

**Contractors Supporting  
Military Operations**

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## **Abstract**

Contractors supporting combat operations have become essential to the way the United States fights wars and conducts operational deployments. The trend toward increasing reliance on contractors for logistical support and to supply expertise not otherwise available to the military is not new. It is surprising to conclude, as this research does, that the issue of who is in charge of contractors in the zone of combat operations is still an open question. While there have been important policy developments in recent years, some fundamental questions concerning contractors supporting combat operations remain to be answered. During policy formulation in the past year the military maxim of “unity of command” met the procurement imperative of the contracting officer’s authority and the military came up short. This research reviews recent policy developments. It then applies the perspective of history to the subject through a series of case studies. Concluding that incremental policy developments of recent years have been inadequate, this paper includes recommendations for “radical” changes in the approach to dealing with contract support including temporarily “militarizing” some contractors.

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## I. Overview

The author's previous research surveyed issues and policies related to the trend toward increased reliance on contractors in combat and other contingency operations; documented relevant case studies; and, presented analyses and recommendations.<sup>1</sup> The current research presents a background summary and updates relevant policy developments since the earlier research. It then takes a distinctly different approach than the earlier study. Instead of trying to extract additional lessons from case studies of current events, this research attempts to gain historical perspective through case studies of earlier conflicts, primarily World War II. Rather than attempting to survey a catalog of issues, this research concentrates on a narrow set of issues.

The issues reviewed in this paper relate to the extent contractors can and should be made an integral part of the "mission team" in combat and contingency operations. If contractors have become integral to the success of combat and contingency operations, shouldn't they be responsive and responsible to the commander formally charged with mission success? Expressed another way, can and should the concept of "unity of command" be applied to contractors in a combat theater? Assuming that contractors should be integrated into joint task force operations in a way that creates the essence of unity of command, how can that be accomplished?

The question of contractor control/unity of command can be relatively simply stated as suggested in the previous paragraph. This research found, however, that the path toward combatant commander control of contractors is complicated by divergent policies; conflicting belief systems; disconnections between policy theory and "on the ground" reality; and, a variety of legal and regulatory hurdles.

A key aspect of the commander's ability to control the forces in his theater, uniformed military or civilian contractor, is the ability to direct available forces to perform the most critical tasks when necessary. In a combat zone the performance of critical tasks may involve activities that constitute or approach "direct participation" in combat. This is not an issue for uniformed military personnel; every soldier can be made a rifleman when

necessary. However, civilians who directly participate in combat risk becoming illegal combatants under international law, compromise their potential status as prisoners of war, and potentially become subject to criminal sanctions. Civilian contractors may find themselves participating directly in combat because their contract work calls for such action (e.g., certain weapons system or security contractors) or due to exigent circumstances.

As pointed out in the author's earlier work there are a number of issues concerning contractors in combat scenarios that need to be resolved. Policy developments have addressed many of these issues in a variety of ways. Progress continues to be made in a number of areas. Recent developments have not, however, assured that the theater commander has effective control over contractor personnel in his area of responsibility. Current policy purports to prohibit direct participation in combat by contractors; but, there seems to be no rigorous method to ensure that contractors (either as part of contract work or due to exigent circumstances) do not actually participate in combat. Moreover, the concept of "direct participation" is not fixed in international law but is still evolving.

This research aims to examine both these areas and if possible recommend policies and approaches that will assure that the theater commander and his subordinates effectively control civilian contractors that support them; and, that only uniformed military personnel will actually participate in combat. Both "participation" and "combat" itself may be more amorphous in a war on terrorism than in some other conflicts. A corollary to the commander's control of the activities of contractor personnel is the concern that civilian contractors that are exposed to the risks of combat receive the same force protection, administrative support, and amenities afforded to soldiers under similar circumstances.

## **II. Contract Support in Combat and Operational Deployments 1995-2005**

### ***Pervasiveness and importance of contract support for operational deployments.***

Many recent commentaries on the subject of contract support for combat and other contingency operations begin with a brief historical reference that goes something like: “Contractors have always been on the battlefield; George Washington’s army relied on civilian wagon drivers.”<sup>2</sup> Comments such as that do not convey the improvements wrought by adoption of the contract supply system for the Continental Army nor do they highlight the importance of civilians (primarily seamen on privateers) in combat during the Revolutionary War. Washington’s wagon drivers and other historical references do, however, suggest questions like “what is so different today?” and “don’t we already know how to do this?”

Actually, things are different today. The international Law of Armed Conflict (LOAC) or laws of war have evolved through a series of treaties, conventions, and protocols over the last century. Important elements of international law that affect contract support for combat operations continue to evolve. Domestic law, primarily government contract law, has also developed significantly in recent decades. More immediately the end of the Cold War and certain business trends since the 1990’s have had major impacts on military force structure and the role of contractors supporting the military.

Victory in the Cold War promised a “peace dividend” and the Department of Defense contributed by reducing its force structure and its proportion of the Federal budget. The defense industrial base shrank and consolidated significantly. Simultaneously, deployments of military forces in “military operations other than war” as well as combat increased significantly. Then came September 11<sup>th</sup> and the Global War on Terror which promised to require a high operations tempo for years to come.

From a peak of about 2.1 million, the active force shrank to less than 1.4 million by the year 2000.<sup>3</sup> Despite events since September 11<sup>th</sup>, 2001, recent military personnel strengths are only slightly greater than in 2000 and prospects for large increases are unlikely.<sup>4</sup> Given shrinking military end strengths in the 1990's a reassessment of force mix was in order. The shrinking military opted to emphasize the fighting "tooth" rather than the supporting "tail" in the new force mix.<sup>5</sup> This decision soon led to the additional measure of providing for necessary surge support for military contingencies by contract. The U.S. Army had initiated a policy calling for Army components to plan and contract for logistics and engineering services for worldwide contingency operations in the mid-1980's.<sup>6</sup> The first actual use of contract support under this "Logistics Civil Augmentation Program" (LOGCAP) came in 1989. In the 1990's the Navy and Air Force followed the Army's lead and entered into worldwide blanket contracts to provide certain types of support for contingency operations.<sup>7</sup>

A shrinking military, and a decision to field more military "tooth" and less "tail," supplies only part of the story for the increase in contracted logistics and combat support functions. For many years, it has been "the policy of the Government of the United States to rely on commercial sources to supply the products and services the government needs. The Government shall not start or carry on any activity to provide a commercial product or service if the product or service can be procured more economically from a commercial source."<sup>8</sup> In 1966, this policy was incorporated in Office of Management and Budget (OMB) Circular A-76. This policy was honored with varying degrees of support in different Presidential administrations. At times Congress seemed supportive but at other times attempted to block attempts by government agencies to "contract out" various functions. Broad trends in the 1990's, both within and outside government, brought "contracting out" or "outsourcing" to the fore.

Within government, at the same time that military force structure and the procurement budget were in decline, the relative importance of DOD service contracting was increasing.<sup>9</sup> This was part of a government-wide trend.<sup>10</sup>



“Contracting out” and “make or buy” decisions are not new business strategies for industry. Recent years have seen a change in the nature and tempo of “outsourcing,” however. According to some estimates, outsourcing in the United States grew “at an annual compound rate in excess of 30 percent” during a five year period spanning the turn of the Century.<sup>11</sup> The subjects of outsourcing have also changed. Once it was common to outsource only “tactical” or “nonessential” parts of a business allowing companies to concentrate on “core competencies” or the “core business.” A relatively new phenomenon is “strategic outsourcing” where core activities like manufacturing or logistics are outsourced.

It seems safe to assume that outsourcing in the private sector is not a fad but is driven by bottom line considerations. Within government there is a philosophical basis for outsourcing services and products available in the private sector (“a government should not compete against its citizens”) but an increase in government outsourcing as well as in “competitive sourcing” (in which increased efficiency, whether in- or out- of house performance results, is the goal) also has a strong financial motivation.<sup>12</sup> The Office of Federal Procurement Policy (OFPP) has estimated that the annual savings from competitive sourcing, if fully implemented, could amount to \$5 billion.<sup>13</sup>

Another factor driving toward increased use of contractors in combat support situations is technology. The growing sophistication of DOD systems often requires the expertise of civilian contractors to operate and maintain them. One well known example of this was the public revelation in 1991 that civilian contractors were aboard J-STARS (Joint Surveillance and Target Attack Radar System) aircraft in combat missions during Operation Desert Storm. Civilian personnel flew similar missions in the Balkans.

Civilian contractors have participated in operational missions of unmanned aerial vehicles (UAVs) such as Predator and Global Hawk. They have provided maintenance support for tactical aircraft such as the F-117A Nighthawk. System support contractors even appear directly on the battlefield when they support systems such as the TOW Improved Target Acquisition System.

In Operation Desert Shield/Desert Storm in 1990-1991 over 500,000 military personnel were deployed to the Middle East. The number of civilian employees and contractor personnel (about 14,000) deployed seems modest in comparison. That conflict was fought with the Cold War force structure still in place. The figures are a bit misleading since they overlook the fact that the majority of the transportation (sealift and airlift) that was the means of deployment was provided by civilian carriers.<sup>14</sup> Dhahran, Saudi Arabia, one of the key points of sealift entry was the target of numerous Scud missile attacks many of which missed ships and port facilities by relatively narrow margins.

In Operation Joint Endeavor in Bosnia, American civilians (primarily contractor employees) made up about ten percent of the U.S. force committed. U.S. contractors hired an even larger number of Bosnians to perform routine base support services. This was particularly important, however, because self-imposed troop ceilings limited the military presence to 20,000 troops. In counter-drug operations in Columbia, civilians made up about twenty percent of the deployed force. Provision of helicopter support by contract in East Timor in 1999 allowed for the relief of an amphibious assault ship and entire Marine expeditionary unit. Two such ships and units had previously been successively employed to supply helicopter lift in support of the Australian-led mission there.<sup>15</sup>

The number of contractor personnel supporting the U.S. Army in Iraq and Kuwait under LOGCAP is about 25,000. Considering that, U.S. military personnel in Iraq generally number less than 150,000 this is an impressive figure. This number does not, however, begin to capture the contractor presence in Iraq. In addition to LOGCAP there are numerous other service contracts administered by weapons system offices or under authority of the theater commander that have a personnel presence in Iraq or Kuwait. Other U.S. Government agencies including the Department of State administer significant contract efforts in Iraq. Suffice it to say that many billions of dollars of contracted work and thousands of contractor personnel are part of U.S. efforts to establish a peaceful Iraq that will not harbor terrorists but will contribute to regional stability and world peace.

What functions do deployed contractors perform? The General Accountability Office (GAO) prepared a list of contractor provided services in different deployment locations as part of one of its reviews of issues related to contract combat support.<sup>16</sup> One category is base operations support. This includes many mundane tasks once performed by soldiers of a different era (peeling potatoes, cleaning latrines), occasionally power generation, and a variety of maintenance and “quality of life” support activities. Fuel and material transport were performed by contractors in all deployed locations surveyed by GAO. Management and control of government property was another function performed by contractors in all locations surveyed.

Other functions were performed in some deployed locations but not in others. These included logistics support, pre-positioned equipment maintenance, non-tactical communications, biological/chemical detection systems, continuing education, tactical and non-tactical vehicle maintenance, medical service, and mail service.

Other services provided by contractors in the GAO list seem much more closely aligned with combat activities. These include weapons systems support, intelligence analysis, linguists, C4-I; and, security guards. These are functions that can obviously be carried out either in the United States or at a deployed location. When they are carried out in a deployed location in conjunction with military operations, some of these activities seem to have the potential to involve contractor employees in something akin to direct participation in combat.

The preceding list includes security guards. These are guards contracted primarily to provide physical security to DOD installations and personnel. Contract security guards are common at both CONUS and overseas DOD facilities. They may be entry or perimeter guards or provide special security to high value facilities. They are often authorized to carry side arms and sometimes have access to more substantial weapons. In the event of an assault on a DOD installation, they would undoubtedly attempt to repel the attack. In a war zone, the fact that their actions were defensive in nature would not exempt their activities from constituting direct participation in combat.

Not necessarily included within the GAO list are other security personnel. Consistent with DOD policy, many contracts require contractors to provide their own security or “force protection.” Contractors often do this by subcontracting with private security companies who typically employ highly trained professionals, who are often former U.S. Special Forces/SEAL personnel or experienced foreign nationals. The former head of the Coalition Provisional Authority (CPA) in Iraq, Ambassador L. Paul Bremer, entrusted his security to such firms including Blackwater Security.

Whether under direct contract to a government agency or under a subcontract to a combat support contractor, private security firms have a strong presence in Iraq. By all accounts, in the narrow sense, they have done their job well. Some have questioned, however, whether their presence has had more negative rather than positive impact on the Coalition’s overall goals in Iraq.<sup>17</sup> Private security firms have been involved in clashes with both insurgents and U.S. military forces. The most famous incident occurred on 4 April 2004 in Najaf. A small number of highly experienced Blackwater employees and a couple military personnel held off a large number of attacking insurgents and reportedly inflicted numerous casualties. During this operation, the small team of Americans received air support. Helicopters operated by Blackwater pilots delivered ammunition to them while the engagement was still in progress.

Whether cleaning latrines; delivering fuel and ammunition; interrogating prisoners; supporting operational planning; operating UAVs; supporting weapons systems in the field; or, fighting pitched gun battles, contractors are not only present in current U.S. military operations but provide vitally needed manpower and resources. Absent an unlikely substantial growth and realignment (and return to the draft) of the U.S. military, contractor support for military operations seems destined to continue into the foreseeable future. Contract support is a vital element in the projection of U.S. military power. The question is not whether contractors *should* have such a vital presence in the operational deployments of U.S. forces. The last decade has resolved that question. The key questions are how best to utilize and manage contract support in combat and contingency deployments.

***Perceived weakness and inconsistency in DOD policy and management of “contractors accompanying the force.”***

The author’s previous research highlighted a number of deficiencies or “contracting challenges” related to using support contractors in combat and other contingency operations. Two of these were particularly emphasized. They were (1) the need for training and (2) the need to enhance the contracting authority of the theater and joint task force commander. The current research reinforces those earlier perceptions. However, both areas, particularly training, are complicated by an over-riding condition; namely, contracting policy often does not fit the reality of the combat zone.

The discussion of training noted that while:

*The prisoner abuse at Abu Ghraib may have been unique, the evident lack of understanding about proper relationships and roles for contractors may not be equally unique. Many soldiers at Abu Ghraib thought contractors were supposed to be fully integrated in the chain of command and even assume supervisory roles over military personnel. This view was shared by the OIC of investigations at the prison and even articulated by a field grade Army spokesman who made comments about the situation from the Pentagon.<sup>18</sup>*

The discussion continued:

*Support service contracts are hard to manage. Maintaining a team concept between contractor employees and government personnel that work side by side in an office or on the battlefield is important. Maintaining formal distinctions between the two is also required (primarily because personal service contracts are generally not authorized).<sup>19</sup>*

The “proper roles” and “formal distinctions” mentioned in the previous quotations are those that stem from government contract law and regulations.<sup>20</sup> The “team” concept and “chain of command” are personnel management concepts that are particularly important to the military. In addition to revealing a deficiency in training, the quotations above may

illustrate a divergence between contracting regulations and the imperatives of effectively handling personnel and fighting a war.

