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Public Hearing on  
“Are Private Security Contractors Performing Inherently Governmental Functions?”  
Statement for the Record  
Submitted to the Commission on Wartime Contracting  
June 18, 2010

Founded in 2001 as a trade association with the mission of promoting high operational and ethical standards of firms active in the peace and stability operations industry, IPOA, the Association of the Stability Operations Industry, endeavors to engage in a constructive dialogue with policymakers about the positive contributions our members make toward enhancing international peace, development, and human security. On behalf of our more than 60 members, I would like to thank the chairman and the other commissioners for inviting IPOA to submit written testimony related to today's hearing.

To provide our bottom line up front, I would like to make four clear statements. First, IPOA supports defining the term "inherently governmental function" in accordance with the Federal Activities Inventory Reform (FAIR) Act (Public Law 105-270). Second, IPOA has strong concerns about the U.S. Government's attempt to define, in regulation, the term "critical functions" and those functions "closely associated with the performance of inherently governmental functions". Third, our industry association is supportive of the effort by the Office of Federal Procurement Policy (OFPP) to require agency-level "strategic human capital planning". Finally, I would like to highlight briefly the unique role played by private security personnel overseas. The remainder of my prepared testimony will elaborate on these points.

The basic question of defining "inherently governmental functions" has received significant and much-deserved scrutiny by congressional, Administration, and industry officials, particularly over the last few years. At its core, the topic of today's hearing – whether private security contractors are performing "inherently governmental functions" – requires

a commonly accepted, easily identifiable definition of what that key phrase means so that we can then discuss the fundamental role that private security contractors play in improving peace and stability operations worldwide. To the end of defining “inherently governmental functions”, the Office of Federal Procurement Policy (OFPP) recently released, and received public comments on, a draft policy letter regarding circumstances under which work must be reserved for performance by Federal government employees.

The IPOA is generally supportive of key elements of this draft letter. In particular, we support the decision to adopt the definition of “inherently governmental function” as outlined in the Federal Activities Inventory Reform (FAIR) Act (Public Law 105-270). The letter properly outlines the significant aspects that render a function “inherently governmental” and, for functions not explicitly deemed “inherently governmental” in this letter or in statute, provides appropriate flexibility for agencies to determine, on a case-by-case basis, the nature of the work and the level of discretion associated with its performance. In such a way, the letter provides a framework for agencies to make informed decisions regarding how best to meet mission requirements. Of particular relevance to the private security industry, the U.S. Department of State should be able to determine – for example - that providing physical security for embassy facilities around the world is not inherently governmental and therefore hire private security contractors.

That said, I remain concerned about OFPP’s attempt to define “critical functions” and those functions “closely associated with the performance of inherently governmental functions” with the same certitude brought to defining “inherently governmental functions”. In fact, in

practical terms, the letter does not truly differentiate “associated” functions as a separate class of functions that merit their own category. The policy letter loosely describes a function “closely associated with the performance of inherently governmental functions” as one that may impinge upon federal officials’ performance of an inherently governmental function and that contractor performance may cause the agency to lack sufficient internal expertise to maintain control of its mission and operations. When viewed in concert with the FAIR Act’s definition of an “inherently governmental function” and with the letter’s own definition of a “critical function” (i.e., one which allows federal employees to maintain control of an agency’s mission and operations), it becomes clear that there is no utility in calling out a separate category for associated functions and that, by doing so, the draft policy letter introduces an unnecessary bureaucratic construct and possible confusion. Instead, it should be sufficient to capture those “associated” ideas within the definition of a “critical function”.

In addition, IPOA encourages the Office of Federal Procurement Policy to retain the necessary flexibility within the definition of a “critical function” to allow the use of private contractors, as appropriate. The draft policy letter provides a useful definition of “sufficient internal capability” and allows agencies to make related determinations on a case-by-case basis – an efficient and effective construct, which has been validated by developments in overseas contingency operations over the last few years. For example federal departments and agencies have retained a core capability in training foreign security forces, but they

have also hired contractors to supplement that capability when cost effective and appropriate and exercised management and control over those efforts.

To that end, one can recognize that such case-by-case determinations of a “critical function” would be best made at the component or individual agency level. Departments are far better-suited for high-level, strategic determinations, but in working through the number of “critical functions”, those determinations may either (1) impose overarching requirements that are ill-fitting to many cases and thus hinder operations, or (2) reflect a mere rubber-stamping of a component’s recommendations and thus create additional, time-consuming bureaucracy.

The current draft policy letter also requires agencies to undertake “strategic human capital planning” that calls for sufficient, qualified agency personnel to manage and oversee contractor performance. IPOA is supportive of this effort to develop and sustain a federal acquisition workforce and cadre of contracting personnel who can apply consistent management of federal contracts. It may prove useful for the guidance to address circumstances in which it would be appropriate for a federal agency to contract – on a temporary basis – for the performance of work normally reserved for federal employees. In particular “surge” circumstances, where sufficient governmental capacity does not yet exist, such guidance would allow officials to find an essential, albeit short-term solution to meet demand while creating the governmental capacity without mission degradation.

Finally, on the very specific topic of using private security providers overseas, I would like to highlight a few key points. First, it is important to note that private security contractors are typically licensed by the host nation and operate in accordance with all local laws. The Commission undoubtedly is aware that these contract personnel are not like armed U.S. government personnel, whether military or civilian; absent war or other specific circumstances, the United States Government has no authority to place or use members of the U.S. armed forces inside another nation, and there are no Status of Forces Agreements or other government-to-government agreements that provide legal protections to private security contractors, who support U.S. interests not only in Iraq and Afghanistan but around the globe. This point is significant as these agreements often include personnel caps under which private companies simply do not fall. We need to keep this fact in mind as U.S. forces continue to withdraw from Iraq and begin to withdraw from Afghanistan – and private security contractors remain in both of those nations and elsewhere, providing critical stability operations support in a tumultuous, at times non-permissive security environment.

Again, I thank the Commission for leading today's timely and important discussion.