Subcommittee on National Security and Foreign Affairs, Majority Staff Report, “Warlord, Inc.: Extortion and Corruption Along the U.S. Supply Chain in Afghanistan,” June 2010.

Phasing out PSC convoy security could be selective. Main roads in much of the western and northern provinces of Afghanistan are not under insurgent control. Convoy-security risks could also be mitigated by replacing PSCs with military guards for high-volume movement along the contested parts of the most heavily traveled routes such as the paved "Ring Road" linking Kabul, Kandahar, Herat, and other cities. Also, U.S. and Afghan forces could cooperate in providing military security for convoys.

A selective phasing out of PSC-provided convoy security would not erase the need for reforms. More rigorous vetting of PSC subcontractors and checking of their armed employees would help, as would tracking and video records of convoy movements and debriefings of convoy personnel.

**Many important reforms made in Iraq have not been implemented in Afghanistan.**

### ► **RECOMMENDATION 3**

#### **Phase out use of private security contractors for certain functions**

- Phase out use of host-nation private security contractors in Afghanistan for the convoys on high-volume roads that the insurgency controls or contests. Current alternatives include U.S. military, Afghanistan National Army units, the new Afghan government-sanctioned security providers established under the Karzai decrees as the Afghan Public Protection Force, or some combination of the above.
- Evaluate each static-security site to assess the risk associated with the use of contractors. Where the military commander determines there is a high risk, use military forces. Where the commander determines the high risk is specifically the result of using local-national contractors, use military forces or third-country national PSCs for security.

## Interagency agreement on security in contingency zones is needed

Following the watershed events of Nisur Square in September 2007, a Memorandum of Agreement (MOA) between Defense and State was signed regarding the use of armed contractors in Iraq.<sup>29</sup> This document broadly defined procedural requirements and standards in the selection, vetting, training, equipping, and accounting for PSCs under Defense and State in Iraq.

There is no similar interagency guidance applicable to all federal agencies regarding the proper use of PSCs in Afghanistan or future contingency operations and incorporating lessons learned since December 2007.

The United States has learned lessons, especially in Iraq, regarding effective oversight over PSCs. Examples include interagency-coordinated operations

U.S. Marine convoy, Helmand province, Afghanistan. (U.S. Marine Corps photo)



29. Department of Defense and Department of State, memorandum, "Memorandum of Understanding Between the U.S. Department of State and the U.S. Department of Defense and the U.S. Agency for International Development Relating to Contracting in Iraq and Afghanistan," December 5, 2007.

centers, command and control authorities, clear policies, and technical monitoring of mobile security.

Despite the success of some risk-mitigation strategies, many have not been implemented across the agencies or required in future contingency or combat operations involving the use of PSCs. The U.S. government will likely repeat costly mistakes in future contingencies if best practices are not institutionalized.

**The U.S. government will likely repeat costly mistakes in future contingencies if best practices are not institutionalized.**

Clearly identifying agency roles and responsibilities in the management of PSCs during contingencies allows agencies to prepare for their responsibilities in funding, planning, staffing, and training prior to the actual requirement. In the current military-to-civilian transition in Iraq, State is challenged to quickly fill the voids in specific capabilities as Defense draws down its forces. In addition to assuming Defense Logistics Agency and Army LOGCAP contracts in Iraq, State is adding contracts for support in security, aviation, response capabilities, and medical care. State could at some point face similar challenges in Afghanistan.

An MOA between federal agencies and applicable to all contingency operations regarding the use of PSCs would identify areas that must be addressed by all agencies prior to deploying security contractors.

Necessary conditions, such as serious-incident definition and reporting, effective incident reporting, points of contact, tactical responsibilities like quick-response forces and medevac services, investigative processes, and legal accountability of contractors must be identified to determine whether an agency is prepared to employ armed contractors in a responsible manner.

**► RECOMMENDATION 4****Improve interagency coordination and guidance for using security contractors in contingency operations**

Provide greater control and accountability for security contracting:

- Hold the ambassador, USAID mission director, and military commanders responsible for making, publicizing, and revising their determinations of security-contracting appropriateness as conditions change, giving particular consideration to the geographic, temporal, and organizational proximity to armed conflict.
- When private security or other contractors are to be armed, they should be overseen by government employees and tracked in a centralized system, as is done in Iraq.
- Reliance on private security contractors should be accompanied by greater use and emphasis on vetting, training, authorizing arms, and weapons control; post-convoy debriefing, locational tracking and video monitoring; and more thorough and comprehensive management.
- Execute an interagency agreement to provide guidance on security contracting.
- Defense, State, and USAID should develop and enter into a standing interagency MOA, incorporating lessons and best practices learned in Iraq and Afghanistan, to provide guidance in use of private security contractors in future contingencies.
- This standing MOA should be modified within 90 days of a declared combat operation or other contingency to specifically address the needs and circumstances of that operation.