Contract vehicles available to support the mission of the combatant commander include external support contracts, systems support contracts, and theater support contracts. These terms have all been described and examples have been given in the author's earlier work.<sup>21</sup> Systems support involves the operation or maintenance of weapons, surveillance, targeting or intelligence systems which are involved in deployed contingency operations. External support is exemplified by LOGCAP; contracts are awarded and administered by a command other than the theater commander but are intended to provide logistics and other support to the theater commander. Theater support contracts may provide many of the same supplies and services as external support contracts but are under cognizance of the theater commander. All three types of contracting may be referred to as "contingency contracting," but more narrowly that term applies to relatively small purchases often in local currency conducted with a minimum of formality but with an understanding of local business customs and satisfying the immediate needs of the troops being supported.

Of the three kinds of combat support contractors mentioned above only the theater support contractor operates in an environment where lines of contract authority, resource allocation, and the chain of command intersect. Even then, the chain of command and lines of contract authority may not be identical. For other types of contractors (external support and weapons systems contractors), contract authority, resource allocation, and the customer often constitute three different chains of command. In Iraq, this situation was complicated by the presence of other government agencies and their contractors, as well as contractors of the CPA. The combatant commander is responsible for the success of his mission but he may be dependent upon large numbers of contractors with whom he has no formal contractual relationship but which may have the potential to affect the outcome of his mission.

The evolution of the Army's guidance in this area is of interest. The Army's "Contractors on the Battlefield" (Field Manual 3-100-21, Jan. 2003, previously FM 100-21 of the same title) emphasizes planning as the key to obtaining effective support from contractors

during operations. The Army's earlier guidance notes that generally "multiple contracting agents" will be in the theater dealing with theater support, external support, and systems contractors. The commander is to "integrate and monitor contracting activities throughout the theater." The commander is expressly charged with overall "management and maintaining visibility over the total contractor presence in the theater (battlefield)...contracting support is centralized at the highest level to ensure a coordinated approach for operation support."

The 2003 revision of the Army guidance seems to recognize that what was previously required of the theater commander was simply impossible under existing management techniques and policies. Under the revised manual, the commander merely "sets the tone for the use of contractor support..." through the planning process. He is to assure "harmony of effort." The commander's principal assistant for contracting (PARC) is responsible only for theater support contracts. This guidance is tantamount to admitting that the theater commander directs contractors through coordination and persuasion rather than command.

Unity of command is one of the principles of war recognized in the U.S. Army Principles of War (1993). According to the military maxims of Napoleon, "Nothing is so important in war as an undivided command," or sometimes translated, "Nothing is more important in war than unity in command" (Military Maxim LXIV).

In some recent operational deployments, support contractors have made up twenty percent or more of the deployed force. In the case of some specialties, contractors are on scene to operate and maintain key systems that could not operate, or operate as well, without their help. They certainly provide essential logistics support in most operational deployments. Contractors are not merely important but vital to the success of most operational deployments.<sup>22</sup>

Contractors are important to military success. Unity of command is an important principle of war. We don't have unity of command with respect to contract combat support. This sounds like a recipe for disaster, though no documented disaster has yet happened. How do we account for this anomaly? One hypothesis might be that unity of

command is not actually important in this context. Another hypothesis might be that some condition mitigates the lack of unity of command or effectively substitutes for it.

Army policy is clearly stated in “Contractors Accompanying the Force” (Army Regulation 715-9): “...contractor employees are not under the direct supervision of military personnel in the chain of command.” This is, of course, consistent with general principles of government contract law that recognize an employee-employer relationship between contractor employees and the contractor but not between contractor employees and the government. Moreover, the contractual relationship between the contractor and the government (so far as direction and control are concerned) is between the contractor and an authorized contracting officer, not the “customer” or beneficiary of the services the contractor provides. In the case of deployed contractors, the cognizant contracting officer might be somewhere in the same theater but more probably is in another country or on another continent.

The policy is clear and yet in the Abu Ghraib example soldiers including officers *thought* contractors were in the chain of command. The same belief was held by a U.S. Army spokesman in Washington who stated civilian contractors at Abu Ghraib and elsewhere “fall in line with the current command structure” and are treated just like regular Army personnel.<sup>23</sup> A spokesman for the contractor involved made a somewhat similar statement: “All CACI employees work under the monitoring of the U.S. military chain of command in Iraq.”<sup>24</sup>

There is evidence that beliefs about how contractor employees should relate to the chain of command are not limited to the examples cited above.<sup>25</sup> Lockheed-Martin weapons system support contractor “employees took nearly all their direction from the field commander.”<sup>26</sup> Government officials have admitted that what’s in writing and the way things actually happen may be different; contracting officers may not be directly in control.<sup>27</sup> “Command and control is more important.”<sup>28</sup>

An official for a firm that provided security for officials of the former CPA has stated that things go on daily “outside the scope of the contract. Reality meets the terms of the contract and they don’t match.”<sup>29</sup> His company would “provide a flexible solution.” He



emphasized the give and take needed to make the contract work, stating that it was “not a used car deal!”

Some companies (represented in the Professional Services Council or PSC) operating in Iraq do operate through established lines of contract authority. They found that deployed “contracting officials often lacked authority that was retained by PCOs [procurement contracting officer] and ACOs [administrative contracting officer] in the United States. Contractors found that the terms and conditions of their contracts often dealt inconsistently or erroneously with worker and work place security requirements. The change-order process was slow due to lack of local ACO authority and distances involved. Companies often received conflicting and contradictory directions from their local customer and COR/CO.”<sup>30</sup>

A report by PSC companies found “application of FAR requirements involved significant limits and costs that were not always understood particularly by the oversight community.”<sup>31</sup> There was a lack of authority to waive socio-economic clauses that made no sense under the circumstances. The prevalence of undefinitized contractual actions and Defense Contract Audit Agency (DCAA) insistence on immediate audits caused significant problems. The requirements definition process was too decentralized and often disconnected from the contracting and contract administration process. Performance requirements and execution times were often unrealistic and not synchronized with the government’s ability to support contractor deployments. The “customer” was not always closely connected to contract execution and established contract roles and responsibilities.

As indicated earlier in this section some contractors dealt with the disconnection between the “customer” (military in the field) and the established contract lines of authority by following directions from the commander in the field rather than seeking direction from the contracting officer. This practice would seem to risk “constructive changes” in contract work, out of scope performance, and other actions resulting in requests for equitable adjustments in price, claims, disputes, and litigation. Available evidence suggests that no unusual amount of litigation is associated with Iraq or other contingency

contracting. In the case of the Lockheed-Martin weapons systems support contracts mentioned above, there have been no claims for equitable adjustment.<sup>32</sup> Some of these were time and materials (T&M) contracts for which the contractor was reimbursed for expenses actually incurred but some were fixed price. In other cases, “ratification [after the fact approval] was commonly used.”<sup>33</sup>

Based on the foregoing discussion it is not unreasonable to conclude that there has been no crisis from the lack of “contract unity of command” because in fact many contractors are following directions of the local command and *acting* as if they were subject to the chain of command. This may be because they *believe* they are subject to the chain of command or merely because it *makes good sense*. In other cases contracting officers are in the theater and available to make timely decisions coordinated with the local military command.<sup>34</sup>

When contractors act as if they are subject to the local chain of command and take their directions accordingly, it does not seem to result in disputes and litigation. This probably stems from the fact that many absentee contracting officers realize they are in no position to give timely or intelligent direction to contractors deployed at a distant and dangerous location. By approving billings for T&M contracts without undue scrutiny or ratifying “unauthorized” contractual actions, contracting officers are endorsing “on the ground” decisions that they are not really in a position to second guess.

The immediately preceding paragraphs are not meant to imply that the traditional contract lines of authority and contracting rules never work for deployed combat support contracts. Considering that both contractors and government personnel have been steeped in traditional rules for decades, they must sometimes have been made to work in ways approximating normal efficiency. The fact that there are documented reports of disconnects, inefficiency, and apparently considerable instances of ignoring contracting lines of authority, tends to strongly suggest that a preference for contracting rules over military principles may be misguided.

It is hardly comforting to say, “but see, contracting officers do approve out of scope T&M billings and do ratify unauthorized actions; the system does work.” If DOD intends

to operate consistent with policy, out of scope T&M billings should not be approved and ratifications should be rare rather than “routine” and certainly not handled in a way that “encourages such commitments” (FAR 1.602-3 (1)). Strict enforcement of contracting rules might well bring about the crisis flowing from a lack of unity of command that has not yet been apparent. If contracting rules and policies cannot be strictly applied without threatening important military principles, perhaps they need to be seriously reconsidered.

The author’s own recommendations for enhancing the combatant commander’s contracting authority have already been mentioned.<sup>35</sup> It is worth noting that in addition to the author’s recommendations regarding strengthening the contracting authority of the theater commander others have made somewhat similar, though not identical, recommendations.<sup>36</sup> Additional comments on this will be made in the next section.

Some contractor personnel may *believe* they are subject to the military chain of command. Others may *act as if* they were subject to the military chain of command. This may mask inadequacies in combat support contracting policy. It does not, however, meet the requirements of international law should contractor personnel participate directly in combat.

Contractor personnel are deployed to zones of conflict to operate and maintain sophisticated weapons systems. Others are sent as security guards either to protect government assets or as “force protection” for contractors performing other functions. Others who are contracted to perform only mundane tasks are authorized to carry side arms. These and other categories of contractor personnel may, and have, directly participated in combat. The implications of this flow, not only to the individuals involved, but to the United States, as party to international agreements and LOAC generally, the theater commander, and the companies of the employees involved.

The combination of armed contractors engaging in hostilities (either pursuant to, or contrary to, authoritative direction) and a military commander in charge of an operational area but not in direct control of contractor personnel has grave implications. LOAC presupposes that violations of the laws of war will be avoided through the control of military commanders that are responsible for their subordinates. When members of a

military force violate the laws of war and their theater commander is charged with their crimes, it is no defense for the commander to assert he did not have actual control of his troops.<sup>37</sup> It is not hard to envisage this principle being extended to the control of contractors that are being utilized as a substitute for, or to augment, a deployed military force.

The United States of America may be tarred internationally by the actions of contractors it has sent to a combat zone. A theater commander and his subordinates may be held criminally liable for the actions of contractor personnel in their area of responsibility.<sup>38</sup> Companies face civil or criminal jeopardy for the acts of their employees.<sup>39</sup> One person most unlikely to be subject to criminal sanctions for contractor misconduct is the contracting officer!

Given the implications of inadequate theater combat commander control over contractors and the risks associated with contractors participating in hostilities, one might predict that these issues would be of paramount concern for policy makers. Since operational deployments involve war or, at least a threat of hostile action, one would assume that military principles, such as unity of command, would strongly inform policy developments concerning operational deployments which would in turn guide the formation of contracting policy to support such deployments. The next section shows this has not been the case.

### ***Recent policy developments and management initiatives.***

In 2003, the General Accountability Office (GAO) found that there was no DOD-wide guidance on the subject of contractors deploying overseas with military forces and that DOD “has not fully included contractor support in its operational and strategic plans.”<sup>40</sup> Lack of DOD-wide policy was remedied in 2005. Surprisingly, DOD policy was promulgated not in a DOD Directive but in changes to the DFARS.<sup>41</sup> Subsequently, a DOD Instruction (“Contractor Personnel Authorized to Accompany the U.S. Armed Forces,” DODI 3020.41, 3 Oct. 2005) was issued requiring use of “contractor support...consistent with the” DFARS. Thus, DFARS constitutes top level DOD policy

for areas within its coverage. The DODI coverage overlaps the DFARS to a considerable extent and also covers areas not addressed by the DFARS.

The DFARS prescribes a contract clause (Antiterrorism/Force Protection Policy for Defense Contractors Outside the United States, DFARS 252.225-7040) for inclusion in contracts to be performed outside the United States. Certain provisions of this clause address some of the issues discussed in the previous section.

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

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

The most interesting part of the DFARS changes is what they do not contain. As originally proposed (69 Federal Register 13500) language would have vested in combatant commanders authority to order emergency changes in contract performance. This provision was deleted from the final version of the rule. Some comments received in the rule making process raised concerns about the language. DOD reversed its original position and stated the “proposed language is not consistent with existing procurement law and policy.” Other comments received during the rule making process supported the recommended change and even suggested clarifying or expanding the proposed authority of the combatant commander as well as vesting subordinate commanders with similar authority. The DOD response nonconcurring with these comments stated “DOD does *not*

*recommend any revisions or expansions to the authorities of the combatant commander...*” (emphasis added).

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

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

It is probably not too harsh a judgment to say that recent DOD policy fails to enhance the contracting authority of the combatant commander or to contribute to unity of command in the least. To the extent recent policy embodied in the new contract clause attempts to address the issue of contractor personnel participating directly in combat, it does so in an inept and ineffective way.

Various provisions of the DFARS and DODI address the subject of “direct participation” by contractor personnel and sometimes seem to conflict. The DODI expressly permits their “indirect participation in military operations” and additionally notes their “inherent right to self defense” (DODI 3020.41, para. 6.1.1). The DFARS does not prohibit

contractor personnel from being armed either pursuant to contract or with privately-owned weapons. The discussion of the final rule states the combatant commander will be involved in issues regarding arming contractor personnel on a case-by-case basis. The discussion then concludes by saying that the contractor is “to ensure that its personnel who are authorized to carry weapons are adequately trained. That should include training not only on how to use a weapon, but when to use a weapon” (70 Federal Register 23797). The DFARS states contractor personnel “shall not use force.” The DODI says contractor personnel are “authorized to use force” for self-defense (para. 6.3.4.1). The DODI also expressly permits security services to be provided by armed contractor personnel (para. 6.3.5). In the case of ongoing or imminent combat operations, such services are to be used “cautiously” (6.3.5.2).

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

Neither the DFARS nor DODI attempts to expressly deal with hard questions concerning “direct participation” that have actually occurred. These include civilians flying combat missions on J-STARS, civilians operating UAVs, repairing weapons under combat conditions, civilian interpreters accompanying military forces in combat operations, or contractors flying on board aircraft involved in re-supply missions in defended areas. Circumstances constituting “indirect participation,” other than a very few examples given, are left to case-by-case analysis. Moreover, the examples given may, as suggested in the previous paragraph, involve contractors in combat situations. Although both documents require compliance with treaties and international agreements, neither document warns contractors that the concept of “direct participation” is currently in a state of evolution in international law.<sup>42</sup>

It would be wrong to leave the impression that either the DFARS or DODI were solely or even primarily concerned with the issues that are the subject of this paper. In both documents, there is evidence that considerable time, thought and effort were devoted to a variety of issues that affect contingency contracting and the role of contractors supporting a deployed force. Some of the issues might be characterized as “house keeping” type issues but that is not to say there are not quite important on the practical level. Despite the effort devoted to crafting appropriate DOD policies for contractors supporting military deployments, there are still many unresolved issues. A brief review of some of those issues is included in the next section.

### ***Unresolved issues.***

The original title contemplated for this paper was “Contractors on the Battlefield: Who is in charge?” In dealing with unresolved issues, before getting down to focusing on issues specific to contracting, perhaps we should inquire, “Defense logistics: Who is in charge, the military department or the combatant commander?” It seems worthwhile to explore the question at least briefly since the obvious dispersion of contracting authority in and out of the area of responsibility and the apparent reticence of DOD to vest the combatant commander with enhanced contracting authority may, in part, rest on a fundamental tension between the authority of military departments (services) and the combatant commanders.

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

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

- Supplying.
- Servicing.
- Maintaining.



- The constructing, outfitting, and repair of military equipment.
- The construction, maintenance, and repair of [real property assets]. (10 U.S.C. 3013)

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

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

Section 164 (c) gives combatant commanders, subject only to the authority of the President and Secretary of Defense, functions that include:

*(A) giving authoritative direction to subordinate commands and forces to carry out missions assigned to the command, including authoritative direction over all aspects of military operations, joint training, and logistics; (B) prescribing the chain of command to the commands and forces within the command; (F) coordinating or approving those aspects of administration and support (including control of resources and equipment, internal organization, and training) and discipline necessary to carry out the missions assigned to the command [...].*

The statutory authority delineated above would seem to give combatant commanders clear authority “over all aspects...of logistics” and “control of resources and equipment...necessary to carry out the missions assigned...” A complete treatment of this subject is beyond the scope of this paper. Suffice it to say that combatant commanders do not exercise the unfettered authority over logistics suggested by the quoted statutory language.<sup>43</sup> According to one commentator there is a lack of integration that:

*Results in service program offices, material commands, and inventory control points writing logistics support contracts independently, without considering how to integrate logistics support in the theater of operations and how to handle the ensuing management challenges facing the combatant commander. The presence of contractor personnel in the theater may place the responsibility for their force protection, clothing, housing, medical care, and transportation on the combatant commander, but he lacks the overarching doctrine needed to address the multitude of issues that result from the presence of contractors.*<sup>44</sup>

A number of issues, some of which were addressed in the author's earlier research, continue to impact "battlefield" and other contingency contracting. The issues below will be dealt with only briefly, since most have been examined in the author's earlier paper or discussed above.

Contracting in Iraq has been the subject of exaggerated and irresponsible claims approaching demagoguery by politicians. Repeated charges have been levied against "Halliburton" (actually Halliburton's subsidiary Kellogg, Brown & Root, KBR). Halliburton's former CEO (Vice President Cheney) has apparently made Halliburton into a convenient whipping boy. Rep. Henry Waxman (D – Calif.) has been among the chief accusers. A pattern has developed in which Rep. Waxman makes public pronouncements and posts information on his website whenever a review or investigation of KBR billings or other action is undertaken, making much of the fact that the Army or an audit agency has initiated an investigation. Later, when KBR is cleared or its billings substantially approved, Rep. Waxman makes public pronouncements to the effect that the "Bush administration" has been soft on its favored contractor. Rep. Waxman has repeatedly referred to Halliburton's no-bid contract, referring to LOGCAP. An official of competing contractor Raytheon has publicly pointed out that the contract was "fiercely competed."<sup>45</sup> KBR and its employees have been involved in some derelictions under LOGCAP and other contracts but given the immense size of the efforts and conditions involved, this is hardly surprising. Inaccurate and inappropriate political commentary contributes to a faulty public perception of contingency contracting and affects some of the other issues impacting such contracting. Absent a sudden epidemic of honesty among some American

politicians, there is little that can be done about this but it does merit a comment as an unresolved issue.

Flexible contracting vehicles exist to support contingency contracting. Examples of this were documented in the author's previous paper.<sup>46</sup> Two commentators recently agreed, however, that inflexible contracting vehicles and failure to use flexibilities that exist were among the issues common to both Iraq battlefield support and contracting efforts in the wake of Hurricane Katrina. One of the commentators stated this was the number one issue in Iraq battlefield contracting.<sup>47</sup>

The failure to use existing flexibilities may flow from another issue: "Lack of trained acquisition personnel and lack of training for contingency contracting."<sup>48</sup> It may also be impacted by: "Unreasonable post-award and in some cases post-performance audit; auditing contingency/emergency contracting using non contingency/emergency standards."<sup>49</sup> Excessive contract oversight and oversight conducted using standards inappropriate for the conditions have been documented both in the author's current and previous research. It is the most likely cause of the "fear to make a decision" syndrome among contracting officers which has likewise been noted. The fielding of large numbers of on-site contract oversight personnel rather than warranted contracting officers seems a serious misallocation of resources.

Much publicized "abuses" and allegations of "fraud," whether by politicians or in the popular press, lead "to calls for more oversight and audit scrutiny."<sup>50</sup> "Oversight means second guessing;" there is a "need to focus on the front end not the backend ..." and we need to get it right next time "cooperation, if not partnership, is needed to get the job done."<sup>51</sup>

It should be pointed out that Iraq and other deployments are not merely DOD exercises. The Department of State and other agencies can be major players. Inter-agency efforts and visibility among various agency contractors have not typically been well coordinated. DOD needs to get its policy and doctrine in order. That cannot be done in isolation, however. Other agencies need to be consulted and ultimately a government-wide policy

formulated. As exemplified by the developments concerning “direct participation in hostilities,” there are international dimensions to be considered as well.

The DFARS change discussed above rejected what was essentially a modest proposal to enhance the combatant commander’s contracting authority.<sup>52</sup> The rejection was on the basis that the change was not consistent with existing procurement law and policy. Even if the stated basis was correct, it is interesting to note that there have been no subsequent initiatives to modify procurement law and policy to accommodate the kind of change proposed. The procurement status quo was apparently judged more important than the needs of troops and contractor personnel on the battlefield.

The success of our nation’s enterprise in Iraq depends largely on our military presence. Contractors provide a vital part of our military presence. The willingness of contractors and their employees to go to Iraq (and other dangerous places) is based on a mix of profit and patriotism.<sup>53</sup> In Iraq, contractor employees “live like soldiers,” and, in the case of some Lockheed-Martin employees, were under mortar fire for 180 consecutive days.<sup>54</sup> Contractor employees have suffered considerable casualties including nearly three hundred deaths by one count.<sup>55</sup> Contractor employees generally consider themselves as part of the “team” and try to be responsive to the local military chain of command.<sup>56</sup>

Contracting in Iraq works. The fact that it works is based on a *modus vivendi* between contractors and the local military authorities with the apparent acquiescence or benign neglect of some contracting officials. It is not based on the strict application of procurement law and policy. Problems are ironed out based on good will. Out of scope changes to contract work are accommodated. Ratification actions are routinely used to retroactively approve otherwise unauthorized actions. In cases where traditional contracting rules are strictly applied, the result is often delay and added expense. It goes without saying that in war delay in getting needed work done can result in deaths to personnel and mission failure.

If the misguided political criticism and excessive oversight applied to some aspects of Iraq contracting were generally applied to contracting throughout Iraq, it seems certain the *modus vivendi* would break down. The strict application of procurement law and

policy could result in a serious decline in the effectiveness of contracting in Iraq and in contingency contracting generally. The rejection of the DFARS change proposal is just one example illustrating that the contracting community is extremely reticent to sacrifice its principles for military principles or the real world needs of soldiers, contractors, and commanders. Apparently modest proposals for incremental changes have not worked. Perhaps it is time to examine entirely different approaches to providing combat support by contract.

### **III. The Perspective of History: Case Study Summaries from World War Two and their Lessons for Today**

The lessons of history are frequently ignored or misunderstood. Cryptic comments such as “George Washington’s Army relied on contractors - civilians drove supply wagons” show how facts can be accurate but not tell the whole story or convey an accurate picture. Yes, Washington’s Army did receive supplies from wagons driven by civilian contractors. However, a more revealing fact may be that in 1777 when Washington’s army numbered about 11,000 troops, the Revolutionary War at sea was primarily being fought by about 11,000 civilian seamen serving aboard civilian vessels operating as privateers. United States Navy personnel and ships were but a fraction of a much larger naval effort conducted by privateers. The reference to “letters of marque and reprisal” in the United States Constitution (Art. I, sec. 8, cl. 11) illustrates that war has not always been viewed as an “inherently governmental function” as certain experts have sometimes claimed.<sup>57</sup> Letters of marque were both grants of authority to undertake belligerent action and “contracts” that allowed profits to be derived from captured enemy shipping. The United States did not accede to the Declaration of Paris (1856) by which many Nations outlawed privateers but the rise of the United States Navy as a major maritime force in the late Nineteenth Century effectively ended the prospect that additional privateers would be authorized.

Some people believe Vietnam was the “wrong war” but even more would probably agree that it was a “wrongly fought” war. The United States led with its weakest approach by fighting a ground war on the mainland of Asia, something strategists had long warned against. America’s strong point, its airpower, was shackled with restrictions that dramatically reduced its effectiveness. The Viet-Nam War in general but particularly the air war over Viet-Nam was characterized by disunity of command.<sup>58</sup> Perhaps, as some believe, the ineffectiveness and the disunity of command are related. This may suggest that concern over a lack of unity of command (one theme of this paper) is not merely abstract theorizing over “outdated” military principles but something that should be seriously considered.

World War II may initially seem to be an unlikely candidate for providing lessons about current events and the subjects addressed in this paper. However, in the pre-war and early phases of that war the United States was resource constrained and had a limited number of men in uniform. Contractors picked up some of the slack. Even when the United States built up to a force of some 12,000,000 personnel in uniform, some functions were so ubiquitous or specialized that civilians performed them.

The case studies in this part of the paper are presented without any undue expectations that they will constitute unequivocal sign posts for current decision makers. It is hoped, however, that they will bring a degree of historical perspective to the subject matter. Some readers may choose to ignore them. Others may find in them some things that speak to the recommendations that follow and show that the recommendations are not merely a rejection of the current “business as usual” attitude but attempt to incorporate insights from approaches that have worked in the past. At a minimum, it is hoped they will be interesting.

### ***The Flying Tigers.***

Much information about the Flying Tigers is available. Unfortunately, it exists along side a great volume of misinformation on the same subject. A 1942 motion picture about the Flying Tigers starring John Wayne contained a small dose of fact in an otherwise fictional and inaccurate portrayal. A book about the Flying Tigers published the same year presented a substantially accurate and comprehensive picture of the Tigers and is still worth reading.<sup>59</sup> Because the U.S. Fourteenth Air Force wore a flying tiger shoulder patch and was commanded by the same man (Claire Chennault) who led the Flying Tigers the name “Flying Tigers” is sometimes inaccurately applied to anyone or any unit associated with the Fourteenth Air Force in World War II.

The Flying Tigers are famous in large measure because in the early days of World War II when war news was dismal on almost every front, they set a shining example that the Japanese could be beaten. American military leaders sang their praise and very early sought to have them incorporated into the U.S. Army Air Forces. President Franklin Roosevelt said in April 1942: “The outstanding gallantry and conspicuous daring of the

American Volunteer Group combined with their unbelievable efficiency is a source of tremendous pride throughout the whole of America. The fact that they have labored under...shortages and difficulties is keenly appreciated..."

The facts presented in this case study are drawn from a number of published and primary sources. Most can be found in a few of the best sources.<sup>60</sup> How is this story relevant to the study at hand? Contrary to myth and misinformation, the Flying Tigers were neither members of the U.S. Army Air Forces nor the Chinese Air Force. They were civilian contractors.

Interestingly, the origins of the name "Flying Tigers" are quite unclear. Almost certainly, it had something to do with the shark mouth (Tiger Shark?) design applied to the nose of the group's Curtis Tomahawk fighters. Chennault, the group's leader, professed to be surprised to find that his unit was being billed by that name. However, it was soon in common usage and the Walt Disney organization eventually designed a logo for the unit showing a winged tiger flying through a V for Victory.

Claire Lee Chennault retired from the U.S. Army Air Corps in 1937 in the grade of Captain. Until April 1942, he held no capacity in the U.S. military other than as a retired regular officer. In 1937, he went to China and became an air adviser to Generalissimo Chiang Kai-shek, head of the Chinese Nationalist Government. Chennault was on the payroll of the Bank of China which was headed by T.V. Soong who was also Minister of Finance and Chiang's brother-in-law.

In July 1937, the "China Incident" erupted. The conflict between Japan and China (1937-1941) was a war but the United States classed it as an "incident;" therefore, the U.S. neutrality laws did not apply and the depression-weakened U.S. economy could benefit from trade in war goods to both Japan and China. As the conflict went on the United States position gradually shifted toward favoring China. By 1939, the United States had imposed a "moral embargo" against the export of war materials to Japan. Later the United States imposed legal embargoes against Japan. American loans to China allowed China to purchase war materials from the United States and other countries. In September



1940, Japan aligned itself with Germany and Italy in the Tri-partite Pact. The United States gradually became virtually a co-belligerent with China against Japan.

The Chinese Air Force was often roughly handled by the Japanese. From 1937 to 1940 significant numbers of Soviet “volunteers” and Soviet-supplied aircraft bolstered Chinese air efforts. By 1940, most of the Soviet volunteers were withdrawn. Supplies of Soviet aircraft were drying up and Soviet fighters made available to China could not compete with the latest Japanese fighters. Late in 1940, Chiang sent a mission to Washington with the mission of revitalizing Chinese air efforts. The mission included Chennault, T.V. Soong, and a general of the Chinese Air Force.

In Washington, the Chinese mission met high government officials. The Secretary of the Treasury and Secretary of State were enthusiastic about supplying a 500-plane air force to China supported by American pilots and ground crews. The U.S. military was less enthusiastic when it heard the plan included supplying the latest B-17 bombers to attack Japan and pilots were to be recruited from the U.S. Army and Navy. The upshot of this was a loan to China that allowed them to purchase 100 Tomahawk fighters currently under a British contract and eventually permission for Chinese interests to recruit U.S. military pilots. The rest of the plan was delayed and eventually resulted in a few hundred fighters and a hand full of medium bombers reaching the Chinese in the latter part of 1942.

The original idea behind this American air force in China was to tie down Japanese forces in China, disrupt Japanese supply lines, and even attack the Japanese homeland. It was hoped, in so doing, to make any Japanese move against U.S. interests in Asia difficult, if not impossible. Due to delays and indecisiveness, the only fruits of this plan were to be the fielding of a combat ready fighter group in Burma by December 1941. This was the “First American Volunteer Group” of the Chinese Air Force or Flying Tigers.

Aircraft for this unit were 100 Curtiss Tomahawk II fighters diverted from a British order. These are sometimes referred to as P-40Bs and sometimes as P-40Cs. The aircraft were in production as Tomahawk II/P-40C models when the order was switched from

Britain to China. Once British specifications for the fighters were no longer applicable, Curtiss decided to incorporate certain parts left over from P-40B production in some of the fighters making the fighters something of a hybrid model. Armament was supplied later. Two different types of rifle caliber wing guns (.303 caliber and 7.92 millimeter) were eventually mounted on the fighters and they were equipped with commercially available radios.

In April 1941, recruitment of American pilots was authorized. This was accomplished mainly through representatives of the Central Aircraft Manufacturing Company-Federal (CAMCO), a company incorporated under the China Trade Act, which operated an aircraft factory and had other interests in China. CAMCO was a subsidiary of Intercontinent Corp. with headquarters in New York. Almost all the pilots recruited were reserve officers serving on active duty in the Army, Navy, or Marine Corps. The exceptions were one Marine regular officer and one Navy enlisted pilot.

The general terms of recruitment authorized for the pilots allowed them to (1) resign their commissions and sever all ties to the U.S. Military; (2) immediately sign an employment contract with CAMCO; and (3) promised, should they later seek it, reinstatement in their branch of service, impliedly at a grade and seniority equal to that of their contemporaries who remained on active duty. Their employment contracts with CAMCO stated they were to “perform such duties as the Employer may direct...” Salaries started at \$600 per month (about three times service pay). Transportation and incidental expenses were authorized. Pilots were required to maintain at their own expense a \$10,000 life insurance policy. In event of death or disability, they (or their estates) were to be paid six months salary. Travel documents were supplied (none of their passports identified them as pilots). Not included in writing was a promise of a \$500 bonus for each Japanese aircraft destroyed.

About the time the first pilots were being signed up by CAMCO, the first of the crated Tomahawks arrived at Rangoon, Burma. The British authorities permitted workers from CAMCO’s factory at Loiwing, China, to assemble the fighters at an airfield near Rangoon. By the end of July 1941, the first pilots arrived at Rangoon. William D.

Pawley, President of Intercontinent and CAMCO, had arranged with the British to turn over Kyedaw airfield near Toungoo, Burma, as a training base for the Americans.

On 1 August 1941, Chiang Kai-shek signed an order constituting the “First American Volunteer Group” to be organized by “Col. Chennault” with the American volunteer fliers now arriving in China in order “to participate in the war.” Although Chennault at that time used the title Colonel, he was a Colonel in neither the U.S. nor Chinese Air Force. Subsequently he would sign A.V.G. paper work as “C.L. Chennault, Commanding” without any indication of rank. Indeed, neither Chennault nor any of the pilots were at that time members of any air force.

From August to early December 1941, the aircraft and men of the A.V.G. gradually assembled at Kyedaw and began training under Chennault’s expert tutelage. Three squadrons were organized each with a squadron leader and flight leaders. Although military organization and air discipline were adopted, minor military courtesies and regulations were not. During this period liaison was established between the A.V.G. and Army Air Force officials in the Philippines. As war approached, vital spare parts for the A.V.G. were shipped from the United States and in some cases even flown to Asia aboard the Pan American Clipper.

By December 1941, the A.V.G. was preparing to move to Kunming, its base in China. Each squadron in the A.V.G. had at least twenty operational fighters and a slightly larger number of pilots. Training had taken a toll of several Tomahawks destroyed or damaged as well as a couple pilot deaths. A couple more Tomahawks lacked armament and others were unserviceable due to lack of spare parts. A few pilots had resigned in disgust due to conditions at Kyedaw which included not only minimal facilities but tropical heat, dust, disease and odors.

Soon after the Pacific War began, the A.V.G. flew its first mission. Three Tomahawks, one modified for photographic work, flew a reconnaissance to Bangkok on December 10<sup>th</sup>. A few days later Chennault and most of the A.V.G moved to Kunming where on December 20<sup>th</sup> the A.V.G. entered combat for the first time and shot down several Japanese bombers, putting an end to Japanese raids on Kunming for a considerable

period. This combat did not make the A.V.G. world-wide news. A report of the combat appeared on page 27 of the New York Times.

President Roosevelt's assistant, Dr. Lauchlin Currie, had already recommended that Chennault and his organization be inducted into the U.S. military as a force in being in Asia. The U.S. Army soon began making inquiries along those lines. Chennault began to sound out Chiang's views on the subject via Madame Chiang (who had served as head of the Chinese Aeronautical Commission). Chennault indicated there were certain advantages to China if the A.V.G. were incorporated into the U.S. Army Air Force. These included that China would save money, reinforcements would be more likely, and there would be fewer disciplinary problems among the "enlisted personnel." The "enlisted personnel" were for the most part actually former enlisted men who had been released from active duty along the same lines as the A.V.G. pilots. They, with some personnel recruited in Asia, constituted the technical and administrative staff of the A.V.G. Chennault suggested the issue of discrepancy in pay could be handled by China supplementing the salaries of inducted A.V.G. members until their original contracts expired. The only down side Chennault mentioned was that an officer unfamiliar with China (meaning someone other than Chennault) might be assigned to command the group. Daniel Ford has pointed out that Chennault was quite prepared to be recalled to active duty in the Army but not at a rank below Brigadier General.<sup>61</sup>

Meanwhile one squadron of the A.V.G. had been moved to Mingaladon airfield north of Rangoon. Here beginning on December 23<sup>rd</sup> the A.V.G. and a British squadron of Brewster Buffalo fighters met units of the Japanese Army Air Force in a series of clashes over several days. Both sides suffered losses but the Allies and particularly the A.V.G. claimed spectacular successes. They became front page news. By early 1942 the American volunteer pilots fighting over Burma, soon called the Flying Tigers, were known throughout America.

The Flying Tigers continued to defend Rangoon and southern Burma until early March 1942 when Rangoon fell. In doing so, they operated in coordination with and under the general direction of the local British command. They withdrew to central Burma and then

in April to Lashio. A.V.G. squadrons periodically rotated from China to combat operations in Burma.

Most of the Japanese fighters encountered by the Flying Tigers were fixed landing gear army Type 97 fighters. However, intermittently they clashed with army Type 1 fighters flown by the 64<sup>th</sup> *Hiko Sentai* (Flying Regiment) that were routinely mistaken for the Japanese navy's Type Zero fighter, the fighter that had devastated Chinese flown Soviet-built fighters in 1940 and early 1941. Their claims of success over the formidable Zero fighter only added to the luster of their reputation.

The Chinese Army had intervened to help the Allied cause in Burma. By late April 1942, it had been thrown back to the borders of western China and was being hard pressed by the Japanese in the mountains and gorges bordering the Salween River. Instead of flying air combat missions where Japanese aircraft could be destroyed and \$500 bonuses won, Chennault ordered A.V.G. pilots to strafe Japanese troop columns in the narrow gorges. Similar missions had been ordered and flown earlier in the campaign. Both A.V.G. pilots and planes were pretty worn out by this point and some pilots' morale was low. This led to a "revolt" of sorts by some of the pilots who refused to fly such missions. Other pilots were called in to fly a few strafing missions but ground strafing was soon strictly limited.

While the A.V.G. was gaining fame, it was also encountering problems common to many military organizations. In addition to the "revolt" mentioned above there were many routine disciplinary problems and some "resignations." Some of the "enlisted men" brought Chinese women on base and engaged in inappropriate conduct. Some of the pilots declined to fly in combat and others were rowdy and drank too much. There were threats of courts-martial but everyone understood they had no basis. Some men were fired, and sent home early. Those that resigned without adequate excuse were considered "dishonorably" discharged. There was no basis for this either but the concept actually took on meaning many years later. Chennault was left with "disciplinary" measures such as limiting the number of drinks a rowdy pilot was allowed at the Kunming hostel's bar.

To be plain the "commanding officer" of this famous and successful fighting unit was actually not even the official supervisor of the men he "commanded." Chennault was paid

by the Bank of China but was acting as an air advisor to Chiang and commander of the A.V.G., ostensibly a unit of the Chinese Air Force. The A.V.G. officially existed as a unit of the Chinese Air Force pursuant to Chiang's order; however, the A.V.G. pilots and mechanics were not members of the Chinese Air Force or subject to its discipline. They were employees of CAMCO. Chennault had no official relationship to CAMCO. The A.V.G. was not part of the Chinese Air Force chain of command. Chennault reported only to Chiang and was not subject to the corrupt and ineffective Chinese Air Force. Most of the fighting the A.V.G. did was in support of, and under the general direction of, the British in Burma.

The astute reader at this point might note that "these fellows may have been contractors but they were contractors hired by the Chinese not American contractors." Could any lessons to be found in this case study possibly be valid? It is probably more than a minor point that the money China used to buy the aircraft and pay the pilots was borrowed from the United States and was probably never paid back, and that the whole idea of an American air force in China was meant to serve America's strategic interests. The plot thickens further, however.

In April 1942, Chennault returned to active duty in the U.S. Army Air Forces and was promoted to Brigadier General. This ended his informal contacts with the White House. He now had to report through the theater chain of command. In some respects, Chennault's status did not change. He remained "commanding officer" of the A.V.G. (of the Chinese Air Force). The time was coming, however, when the A.V.G. would cease to exist and an official U.S. military organization would take its place. Chiang had agreed to this and the date for transition had been set as 4 July 1942.

By June 1942, American Army pilots were arriving in China and learning the ropes from A.V.G. veterans. They would become the 23<sup>rd</sup> Fighter Group and successors to the Flying Tigers. Chennault was slated to become the commander of the China Air Task Force of the Tenth Air Force. The 23<sup>rd</sup> Fighter Group and a small detachment of bombers would report to him. Meanwhile efforts were underway to recruit pilots of the Flying Tigers into the Army.

Chennault was shunted aside in the induction process and very few Tigers agreed to sign on as Army pilots. The few that did played key roles in the 23<sup>rd</sup> Fighter Group. Several other Tigers extended their contracts to fly with the 23<sup>rd</sup> Fighter Group on its early missions. One was killed in action during this contract extension. Before an appropriate Army officer was found to command the 23<sup>rd</sup> Fighter Group, Chennault appointed one of his civilian pilots to command the Group. Most of the fighters initially flown by the 23<sup>rd</sup> Fighter Group were owned by the Chinese and included a fair number of the original Tomahawks that had seen many months of hard combat service with inadequate maintenance.

Pilots of the Flying Tigers received numerous Chinese awards. More remarkably, these contractors received American and British decorations. Chennault was awarded the Distinguished Service Cross. At least ten Tigers received American or British Distinguished Flying Crosses. As will be discussed later, service with the A.V.G. eventually was legally determined to be active duty in the U.S. military. A few weeks ago, Dick Rossi, six victory ace with the Flying Tigers, told me how surprised he was to receive an Honorable Discharge certificate from the U.S. Air Force some years back. Dick never served in the U.S. Air Force or Army Air Forces!

### ***Pacific Base Contractors – Wake Island.***

The story of Wake Island and the role contractors played there is shorter both in time and in this narrative than the story of the Flying Tigers. Like the Flying Tigers, the Wake Island story was inspirational for the American people in the early days of World War II. Incidents at Wake Island (actually an atoll of three tiny islands) spawned movies of varying degrees of fidelity to actual events (including one starring John Wayne) as well as numerous books, articles, and television retrospectives. The principle sources relied upon for this case study include official histories, popular literature, and a primary source document.<sup>62</sup>

To avoid any confusion, the story of the defense of Wake Island in early World War II is primarily the story of heroic and efficient military men commanded by Cdr. Winfield S. Cunningham, U.S.N. The primary fighting units on the island were an under strength

battalion (First Defense Battalion) of Marines commanded by Maj. James Devereux and a similarly under strength Marine fighter squadron (VMF-211) commanded by Maj. Paul Putnam. The Marine ground troops had arrived only a couple months before war broke out and the fighter planes arrived only days before the attack on Hawaii.

A Japanese air attack on the first day of the war destroyed the majority of the Marine fighters. Wake Island had no radar and the defenders were taken by surprise when cloud cover helped mask the approaching Japanese bombers. An invasion attempt a few days later was soundly repulsed thanks to Devereux's coastal guns and attacks by Putnam's remaining F4F-3 Wildcat fighters. The defenders sank two destroyers, put a transport out of action, damaged other warships, and inflicted over four hundred casualties on the Japanese. This news greatly cheered the American public at a time when otherwise all the news was bad.

From the Japanese point of view: "Considering the power accumulated for the invasion of Wake Island, and the meager forces of the defenders, it was one of the most humiliating defeats our navy had ever suffered."<sup>63</sup> The Japanese regrouped and prepared for a second invasion attempt when they could receive support from their task force returning from the attack on Hawaii. Meanwhile the atoll and its defenders were subjected to repeated bombing attacks.

A second landing attempt in the early hours of 23 December 1941 was conducted by stealth rather than direct challenge to Wake's coastal batteries. Japanese landing troops got ashore and fierce fighting ensued with the Japanese troops receiving supporting fire from both ships and aircraft. The outnumbered defenders suffered casualties and were thrown back but they also inflicted casualties on the Japanese and dislodged them from strong points in counter-attacks. An approaching American task force would be unable to provide any relief to Wake for at least a full day. With the defending force divided, communications unreliable, and unclear how much damage they had inflicted on the Japanese, Cdr. Cunningham bowed to the inevitable and surrendered the atoll.

Before the war, Wake Island was a refueling and rest stop for the Pan American clipper. For about five years, a few dozen employees of Pan Am were the only substantial



presence on Wake. Late in 1940, a contract was awarded to the “Contractors Pacific Naval Air Bases” organization for a three-year effort to turn Wake Island into a major naval air base. Construction workers were recruited from men who had worked on big construction projects such as the Hoover and Grand Coulee Dams. The advance party of construction workers arrived on the island in January 1941.

When the first Marines arrived late in 1941, they found they were greatly outnumbered by the construction workers. Devereux’s battalion eventually reached about half strength or roughly 450 Marines. A service detachment from Marine Air Group 21, the pilots of VMF-211, and other navy men and marines added less than a hundred additional personnel to the military total. Civilian construction workers reporting to contractor superintendent Daniel Teeters numbered about 1,150.

The contractor had dynamite, bulldozers, dredging equipment, and other tools but the workers were unarmed. Devereux’s Marines began work on defense installations. They were armed but equipped with little more than picks and shovels for construction work. Short of manpower, the Marines worked in twelve-hour shifts. Teeters men continued with their contract work but Teeters loaned the Marines a bulldozer and other equipment to help them prepare gun emplacements, bomb shelters, and defensive positions.

Early in November, Devereux received a warning message: “International situation indicates you should be on the alert.” Devereux sent a return message: “Does international situation indicate employment of contractor’s men on defense installations which are far from complete?” Devereux met with Teeters and Lt. Cdr. Elmer Greey, the military supervisor of construction, and began planning for the use of the civilian contractor work force and equipment to aid in completing high priority fortifications. Devereux assumed he would be granted permission to employ the contractor’s resources on the highest priority projects. The reply from Pearl Harbor denied Devereux the permission he requested. Devereux could only assume the international situation was not as critical as the earlier warning message had indicated.

Devereux’s battalion was equipped with old weapons, some dating back to World War I, but it had an impressive array of them. These included six 5-inch guns; twelve 3-inch

guns; eighteen .50 caliber machine guns; and thirty .30 caliber machine guns. Only one of the 3-inch guns came with its full fire control equipment. The biggest problem was that Devereux did not have sufficient manpower to man all the weapons. His men were also equipped with submachine guns, rifles and pistols but naval personnel on the island and a small army communications team were unarmed.

On the morning of December 8<sup>th</sup> Wake received notice of events occurring in Hawaii (where it was December 7<sup>th</sup>). Soon Wake received its first air raid and suffered its first casualties. Wake's lone navy doctor was ordered to take over the contractor's hospital which was larger than the marine aid station. Teeter and several of his men soon volunteered their services to the military.

On the first day, Teeter and 185 construction workers volunteered their help to the Marines. Teeter kept the volunteers on the payroll and also released equipment and supplies whenever needed. This initial group was soon joined by a hundred others and eventually over 300 civilians worked alongside the Marines. Bomb damage was repaired. Food and fuel were dispersed and camouflaged. Empty gasoline drums were cleaned and used to store fresh water.

Teeters took over one of Devereux's major problems by feeding Marines that were now dispersed all around the island. Civilians stood watch along with Marines. Volunteers with no previous military experience received training in weapons so they could replace Marines that might be injured or killed in battle. At one 5-inch battery, a party of 25 civilians helped Marines repair bomb damage and maintain camouflage. The civilians took over all work involved in handling ammunition for the battery.

The 5-inch guns were permanently emplaced. The 3-inch guns were moved to new positions after each (almost daily) air raid. This was done in hours of darkness using entirely civilian labor and equipment. Sixteen civilians under a Marine Sergeant were trained as a gun crew to man a 3-inch gun which was part of a previously unmanned battery on Peale Island.

Most civilians that did not volunteer to help the Marines continued with their contract work. Unfortunately, the civilians had not learned to disperse during air raids. On December 9<sup>th</sup> a Japanese bombing attack hit Camp No. 2 and fifty-five civilians were killed. Several others had been lost the previous day.

After beating off a Japanese invasion attempt on December 11<sup>th</sup> the defense of Wake was headline news as were the repeated air raids that the atoll had suffered. This did not stop construction headquarters in Hawaii from insisting that the dredging of the channel continue and demanding to know when the task would be completed. Other messages seemed to indicate slightly more awareness that Wake was under attack. One message had suggestions for replacing damaged window glass. The barracks buildings that had once had windows had all been destroyed!

During the second Japanese invasion attempt contractors fought as infantry beside the Marines. Virtually all accounts credit the civilians who actively participated in Wake's defense as making a significant contribution to the action there. Had all the civilians been armed and participated in the atoll's defense, the defenders would actually have outnumbered the Japanese landing forces. Surviving civilians and military, alike, subsequently endured years of brutal Japanese captivity. About one hundred civilian contractors were retained on Wake by the Japanese to act as laborers. They were murdered by the Japanese in October 1943.

Before Pearl Harbor, the Navy Bureau of Yards and Docks began organizing units known as "Headquarters Construction Companies." These units were to be utilized as administrative units by officers in charge of construction at advanced bases in case war interrupted contract operations. Only one such company had been organized by 7 December 1941. It formed the nucleus of the first Construction Detachment which deployed to Bora Bora at the end of January 1942.

With the advent of the war, it became apparent that the services of contractors and their civilian employees could not adequately be utilized for construction work in combat zones. Under military law, the contractor's forces in their status as civilians could not offer resistance when the bases they were constructing were under attack. A civilian

bearing arms would have been considered a guerilla and as such would have been liable to summary execution if captured. Furthermore, it was all too clear that civilian workers lacked the training to defend themselves. This was part of the lesson learned at Wake, Cavite, and Guam.<sup>64</sup>

At the end of December 1941, the Chief, Bureau of Yards and Docks advised the Bureau of Naval Personnel that construction work at advanced bases could only be satisfactorily carried out by using military personnel under direct military command. It was recommended that early steps should be taken toward organizing military construction forces. Initial recommendations were for three battalions of about a thousand men each.

These recommendations led to the creation of “Construction Battalions” better known as Seabees. Initially recruitment was directed at men already skilled in the construction trades. Qualified recruits were offered classification as Petty Officers based on their civilian construction experience and age. In the early days of the organization, the average Seabee enlisted with a rate of petty officer, second class, equivalent to an army staff sergeant. Average pay and allowances of \$140 per month made Seabees among the highest paid groups in the military service. By the time Seabee recruitment was modified in December 1942 about 60 battalions had been formed.

Whether or not the rationale quoted above was a strictly accurate reflection of international law, it does accurately reflect some of the motivation for creation of the Seabees. Had the construction workers on Wake Island all been trained to fight and had they been in uniform under military command, there is a high probability Wake Island could have held out longer possibly until a relief effort was mounted.

### ***Merchant Marine and other examples.***

The formation of the Flying Tigers and the unsuccessful plans to bomb Japan before Pearl Harbor illustrate that the United States had assumed something akin to a co-belligerent status with China against Japan long before the “Day of Infamy.” In the Atlantic, the United States moved from providing Great Britain with fifty overage destroyers in 1940, to escorting convoys far across the Atlantic, attacking German

submarines, and occupying Iceland in 1941. The German Declaration of War referred to America's "open acts of war" and alleged the United States "virtually created a state of war." One of the few ways Germany could directly strike back at America once war had formally begun was to attack our merchant shipping. This it did with a vengeance.<sup>65</sup>

The death rate among American civilian mariners in World War II was higher than that among any of the Armed Forces except for the U.S. Marine Corps.<sup>66</sup> More than 250,000 officers and crewmen served aboard U.S. merchant vessels in World War II. Over seven hundred ships (each exceeding 1,000 gross tons displacement) were sunk. An estimated 6,800 seamen were killed and 11,000 wounded. At least six hundred others became prisoners of war.

Merchant vessels kept Britain in the war. Without the lifeblood of supplies carried by merchant ships, Britain would have been forced to capitulate. Winston Churchill remarked that the closest Britain came to losing the war was when the U-boat menace was at its worst. One of the worst moments of the war for the United States came in the early months of 1942 when dozens (145 in 3 months) of American merchant ships were being sunk within sight of the American coastline.

As bad as was the threat posed by enemy submarines, it was not the only threat faced by merchant ships. Merchant ships were also subject to attack by enemy aircraft and surface forces, and, encountered other hostile conditions. In addition to carrying supplies between ports, merchant ships also participated in amphibious operations along side transports and cargo ships of the Navy. At Leyte Gulf, for example, merchant ships were among the first victims of kamikaze attacks.

A year before Pearl Harbor the Coast Guard began training merchant seaman in military subjects including gunnery. Units of the Naval Reserve also provided military training to merchant seaman. By September 1941, gunnery training for merchant crewman on 83 Panamanian flagged vessels had been authorized. In November 1941, Congress ended a Neutrality Act ban on arming U.S. flagged merchant ships. Thereafter merchant seaman received expanded military training including gunnery, handling barrage balloons,

wartime communications, gas warfare, swimming through burning oil, and spotting enemy ships at night.

On some merchant ships, uniformed sailors manned the guns. In such cases, civilian seamen usually were reserve members of the gun crew or ammunition handlers. On other merchant ships civilian seamen served as the primary gun crews in addition to their other duties.

Wartime brought several changes in status for merchant seamen. Many seamen became Federal employees under the auspices of the War Shipping Administration. The majority of merchant ships were placed under the control of the Army or Navy. The “articles” under which seamen sailed were made less specific and might give a seaman only a vague idea of where a voyage might take him or how dangerous it would be. A seaman who attempted to resign during the course of a voyage or otherwise violated military policy was subject to courts-martial (over 100 merchant seamen actually were convicted by courts-martial).

It is interesting to note that at the same time one part of the Navy was determining that civilian contract workers were unsuitable for building (and possibly defending) advanced bases, another part of the Navy was intensifying its training of civilian seaman to defend the merchant ships on which they served. It is also interesting to note that while construction workers were intensely recruited and later drafted, members of the merchant marine were exempt from the draft (and in some cases released from military service) on the grounds that they were performing a service essential to the war effort. Admiral Nimitz even referred to the merchant marine as “an auxiliary of the Army and Navy in time of war.”

General Richard B. Meyer’s statement that in Operation Desert Storm, Military Sealift Command and the merchant marine vessels delivered more than 450 shiploads of cargo in seven months amounting to 95 percent of the U.S. cargo required for the war is a recent and telling example as far as the continued relevance of the merchant marine is concerned. General Meyer also noted the work of the merchant marine in Operation Iraqi Freedom including the strategic implications of its movement of the 4<sup>th</sup> Infantry Division.

It is also interesting that legal authority to arm merchant vessels still exists (10 U.S.C. 351).

Two other brief examples may add some perspective to our inquiry. The first relates to the Coastal Patrol of the Civil Air Patrol.<sup>67</sup> The Civil Air Patrol (CAP) was created just prior to World War II. CAP volunteers (private pilots and aircraft owners) were contractors in the sense that when they flew missions for the Army Air Force they agreed to carry out the mission and were allowed access to aviation fuel and reimbursed for certain expenses upon agreed terms. The CAP and its value to the Army was the subject of debates that ranged from whether its activities were worthwhile to whether it should be militarized. Eventually the CAP proved its utility in a variety of roles.

One mission assigned to the CAP was the Coastal Patrol. The Coastal Patrol was an anti-submarine patrol initiated in response to U-boat incursions close to the U.S. coast that took a heavy toll of merchant shipping beginning in January 1942. This was primarily a Navy responsibility, but in the early days of World War II the Navy was overwhelmed, and the Army was required to share in this mission. The Army also had few resources, and, as a result, a 30 day experiment was authorized during which the CAP's civilian aircraft flown by civilian crews (a pilot and an observer) would supplement the military effort. Some of the more substantial CAP aircraft (Stinson, Waco, Cessna, and other types equipped with 90 horsepower engines or larger) were used for this work. The 30 day experimental program was extended to a 90 day experimental program and then made indefinite. The CAP Coastal Patrol eventually went on for eighteen months as long as the Army retained a role in anti-submarine warfare.

Missions were flown up to 50 miles off-shore. In initial operations, the civilian planes were unarmed. The idea was that they would sight enemy submarines and then radio for assistance. The German U-boats not knowing the planes were unarmed usually crash dived at their approach and eluded armed aircraft arriving later. In one case, a German U-boat crash dived off the New Jersey coast in shallow water and became stuck in the mud. The CAP plane circled the submarine for an hour as it tried to extricate itself. The plane radioed for help but eventually the submarine freed itself and went on its way unharmed.

Some CAP observers brought their privately owned cameras along and returned with photos of surfaced German submarines and their surprised crews scrambling off the decks to get below and submerge.

Within a few months of initial operations, CAP Coastal Patrol planes were equipped with bomb racks and makeshift bomb sights. After the middle of 1942, the U-boat menace near American shores lessened but did not entirely disappear. CAP continued flying patrol missions until late summer 1943. In some patrol areas, the CAP alternated patrols with the Navy. Other areas were covered exclusively by the CAP. They eventually operated from 21 bases.

This civilian effort was tremendous. The CAP Coastal Patrol flew 86,685 missions involving 244,600 flying hours. It spotted 173 submarines and was credited with destroying or damaging two exclusive of those destroyed by the Army and Navy based on CAP sightings. In addition, it reported 91 vessels in distress and the presence of 17 floating mines. In rescue missions, it was responsible for rescuing 363 survivors and the recovery of 36 bodies. It reported hundreds of irregularities at sea and made over a 1,000 special investigations at sea or along the coast line. At the request of the Navy, it performed 5,684 special convoy missions. During the course of these operations 26 CAP members lost their lives, 7 were seriously injured, and 90 aircraft were lost.

The final vignette involves Charles A. Lindbergh. Lindbergh was probably America's most famous aviator. His New York to Paris flight was the first solo flight across the Atlantic and captured world attention. Later he had pioneered international air routes for Pan American. In the years just preceding World War II he was an outspoken critic of President Roosevelt and his policy of pushing America into an unofficial alliance with Britain against Germany.<sup>68</sup> Lindbergh was certain this would involve the United States unnecessarily in a European war. Roosevelt had other critics but few with the influence and star-power of Lindbergh. In April 1941 after Roosevelt publicly questioned his loyalty, Lindbergh resigned his reserve commission. After war started, Lindbergh sought to enter the Army Air Force. Roosevelt would have none of it.



Lindbergh offered his services to various aviation related companies with whom he had advisory relationships but the White House made its position known to companies that wanted to play a role in national defense. Lindbergh was unwelcome. Only Ford, in the process of converting from producing cars to bombers, would hire him. He was soon flying and solving problems with aircraft built by a number of different companies.

Eventually in 1944, Lindbergh managed a trip to the South Pacific where he flew fighters on combat missions demonstrating his techniques of cruise control for extending combat range. In flights in Marine F4U Corsair fighters no enemy aircraft were encountered but Lindbergh did engage in strafing and dive-bombing ground targets as well as flying patrol and bomber escorts totaling fourteen missions. Lindbergh then traveled to New Guinea and demonstrated his techniques to fighter pilots of the Fifth Air Force.

Lindbergh visited units equipped with long range P-38 fighters. He taught them how to get even more range out of their fighters. At the end of June 1944, he began flying combat missions with the 475<sup>th</sup> Fighter Group. On July 28<sup>th</sup>, Lindbergh finally ran into enemy aerial opposition and shot down Capt. Saburo Shimada, a veteran pilot and commander of the Japanese army's 73<sup>rd</sup> Independent Flying Squadron. Shimada was flying a Type 99 Army Reconnaissance plane (*Ki 51*), a plane much slower but much more maneuverable than the P-38. Before Lindbergh shot him down, Shimada had eluded other P-38 pilots in a series of low level engagements.

In mid-August shortly before he was to return to the United States, Lindbergh was officially grounded. The Fighter Group commander that had flown on the mission with him had been reprimanded a few days after the mission on July 28<sup>th</sup>. Lindbergh had been in New Guinea for nearly two months; and, his flights were hardly a secret but, not until more than ten days after the shoot down was any action taken. Lindbergh suspected the reprimand and grounding had nothing to do with the shoot down. The Fifth Fighter Command had turned down requests to escort bombers to Palau on the basis that the distance was too far and the weather too difficult. Lindbergh's missions with the 475<sup>th</sup> demonstrated that the P-38 could fly far enough to escort the bombers to Palau. It was official embarrassment over this rather than risking the life of a national hero that he

suspected was the real cause of official displeasure. As far as appears in the record, no one seemed to mind that a civilian shot down an enemy combatant.

### ***Current relevance and implications.***

There can be little doubt that the official position of the U.S. Government during World War II was that, consistent with international law, civilians should not take up arms and directly participate in combat. The creation of the Seabees was in part motivated by this concern. Despite this, these case studies provide several examples of official sponsorship of civilians in combat roles. Before the war, the Flying Tigers were a semi-covert operation. In April 1942, President Roosevelt publicly praised them. The American people may not have been fully informed of their status at that time but President Roosevelt was certainly aware of it. They would never have been released from active duty and recruited by CAMCO for service in the A.V.G. without Presidential approval. Wake Island and Lindbergh's flights might be considered aberrations authorized by local commanders. Arming the merchant marine and the Civil Air Patrol and sending them on missions where they were likely to encounter the enemy were clearly reasoned decisions made after due governmental deliberation. These case studies seem to indicate an inconsistent attitude toward civilians participating in combat, *de jure* opposed to such participation but, at least on a practical level, permissive.

Some of these case studies suggest that civilians who are subject to no actual military authority or discipline may none the less act as if they are. It appears that association with a cause larger than the individual, team spirit and a can-do attitude about getting a job done, may go a long way toward forming a cohesive group that acts as if it was subject to the chain of command. Informal adherence to the chain of command may be common but the case studies show examples of derelictions, for example, among some of the Flying Tigers and some contractors on Wake Island.

These case studies illustrate trends stemming back to World War II that are evident in current circumstances and policies as discussed earlier in this paper. Despite an official position against direct civilian participation in combat, current policies do not really create a bright demarcation between direct and indirect participation. We should not be

surprised notwithstanding current policies if we find instances of civilians participating directly in combat. The possible existence of an “informal chain of command” that masks a lack of unity of command as discussed earlier is supported by ample evidence from these case studies.

The case studies show that despite having some 12,000,000 troops in uniform in World War II there was still ample room for civilian contractors to play important roles supporting America’s war fighting efforts. Rather than an “either-or” or “one size fits all” approach, these case studies show a variety of different approaches to obtaining the needed expertise available in the civilian sector and augmenting military forces with forces of civilians.

In some instances, civilians were put in uniform and asked to perform essentially military functions but at enhanced salaries. The uniform might be that of a quasi-military organization (Flying Tigers) or a special corps of the U.S. Military (Seabees). In other cases seaman were armed and sent into harm’s way in a civilian status but subject to courts-martial jurisdiction and certain military rules (merchant marine). Civilians were permitted to cross the line between direct and indirect participation in combat when it seemed practical to allow it due to exigent circumstances (Wake Island) or in order to take advantage of specialized civilian expertise (Lindbergh). Direct civilian participation in combat was officially authorized when there was little likelihood the civilians would be captured by the enemy and thus held to account for participating in combat (CAP Coastal Patrol).

Some of the examples show that local commanders need to be able to prioritize the tasks contractor personnel perform even if they are outside the normal scope of work of the contract (Wake Island pre-war). In other cases, it makes sense for the operational commander rather than the contract supervisor to provide day to day direction to personnel (Flying Tigers). In many of the examples presented, informal “command” or control was involved, but in other cases, a formal military relationship (Seabees) or at least the enforcement of military discipline (merchant marine) was deemed important.

It should be noted that pursuant to law the service of some civilians can be recognized as “active military service.”<sup>69</sup> Honorably discharged Flying Tigers, active participants in the defense of Wake Island, and certain merchant mariners are among those whose service has been so recognized. The benefits that flow from such recognition are usually minimal. There certainly is a symbolic significance involved. This form of recognition may also increase the relevance of these case studies to the recommendations below.

Drawing what lessons we can from the foregoing case studies and discussion, the next section suggests policies and approaches that may meet the goals set out earlier in this paper. Those goals are (1) vest actual control over in-theater contractor personnel in the theater commander and his military subordinates, (2) avoid the direct participation of civilians in combat, and (3) treat contractor personnel who are subject to the hazards of combat essentially the same way soldiers are treated so far as force protection, administrative support and amenities are concerned.

## **IV. Alternatives and Recommendations For Reform**

Some of the suggestions in this part of the paper will require changes in law, regulations, current policies, and traditional concepts. Decision makers or their staff assistants uncomfortable with such suggestions are hereby put on notice!

### ***A United Kingdom model: The Sponsored reserve.***

Under Britain's Reserve Forces Act of 1996 a new category of volunteer reserves was created, the sponsored reserve. The first sponsored reserve unit, the Mobile Meteorological Unit (MMU) was formed in 2000.<sup>70</sup> The new category changes the relationship between the reservist, their employer, and the Ministry of Defense (MoD). According to Jim Sharpe, Chief Met. Officer at Strike Command:

*In a sponsored Reserve Unit, there is a three-way partnership, where a company or agency agrees to provide capability and skilled staff through a formal agreement with MoD. The individuals concerned also have an agreement with the relevant arm of the forces to serve for an agreed period, and with the employer who, in the case of the MMU, is responsible for paying the reservist and providing the tools of the trade.<sup>71</sup>*

The purpose of the sponsored reserve is to allow the military to make "greater use of skills in the civil sector." In the case of the MMU, the civilian employer was a government agency. More typically, the employer would be a commercial company.

According to a summary of Authoritative Guidance on the Sponsored Reserve:

1. MOD [may] require its contractors to deliver certain designated services by staff who have Sponsored Reserve (SR) status. Thus, a contract for services may be delivered through SRs not only in peacetime but also in operations in a non-benign environment.
2. A SR may either be employed and paid by MOD, or remain employed and paid by their civilian employer. The latter option is preferred since it offers the benefit

of continuity and reduced administration whilst having no impact on the degree of command and control MOD has over the SR when he...is Called-Out or under Service Training.

3. Before SR draft terms and conditions specific to any particular project are offered to tenderers, it is important to ensure that in addition to usual project stakeholders, Centre and single Service Authorities with SR interest are consulted.<sup>72</sup>

The U.K. Sponsored Reserve approach has a number of interesting features and deserves study. The basic idea of being both in a military status and being paid by a private employer is one that is discussed below. The idea of maintaining military command and control over personnel that are essentially contractor employees is likewise important.

Reserve forces in the U.K. are structured differently than in the United States. The volunteer reserve (of which the SR is only a small part) makes up only about 15% of the combined total of regular forces and volunteer reserves. In the case of the Royal Air Force, the figure is less than 4%. Neither the structure of U.K. military forces nor the purpose of the Sponsored Reserve (obtaining civilian skills) make the wholesale importation of the Sponsored Reserve concept into the U.S. military scene necessarily desirable or one that promises a universal solution for all issues related to contracted combat support.

In Britain, the Sponsored Reserve is not primarily used as a means of large scale augmentation of deployed forces but rather to maintain continuity of services performed by civilians in peacetime and assure that deploying support personnel are in a military status. The Sponsored Reserve concept would seem to be a closer fit for deployed weapons system contractors (or other specialists) than for LOGCAP type contracts. It might be particularly suitable in instances where weapons system contractors are involved in the actual operation of a weapon system or in maintenance and support that can take place on the battlefield. It seems probable, however, that a concept along the lines of Britain's Sponsored Reserve could find, at a minimum, some useful role in the structure of U.S. forces.

***Functional control: integrating contractor personnel into the operational team.***

One modest change that could help link policy and reality in the operational theater would be to vest functional control and supervision over contractor personnel in commanders subject to the theater chain of command. This would formalize the “informal chain of command” relationship which apparently already exists in many instances.

Functional control is the type of control familiar in matrix organizations and among personnel seconded from one organization to another. In agency and employment law, this type of relationship is recognized in the common law “borrowed servant” doctrine. Examples in civil life include a construction crew from one employer (who currently lacks a project to work on) being transferred to another employer’s work site and performing work for the second employer. The construction crew may continue to receive its pay from the first employer, who for many purposes continues to be the “legal” employer, and take its day to day supervision from its normal crew boss. The second employer would specify the work to be accomplished and give general directions. Typically, the second employer reimburses the first employer for the pay and expenses of the “borrowed” employees. Other examples include some types of employment agencies which provide temporary workers to manufacturing or retail establishments. The agency pays the employee but the receiving employer exercises functional control.

The basic concept of separating the legal and functional relationships between employers and employees is not foreign to the Federal Government where “work with industry,” the Inter-Governmental Personnel Act program, and similar programs have long existed. What is being proposed is actually less extreme than any of the examples just mentioned.

The fact that functional control is vested in a commander in the theater does not mean that the commander or his subordinates will be engaging in relatively close or continuous supervision of contractor employees. The contractor’s own supervisory structure would still be expected to provide day to day supervision to contractor employees. The type of

functional control exercised would be top level direction and establishing work priorities that impact mission accomplishment.

What is essentially being suggested is modifying the following theoretical chain of direction where: (1) the “customer” in the theater communicates its needs and priorities (2) to a non-resident contracting officer who validates them and then communicates them (3) to a contractor point of contact who then passes them (4) to the contractor personnel who are in theater. There are delays inherent in such a chain. Most likely (1) and (4) are in close contact, and between them, the most accurate communication takes place. In a functional chain of direction, (1) would communicate directly to (4) on a real time basis. Information would be supplied to (2) and (3) who could provide guidance if local direction varied from contract terms. In instances where such was the case, (1) and (4) would be informed accordingly and the variance would be corrected, the action ratified, and/or the contract modified to reflect local conditions.

Based on research documented in this paper, what is suggested here does not actually change what is taking place; it merely recognizes it as a fact and endorses it as a rational approach to the control and management of contractors in deployment situations. It seems quite possible to implement this suggestion with appropriate contract language and delegations of authority.<sup>73</sup> Regulatory changes expressly recognizing the propriety of this type of relationship might be necessary, however, to overcome the entrenched views and resistance likely to be encountered from contracting officials.

This recommendation is not intended to create a personal service contract relationship between the theater command and the contractor’s personnel within the meaning of FAR 37.104. Nothing more is intended than to make official the unofficial relationships that are currently evident.

### ***Temporary militarization of contractor personnel.***

Given that the definition of “direct participation” in combat is evolving and that some of the functions that have been performed by contractors, or that may be performed by contractors in the future, could cross the line between indirect and direct participation in



combat, it is important to find ways to protect the individuals involved as well as for the United States to comply with its responsibilities under LOAC. One way to do this would be to temporarily grant military status to contractor personnel performing functions or in circumstances involving a significant possibility of direct participation in combat.

One approach would be to establish a new category of military reserve or militia service to which certain contractor personnel would be subject as a condition of their contract employment. The statute establishing this type of service would limit the number of personnel that could actively serve in it but not count them against either the active or reserve strength of the Armed Forces serving under standard legal authorities.

Contractor employees identified for potential activation under this authority would receive at least the minimum training in LOAC and other subjects in order to comply with international law as well as a basic form of military training. Training would be conducted pursuant to government standards. The intent is for activation under this authority not only to be temporary but intermittent, that is, military status would be conferred only when there was an actual possibility of being directly involved in combat. Personnel would be subject to the Uniform Code of Military Justice and other applicable military regulations when in an active status and at other times with respect to actions occurring while in an active status or relating to it.

The uniform worn and standards of appearance for these personnel should be essentially the same as for other military personnel. They would have some form of distinctive insignia. They should have a distinctive rank titled "Technician" or some similar term, as well as a class of rank applicable for protocol but not command purposes (except with respect to others in a similar status). They should be exempted from Federal statutes incompatible with the temporary and intermittent nature of their service or incompatible with their on going relationship with their private employer. They would be issued military identification cards and afforded access to military health and welfare programs while in an active status. Their military status would end with their death or disability which would be handled under the terms of their civilian employment relationship.

Their pay and allowances would be a continuation of their employer's pay plan or a system could be devised similar to the U.K. Sponsored Reserve where compensation expenses upon activation could be paid by the employer, the Government, or, some combination. Simply continuing the employer's pay plan would probably be the simplest approach in most cases.

### ***Critique of the recommendations and recent developments.***

The version of this paper presented at the Naval Post Graduate School Acquisition Research Conference was essentially similar to this final version and very much presented in order to generate discussion and critique of the ideas presented. Comments on the recommendations as well as other aspects of the paper were solicited prior to the conference and comments were solicited at the conference and afterwards.

A number of comments were received both before and after presentation of the paper at Monterey. No formal critique has been submitted by any of those who chose to make comments. Admiral Leonard Vincent who was the discussant at the conference session in which the paper was presented expressed appreciation for the inclusion of the historical section. Some others submitted similar comments. The author is pleased by the affirmation of the historical approach used in this paper believing it adds significant perspective to the issues involved.

Several persons cited as sources in footnotes of the paper made comments regarding the nature of the materials for which they were cited and, in some cases, revised remarks quoted or positions taken. These were incorporated in the text or notes when appropriate. Comments of a technical nature were made by a few experts prior to final submission of the paper and were generally accommodated in the text. A few comments of a technical nature were received at the conference or afterwards but none of these were deemed sufficiently meritorious to modify the text. A former Director of Defense Procurement stated that "we" (presumably meaning persons responsible for writing the DFARS) generally oppose subjecting contractor personnel to the UCMJ.

Several persons making comments stated that they were in general agreement with the thrust of the paper and its recommendations. Interestingly, no person providing comments expressly objected to the recommendations (though the comment of the former Director of Defense Procurement mentioned above may be so construed). The author does not take the lack of objection for total agreement. One could hardly imagine that radical recommendations such as contained in this work would receive universal approbation. Still, the absence of objection to the reasoning and recommendations contained in this paper should be accorded appropriate weight in assessing the viability of the recommendations.

Evidence of the dynamic nature of this area of contracting is the fact that almost exactly a month after the NPS acquisition research conference at Monterey DOD issued an interim rule revising the DFARS provisions discussed in this paper. That interim rule, as well as the author's comments on it, are submitted as attachments to this paper (see Attachments A and B).

## End Notes

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<sup>1</sup> Dunn, Contractors in the 21<sup>st</sup> Century ‘Combat Zone’, presented at the Naval Post Graduate School 2<sup>nd</sup> Annual Acquisition Research Conference (*vide*). Available from the Center for Public Policy and Private Enterprise, School of Public Policy, University of Maryland; and at the NPS website ([www.nps.navy.mil/gsbpp/ACQN/publications](http://www.nps.navy.mil/gsbpp/ACQN/publications)).

<sup>2</sup> For example, a comment to that effect was by made David G. Ehrhart, Brig. Gen. (USAF) at the American Bar Association Public Contract Law Section’s Federal Procurement Institute held at Annapolis, Maryland, 3 March 2006 (hereafter cited as FPI/Annapolis). Some commentators also mention the improvement in supply to the Continental Army after adopting the contract system. See for example, Ferris and Keithly, Outsourcing the Sinews of War: Contractor Logistics, MILITARY REVIEW, Sept-Oct 2001, 72.

<sup>3</sup> “DOD’s Active Duty Military Personnel Strength Fiscal Years 1950-2002” Viewed at <http://whs.osd.mil/mmid/military/ms8.pgf>; at the start of the Iraq war strength was down to 1.3 million.

<sup>4</sup> Bruner, “Military Forces: What is the Appropriate Size for the United States?” *Congressional Research Service Report*, May 28, 2004. The Bush administration proposed temporary increases in end strengths. Actual increases in end strengths in FY 2005 Defense Authorization Act were limited to 20,000 for the Army and 3,000 for the Marines (sec. 401, Public Law 108-375).

<sup>5</sup> Remarks by Robert St. Onge, Maj. Gen. (U.S.A., ret.), George Washington University conference, Contractors on the Battlefield: Learning From the Experience in Iraq, 28 Jan. 2005 (hereafter cited as GWU conference). See also Bruner (note 4), *ibid*. The change is generally ascribed to a decision by Secretary Cohen in 1997.

<sup>6</sup> U.S. Army Material Command (AMC) Pamphlet No. 700-300 “Logistics Civil Augmentation Program (LOGCAP)” Aug. 2003, 4. LOGCAP was initiated by Army Regulation (AR) 700-137 in December 1985.

<sup>7</sup> Higgins, “Civilian Augmentation of Joint Operations,” *Army Logistician*, vol. 35, Jan.-Feb. 2003 contains a description of each service’s program (LOGCAP, AFCAP, and CONCAP).

<sup>8</sup> Bureau of the Budget Circ. No. 55-4, Jan. 1955

<sup>9</sup> Rush, “Performance Based Service Acquisition,” presentation at 2003 Business Managers Conference, Defense Acquisition University, May 2003 (by 2001 service contracting was over 50% of DOD’s total procurement). According to Robert Lieberman, DOD Assistant Inspector General, between FY1992 and FY 1999 DOD services procurement grew from \$40 billion to \$52 billion (Testimony, Subcommittee on Government Management, Information and Technology, 16 March 2000).

<sup>10</sup> Bruner, *ibid*, noting that by 2001 services accounted for 60% of total government procurement.

<sup>11</sup> CNETNew.com, “Why Outsourcing is Suddenly In.” Sept. 29, 2002, [www.marketwatch-cnet.com.com/why+outsourcing+is+suddenly+in/2009-1001\\_3-959785.html](http://www.marketwatch-cnet.com.com/why+outsourcing+is+suddenly+in/2009-1001_3-959785.html)

<sup>12</sup> “Competitive Sourcing” chapter in Gansler, Moving Toward Market-Based Government: The Changing Role of Government as Provider,” IBM Center for the Business of Government, June 2003, discusses competitive sourcing and gives examples of savings.

<sup>13</sup> Letter, David Safavian, Administrator OFPP, to Richard Cheney, President of the Senate, no subject, 25 Jan. 2005.

<sup>14</sup> Matthews & Holt, So Many, So Much, So Far, So Fast, Joint History Office JCS (1995), 37-84,115-143.

<sup>15</sup> See Dunn (note 1) *op. cit.* for examples of various case studies on recent use of contractor support.

<sup>16</sup> *Contractors Provide Vital Services to Deployed Forces but are not Adequately Addressed in DOD Plans*. GAO-03-695, June 2003; the relevant appendix can also be found at Dunn (note 1) p. 78.

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<sup>17</sup> Remarks of Thomas Hammes, Col. (USMC) at GWU conference (note 5). Hammes recounted Blackwater black SUVs racing through the streets of Baghdad running his own military vehicle as well as Iraqi civilian vehicles off the road on more than one occasion. This annoyed (Hammes used a Marine euphemism) many Iraqis in the process and, no doubt, contributed to an unwanted “ugly American” image.

<sup>18</sup> Dunn (note 1), *op. cit.*, 60.

<sup>19</sup> *Ibid.*, 61

<sup>20</sup> The primary procurement law applicable to DOD components is the Armed Services Procurement Act (10 U.S.C. chapter 137) implemented by the Federal Acquisition Regulation, FAR, (48 C.F.R. Parts 1-53) and the DOD FAR Supplement, DFARS, (48 C.F.R. Parts 201-253).

<sup>21</sup> Note 1, *op. cit.*

<sup>22</sup> Michael K. Love, remarks at FPI/Annapolis (contractors provide “vital” combat support); comments summarized the views of other session panelists. See also note 16.

<sup>23</sup> Worden, “Army May be Misusing Contractors,” The-Signal.com, 15 June 2004 (quoting Lt. Col. Pamela Hart)

<sup>24</sup> *Ibid.*

<sup>25</sup> Davidson, *Ruck Up: An Introduction to Legal Issues Associated with Civilian Contractors on the Battlefield*, 29 PUB. CONT. L.J. 233 at 266-267 (2000).

<sup>26</sup> Dennis C. Colby, Lockheed-Martin Orlando, remarks at FPI/Annapolis. Original statement did not include “nearly” which was added per e-mail correction from Colby (12 April 2006).

<sup>27</sup> Ehrhart (note 2), *ibid.* agreeing with Colby, *ibid.*

<sup>28</sup> Marcia Bachman, Assoc. General Counsel, Department of the Air Force; remarks at FPI/Annapolis.

<sup>29</sup> Chris Taylor, Vice-President, Blackwater USA, remarks at GWU conference (note 5).

<sup>30</sup> Dunn (note 1) *op. cit.*, 41 summarizing parts of a briefing prepared by representatives of the Professional Services Council.

<sup>31</sup> *Ibid.*, p.40; See also Testimony of Stan Soloway, President, Professional Services Council, Subcommittee on National Security, Emerging Threats, and International Relations, Committee on Government Reform, U.S. House of Representatives, 21 June 2005 (available from PSC).

<sup>32</sup> Colby remarks (note 26), *ibid.* Following sentence modified to include “fixed price” (e-mail, 4/12/06).

<sup>33</sup> Stuart Nibley, presentation (“Emergency Contracting at Home and in Battle”) at West Government Contracts Year in Review Conference, Washington, D.C., 24 Feb. 2006 (hereafter cited as West conference). See FAR 1.602-3 for ratification policy and procedure.

<sup>34</sup> The mere presence of contracting officers in theater does not guarantee timely decisions. In Iraq at one point contract oversight personnel outnumbered warranted contracting officers. Some contracting officers were so intimidated and afraid to make a wrong decision that they made no decisions at all. Soloway Testimony (note 31).

<sup>35</sup> Note 1, *op. cit.*, pp. 63-67, 75-77

<sup>36</sup> Douglas, “Contractors Accompanying the Force: Empowering Commanders With Emergency Change Authority”, 31 A.F.L.R. 127 (2004); American Bar Association, Section on Public Contract Law, “Contractors in the Battle Space,” 12 Oct. 2005 (Report and letter to Principal Deputy to the Assistant Secretary of the Army); DOD proposed rule, “Contractor Personnel Supporting a Force Deployed Outside the United States” 69 F.R. 13,500 (23 March 2004).

<sup>37</sup> In re Yamashita, 327 U.S. 1 (1946).

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<sup>38</sup> Ibid. (see comments in preceding paragraph). Military personnel up to the rank of Brigadier General were disciplined for misconduct at Abu Ghraib, some of which involved indirect responsibility for actions of military subordinates and contractor personnel.

<sup>39</sup> For example, Nordan v. Blackwater (No. 5:05-CV-48-FL(1), U.S.D.C., E.D.N.C.) wrongful death action filed against Blackwater Security arising out of incidents at Fallujah, Iraq, in 2004.

<sup>40</sup> GAO (note 16), pp 2-3, 15-20.

<sup>41</sup> Changes to DFARS Parts 207, 212, 225, and 252; “Contractor Personnel Supporting a Force Deployed Outside the United States”, 70 F.R. 23790-23802, effective 6 June 2005.

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

<sup>43</sup> Papparone, “Who Rules Logistics? Service versus COCOM Authority,” *Army Logistician*, vol. 37, Nov.-Dec. 2005.

<sup>44</sup> McPeak and Ellis, “Managing Contractors in Joint Operations: Filling the Gaps in Doctrine”, *Army Logistician*, vol. 36, Mar.-Apr. 2004.

<sup>45</sup> Michael Mutek, remarks at West Conference (note 33).

<sup>46</sup> Dunn (note 1) *op. cit.*, 52-55.

<sup>47</sup> Nibley & Mutek, “Emergency Contracting at Home and in Battle”, Conference Briefs, 14, from West Conference (note 32). Michael Mutek identified lack of contracting flexibility as the prime issue in his remarks.

<sup>48</sup> Conference Briefs, *ibid.* Stuart Nibley identified this as his prime issue.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> Remarks by Stuart Nibley and Michael Mutek, West Conference (note 32).

<sup>52</sup> See Douglas (note 36) for a relatively detailed discussion of the proposed change.

<sup>53</sup> Dunn (note 1) *op. cit.*, 24.

<sup>54</sup> Colby (note 26) *ibid.*

<sup>55</sup> Conference Briefs (note 46), 7.

<sup>56</sup> Colby (note 26) *ibid.* Dunn (note 1), *op. cit.*, 22-24.

<sup>57</sup> FPI/Annapolis. Remarks of Marcia Bachman (pro inherently governmental and suggesting civilians in combat undermine the President’s commander-in-chief authority) and Michael Love (con).

<sup>58</sup> For example see, Correll, “Disunity of Command”, *Air Force*, vol. 88, Dec. 2005.

<sup>59</sup> Whelan, The Flying Tigers, Viking Press, New York, 1942.

<sup>60</sup> Whelan, *ibid.*; Chennault, Way of a Fighter, Putnam, New York, 1949; Ford, Flying Tigers, Smithsonian Institution Press, Washington, 1991; Armstrong, Preemptive Strike, Lyons Press, Guilford, Connecticut (to be published June 2006). The website of the Flying Tigers ([www.flyingtigersavg.com](http://www.flyingtigersavg.com)) and Daniel Ford’s Warbird’s website, which includes an “Annals of the Flying Tigers” section ([www.warbirdforum.com](http://www.warbirdforum.com)), contain valuable resource materials. In the latter case this includes the author’s article, “Flying Tigers: Heroes but Were They Legal?” Some archival material on the Flying Tigers is available on line, the Franklin D. Roosevelt Library and Museum being one source ([www.fdrlibrary.marist.edu](http://www.fdrlibrary.marist.edu)).

<sup>61</sup> Ford (note 60) *op. cit.*, 107.

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<sup>62</sup> Building the Navy's Bases in World War II, U.S.G.P.O., Washington, 1947; Dod, The Corps of Engineers in the War Against Japan, Office of the Chief of Military History, U.S. Army, Washington, 1966; Schultz, Wake Island, St. Martin's Press, New York, 1978; Bayler, Walter, Maj. (USMC), Ltr. to Commander-in-Chief, U.S. Pacific Fleet, Subject: "Report on Wake Island. Period of 7<sup>th</sup> to 20<sup>th</sup> December 1941" dtd. 7 Jan. 1942.

<sup>63</sup> Okumiya & Hirokoshi, *Zero*, E.P.Dutton, New York, 1957 (Ballentine ed., 86)

<sup>64</sup> "Building the Navy's Bases..." (note 62), 133.

<sup>65</sup> Bailey & Ryan, Hitler vs. Roosevelt, The Free Press, New York, 1979, provides a good review of U.S. diplomatic and naval conflict with Germany in the years between 1939 and 1941.

<sup>66</sup> Sources for the merchant marine aspects of this section include Schumacher v. Aldridge, C.A. No. 86-2015-LFO, (U.S.D.C., D.C., 16 Jul. 1987); Remarks of Gen. Richard B. Meyers (National Maritime Day Ceremony, 22 May 2003); House Concurrent Resolution 109 (National Maritime Day) 21 May 2001.

<sup>67</sup> "Civilian Volunteer Activities in the Army Air Forces," Army Air Force Historical Study No. 19 (1944).

<sup>68</sup> See generally, "Charles Lindbergh and the 475<sup>th</sup> Fighter Group," at [www.charleslindbergh.com/wwii/](http://www.charleslindbergh.com/wwii/).

<sup>69</sup> Sec. 401, Public Law 95-202, 91 Stat. 1449 (1977) (codified at 38 U.S.C. 106 note).

<sup>70</sup> "Rapid Reaction Met. men to be first sponsored reserves", U.K. Meteorological Office, press release (27 Oct. 2000).

<sup>71</sup> *Ibid.*

<sup>72</sup> "Sponsored Reserves", Ministry of Defense, United Kingdom (May 2003).

<sup>73</sup> Broad authority to delegate procurement functions is found at 10 U.S.C. 2311. Even if a deviation from the FAR or DFARS is deemed necessary to effect this recommendation, that should not inhibit its implementation (FAR 1.402).

## Biographical Information

Richard L. Dunn is currently an independent consultant and Senior Fellow at the University of Maryland. He conducts research and provides advice on business strategies to effectively develop and employ technologies in the military and civil sectors. Mr. Dunn retired from Federal service where he served as the first General Counsel of the Defense Advanced Research Projects Agency and was awarded the Presidential Rank of Meritorious Executive. He also served at NASA Headquarters and was on active duty as a Judge Advocate in the USAF for ten years. At DARPA Mr. Dunn pioneered contracting using “other transactions” to increase the effectiveness of R&D and prototyping efforts. He is a member of the editorial advisory board of the Government Contractor. He has written extensively both in the area of government contracts and military history. Mr. Dunn is a graduate of the University of New Hampshire (*cum laude*), and has law degrees from the University of Maryland, and, George Washington University (Highest Honors). Mr. Dunn and his wife, Karen, reside in Edgewater, Maryland.



# Attachment A - DFARS Interim Rule

FR Doc E6-9499

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[Federal Register: June 16, 2006 (Volume 71, Number 116)]  
[Rules and Regulations]  
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From the Federal Register Online via GPO Access [wais.access.gpo.gov]  
[DOCID:fr16jn06-16]

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 212, 225, and 252

RIN 0750-AF25

Defense Federal Acquisition Regulation Supplement; Contractor  
Personnel Authorized to Accompany U.S. Armed Forces (DFARS Case 2005-  
D013)

AGENCY: Defense Acquisition Regulations System, Department of Defense  
(DoD).

ACTION: Interim rule with request for comments.

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SUMMARY: DoD has issued an interim rule amending the Defense Federal  
Acquisition Regulation Supplement (DFARS) to implement DoD policy  
regarding contractor personnel authorized to accompany U.S. Armed  
Forces deployed outside the United States. The rule addresses the  
status of contractor personnel as civilians accompanying the U.S. Armed  
Forces and the responsibilities of the combatant commander regarding  
the protection of contractor personnel.

DATES: Effective date: June 16, 2006.

Comment date: Comments on the interim rule should be submitted to  
the address shown below on or before August 15, 2006, to be considered  
in the formation of the final rule.

ADDRESSES: You may submit comments, identified by DFARS Case 2005-D013,  
using any of the following methods:

[cir] Federal eRulemaking Portal: <http://www.regulations.gov>.

Follow the instructions for submitting comments.

[cir] E-mail: [dfars@osd.mil](mailto:dfars@osd.mil). Include DFARS Case 2005-D013 in the  
subject line of the message.

[cir] Fax: (703) 602-0350.

[cir] Mail: Defense Acquisition Regulations System, Attn: Ms. Amy  
Williams, OUSD(AT&L) DPAP (DARS), IMD 3C132, 3062 Defense Pentagon,  
Washington, DC 20301-3062.

[cir] Hand Delivery/Courier: Defense Acquisition Regulations  
System, Crystal Square 4, Suite 200A, 241 18th Street, Arlington, VA  
22202-3402.

Comments received generally will be posted without change to <http://www.regulati>  
, including any personal information provided.

<http://www.acq.osd.mil/dpap/dars/dfars/changenotice/2006/20060616/E6-9499.htm>

6/20/2006

FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, (703) 602-0328.

SUPPLEMENTARY INFORMATION:

A. Background

This interim rule revises DFARS Subpart 225.74 and the clause at DFARS 252.225-7040 to implement the policy in DoD Instruction 3020.41, Contractor Personnel Authorized to Accompany the U.S. Armed Forces, dated October 3, 2005. DoD Instruction 3020.41 is available via the Internet at <http://www.dtic.mil/whs/directives/corres/html/302041.htm>.

The DFARS changes address the following areas:

1. Contractor participation in hostilities

Prior to this interim rule, paragraph (b) of the clause at DFARS 252.225-7040 prohibited contractor personnel from using force or otherwise directly participating in acts likely to cause actual harm to enemy armed forces. The interim rule revises the clause to provide for contractor personnel other than private security contractor personnel to use deadly force against enemy armed forces only in self-defense. Private security contractor personnel are also authorized to use deadly force when necessary to execute their security mission to protect assets/persons, consistent with the mission statement contained in their contract. It is the responsibility of the combatant commander to ensure that private security contract mission statements do not authorize the performance of any inherently Governmental military functions, such as preemptive attacks,

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or any other types of attacks. Otherwise, civilians who accompany the U.S. Armed Forces lose their law of war protection from direct attack if and for such time as they take a direct part in hostilities.

2. Government support

Prior to this interim rule, paragraph (c) of the clause at 252.225-7040 required the combatant commander to develop a security plan for protection of contractor personnel through military means unless the terms of the contract placed the responsibility with another party. In accordance with DoD Instruction 3020.41, paragraph 6.3.4., this interim rule revises the clause to limit the requirement for the combatant commander to develop such a security plan to those locations where there is not sufficient or legitimate civil authority and the combatant commander decides that it is in the interests of the Government to provide security.

Paragraph (c)(3) of the clause at 252.225-7040 requires the contractor to provide support for its personnel, except as otherwise specified in the contract. This interim rule adds text at 225.7402-3(b) to state that the Government will provide logistical or security support only when the appropriate agency official, in accordance with agency guidance, determines that Government provision of such support is needed to ensure continuation of essential contractor services and that the contractor cannot obtain adequate support from other sources. This interim rule also adds text at 225.7402-3(c)(4) to require that the contract specify whether the support is to be provided on a reimbursable basis, citing the authority for the reimbursement.

3. Authorized to accompany the U.S. Armed Forces

The phrase ``supporting a force'' is replaced with ``authorized to accompany U.S. Armed Forces'' throughout the rule.

4. Other military operations

The scope of the DFARS policy is changed, from ``other military operations or exercises designated by the combatant commander,'' to ``other military operations'' and ``military exercises designated by the combatant commander.'' A definition of ``other military operations'' is added to paragraph (a) of the clause at 252.225-7040.

5. Not active duty

Paragraph (b)(4) is added to the clause at 252.225-7040 to clarify that service performed by contractor personnel subject to the clause is not active duty or service under 38 U.S.C. 106.

6. Letter of Authorization and Common Access Card

Paragraph (c)(4) is added to the clause at 252.225-7040 to address requirements for contractor personnel to have a letter of authorization, for consistency with the policy at 225.7402-3(d). Also, text has been added to paragraph (e)(1)(iii) of the clause to address requirements for Common Access Cards issued to deploying personnel to contain the access permissions allowed by the letter of authorization.

7. Training

Paragraphs (e)(1)(v) and (vi) are added to the clause at 252.225-7040 to address additional pre-deployment training requirements relating to personal security and isolated personnel.

8. Military Extraterritorial Jurisdiction Act and other applicable statutes

Paragraph (e)(2) is added to the clause at 252.225-7040 to address the requirement for the contractor to notify its personnel that--  
[cir] The Military Extraterritorial Jurisdiction Act (18 U.S.C. 3621, et seq.) and some other statutes may apply to contractor personnel who commit offenses outside the United States; and  
[cir] When there is a formal declaration of war by Congress, contractor personnel authorized to accompany U.S. Armed Forces may be subject to prosecution under the Uniform Code of Military Justice.

9. Deployment centers

Paragraph (f)(1) of the clause at 252.225-7040 is amended to clarify that the deployment center must ensure that all deployment requirements are met.

10. Personnel data list

Paragraph (g)(1) of the clause at 252.225-7040 is revised to clarify requirements for the contractor to establish and maintain a personnel data list.

11. Military clothing and protective equipment

Paragraph (i) of the clause at 252.225-7040 is amended to clarify requirements relating to military clothing and protective equipment.

#### 12. Weapons

Paragraph (j) of the clause at 252.225-7040 is revised to clarify requirements relating to situations where contractor personnel are authorized to carry weapons. A statement has also been added to clarify that the liability for use of any weapon by contractor personnel rests solely with the contractor and the contractor employee using such weapon.

#### 13. Personnel recovery

Paragraph (n) of the clause at 252.225-7040 is amended to include additional terms ("isolated" and "detained") to cover all situations in which an employee might need to be recovered.

#### 14. Changes

Paragraph (p) of the clause at 252.225-7040 is amended to include "place of performance" as a condition that is subject to change, in addition to those authorized by the Changes clause. Although paragraph (c) of the clause already addresses site changes, the term "place of performance" has a broader applicability, since the term "site" is normally associated with construction contracts.

This rule was subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

#### B. Regulatory Flexibility Act

This rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because application of the rule is limited to those contracts that involve contractor personnel authorized to accompany U.S. Armed Forces deployed outside the United States. Therefore, DoD has not performed an initial regulatory flexibility analysis. DoD invites comments from small businesses and other interested parties. DoD also will consider comments from small entities concerning the affected DFARS subparts in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 2005-D013.

#### C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply, because the rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, et seq. Although the contract clause requires contractors to maintain certain information regarding their personnel, DoD believes

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that this requirement is usual and customary and does not exceed what a contractor would maintain in the normal course of business.

#### D. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense that urgent and compelling reasons exist to publish an

interim rule prior to affording the public an opportunity to comment. This interim rule implements DoD Instruction 3020.41, Contractor Personnel Authorized to Accompany the U.S. Armed Forces, dated October 3, 2005. Existing DFARS requirements prohibit contractor personnel from using force or otherwise directly participating in acts likely to cause actual harm to enemy armed forces. In accordance with DoD Instruction 3020.41, this interim rule revises the DFARS to provide for contractor personnel to use deadly force against enemy armed forces in self-defense or in the performance of a contract for private security services. Comments received in response to this interim rule will be considered in the formation of the final rule.

List of Subjects in 48 CFR Parts 212, 225, and 252

Government procurement.

Michele P. Peterson,  
Editor, Defense Acquisition Regulations System.

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Therefore, 48 CFR Parts 212, 225, and 252 are amended as follows:

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1. The authority citation for 48 CFR Parts 212, 225, and 252 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR Chapter 1.

PART 212--ACQUISITION OF COMMERCIAL ITEMS

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2. Section 212.301 is amended by revising paragraph (f)(vii) to read as follows:

212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

(f) \* \* \*

(vii) Use the clause at 252.225-7040, Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States, as prescribed in 225.7402-4.

\* \* \* \* \*

PART 225--FOREIGN ACQUISITION

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3. Sections 225.7402 through 225.7402-4 are revised to read as follows:

225.7402 Contractor personnel authorized to accompany U.S. Armed Forces deployed outside the United States.

225.7402-1 Scope.

This section applies to contracts that involve contractor personnel authorized to accompany U.S. Armed Forces deployed outside the United States in--

- (a) Contingency operations;
- (b) Humanitarian or peacekeeping operations;

<http://www.acq.osd.mil/dpap/dars/dfars/changenotice/2006/20060616/E6-9499.htm>

6/20/2006



- (c) Other military operations; or
- (d) Military exercises designated by the combatant commander.

## 225.7402-2 Definitions.

Combatant commander, other military operations, and theater of operations, as used in this section, have the meaning given in the clause at 252.225-7040, Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States.

## 225.7402-3 Government support.

(a) Government support that may be authorized or required for contractor personnel performing in a theater of operations may include, but is not limited to, the types of support listed in PGI 225.7402-3(a).

(b) The agency shall provide logistical or security support only when the appropriate agency official, in accordance with agency guidance, determines in coordination with the combatant commander that--

(1) Government provision of such support is needed to ensure continuation of essential contractor services; and

(2) The contractor cannot obtain adequate support from other sources.

(c) The contracting officer shall--

(1) Ensure that the contract contains valid terms, approved by the combatant commander, that specify the responsible party, if a party other than the combatant commander is responsible for providing protection to the contractor personnel performing in the theater of operations as specified in 225.7402-1;

(2) Specify in the terms of the contract, if medical or dental care is authorized beyond the standard specified in paragraph (c)(2)(i) of the clause at 252.225-7040, Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States;

(3) Provide direction to the contractor, if the contractor is required to reimburse the Government for medical treatment or transportation of contractor personnel to a selected civilian facility in accordance with paragraph (c)(2)(ii) of the clause at 252.225-7040; and

(4) Specify in the contract any other Government support to be provided, and whether this support is provided on a reimbursable basis, citing the authority for the reimbursement.

(d) Contractor personnel must have a letter of authorization (LOA) issued by a contracting officer in order to process through a deployment center or to travel to, from, or within the theater of operations. The LOA also will identify any additional authorizations, privileges, or Government support that the contractor personnel are entitled to under the contract. For a sample LOA, see PGI 225.7402-3(d).

## 225.7402-4 Contract clauses.

(a) Use the clause at 252.225-7040, Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States, in solicitations and contracts when contract performance requires that contractor personnel accompany U.S. Armed Forces deployed outside the United States in--

- (1) Contingency operations;
  - (2) Humanitarian or peacekeeping operations;
  - (3) Other military operations; or
  - (4) Military exercises designated by the combatant commander.
- (b) For additional guidance on clauses to consider when using the clause at 252.225-7040, see PGI 225.7402-4(b).

## PART 252--SOLICITATION PROVISIONS AND CONTRACT CLAUSES

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4. Section 252.225-7040 is revised to read as follows:

252.225-7040 Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States.

As prescribed in 225.7402-4(a), use the following clause:  
Contractor Personnel Authorized To Accompany U.S. Armed Forces Deployed Outside The United States (JUN 2006)

(a) Definitions. As used in this clause--

Combatant Commander means the commander of a unified or specified combatant command established in accordance with 10 U.S.C. 161.

Other military operations means a range of military force responses that can be projected to accomplish assigned tasks. Such operations may include one or a combination of the following: Civic action, humanitarian assistance, civil affairs, and other military activities to develop positive relationships with other countries; confidence building and other measures to reduce military tensions; military presence; activities to convey messages to adversaries; military

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deceptions and psychological operations; quarantines, blockades, and harassment operations; raids; intervention operations; armed conflict involving air, land, maritime, and strategic warfare operations; support for law enforcement authorities to counter international criminal activities (terrorism, narcotics trafficking, slavery, and piracy); support for law enforcement authorities to suppress domestic rebellion; and support for insurgency, counterinsurgency, and civil war in foreign countries.

Theater of operations means an area defined by the combatant commander for the conduct or support of specified operations.

(b) General.

(1) This clause applies when Contractor personnel are authorized to accompany U.S. Armed Forces deployed outside the United States in--

- (i) Contingency operations;
- (ii) Humanitarian or peacekeeping operations;
- (iii) Other military operations; or
- (iv) Military exercises designated by the Combatant Commander.

(2) Contract performance in support of U.S. Armed Forces deployed outside the United States may require work in dangerous or austere conditions. The Contractor accepts the risks associated with required contract performance in such operations.

(3) Contractor personnel are civilians accompanying the U.S. Armed Forces.

(i) Except as provided in paragraph (b) (3) (ii) of this clause, Contractor personnel are not authorized to use deadly force against enemy armed forces other than in self-defense.

(ii) Private security Contractor personnel are authorized to use deadly force only when necessary to execute their security mission to

protect assets/persons, consistent with the mission statement contained in their contract.

(iii) Civilians who accompany the U.S. Armed Forces lose their law of war protection from direct attack if and for such time as they take a direct part in hostilities.

(4) Service performed by Contractor personnel subject to this clause is not active duty or service under 38 U.S.C. 106 note.

(c) Support. (1)(i) The Combatant Commander will develop a security plan for protection of Contractor personnel in locations where there is not sufficient or legitimate civil authority, when the Combatant Commander decides it is in the interests of the Government to provide security because--

(A) The Contractor cannot obtain effective security services;

(B) Effective security services are unavailable at a reasonable cost; or

(C) Threat conditions necessitate security through military means.

(ii) The Contracting Officer shall include in the contract the level of protection to be provided to Contractor personnel.

(iii) In appropriate cases, the Combatant Commander may provide security through military means, commensurate with the level of security provided DoD civilians.

(2)(i) Generally, all Contractor personnel authorized to accompany the U.S. Armed Forces in the theater of operations may be provided resuscitative care, stabilization, hospitalization at level III military treatment facilities, and assistance with patient movement in emergencies where loss of life, limb, or eyesight could occur. Hospitalization will be limited to stabilization and short-term medical treatment with an emphasis on return to duty or placement in the patient movement system.

(ii) When the Government provides medical treatment or transportation of Contractor personnel to a selected civilian facility, the Contractor shall ensure that the Government is reimbursed for any costs associated with such treatment or transportation.

(iii) Medical or dental care beyond this standard is not authorized unless specified elsewhere in this contract.

(3) Unless specified elsewhere in this contract, the Contractor is responsible for all other support required for its personnel engaged in the theater of operations under this contract.

(4) Contractor personnel must have a letter of authorization issued by the Contracting Officer in order to process through a deployment center or to travel to, from, or within the theater of operations. The letter of authorization also will identify any additional authorizations, privileges, or Government support that Contractor personnel are entitled to under this contract.

(d) Compliance with laws and regulations. The Contractor shall comply with, and shall ensure that its personnel authorized to accompany U.S. Armed Forces deployed outside the United States as specified in paragraph (b)(1) of this clause are familiar with and comply with, all applicable--

(1) United States, host country, and third country national laws;

(2) Treaties and international agreements;

(3) United States regulations, directives, instructions, policies, and procedures; and

(4) Orders, directives, and instructions issued by the Combatant Commander, including those relating to force protection, security, health, safety, or relations and interaction with local nationals.

(e) Pre-deployment requirements. (1) The Contractor shall ensure that the following requirements are met prior to deploying personnel in support of U.S. Armed Forces. Specific requirements for each category may be specified in the statement of work or elsewhere in the contract.



(i) All required security and background checks are complete and acceptable.

(ii) All deploying personnel meet the minimum medical screening requirements and have received all required immunizations as specified in the contract. The Government will provide, at no cost to the Contractor, any theater-specific immunizations and/or medications not available to the general public.

(iii) Deploying personnel have all necessary passports, visas, and other documents required to enter and exit a theater of operations and have a Geneva Conventions identification card, or other appropriate DoD identity credential, from the deployment center. Any Common Access Card issued to deploying personnel shall contain the access permissions allowed by the letter of authorization issued in accordance with paragraph (c) (4) of this clause.

(iv) Special area, country, and theater clearance is obtained for personnel. Clearance requirements are in DoD Directive 4500.54, Official Temporary Duty Abroad, and DoD 4500.54-G, DoD Foreign Clearance Guide. Contractor personnel are considered non-DoD personnel traveling under DoD sponsorship.

(v) All personnel have received personal security training. At a minimum, the training shall--

(A) Cover safety and security issues facing employees overseas;

(B) Identify safety and security contingency planning activities;

and

(C) Identify ways to utilize safety and security personnel and other resources appropriately.

(vi) All personnel have received isolated personnel training, if specified in the contract.

(2) The Contractor shall notify all personnel who are not a host country national, or who are not ordinarily resident in the host country, that--

(i) Such employees, and dependents residing with such employees, who engage in conduct outside the United States that would constitute an offense punishable by imprisonment for more

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than one year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States, may potentially be subject to the criminal jurisdiction of the United States in accordance with the Military Extraterritorial Jurisdiction Act of 2000 (18 U.S.C. 3621, et seq.);

(ii) Pursuant to the War Crimes Act (18 U.S.C. 2441), Federal criminal jurisdiction also extends to conduct that is determined to constitute a violation of the law of war when committed by a civilian national of the United States;

(iii) Other laws may provide for prosecution of U.S. nationals who commit offenses on the premises of U.S. diplomatic, consular, military or other U.S. Government missions outside the United States (18 U.S.C. 7(9)); and

(iv) When there is a formal declaration of war by Congress, Contractor personnel authorized to accompany U.S. Armed Forces may be subject to prosecution under the Uniform Code of Military Justice.

(f) Processing and departure points. Deployed Contractor personnel shall--

(1) Process through the deployment center designated in the contract, or as otherwise directed by the Contracting Officer, prior to deploying. The deployment center will conduct deployment processing to ensure visibility and accountability of Contractor personnel and to ensure that all deployment requirements are met, including the

requirements specified in paragraph (e)(1) of this clause;

(2) Use the point of departure and transportation mode directed by the Contracting Officer; and

(3) Process through a Joint Reception Center (JRC) upon arrival at the deployed location. The JRC will validate personnel accountability, ensure that specific theater of operations entrance requirements are met, and brief Contractor personnel on theater-specific policies and procedures.

(g) Personnel data list.

(1) In accordance with DoD Instruction 3020.41, Contractor Personnel Authorized to Accompany the U.S. Armed Forces, the Contractor shall establish and maintain with the designated Government official a current list of all Contractor personnel that deploy with or otherwise provide support in the theater of operations to U.S. Armed Forces as specified in paragraph (b)(1) of this clause. The list shall include each individual's general location in the theater of operations. The Contracting Officer will inform the Contractor of the Government official designated to receive this data and the appropriate automated system(s) to use for this effort.

(2) The Contractor shall ensure that all employees on the list have a current DD Form 93, Record of Emergency Data Card, on file with both the Contractor and the designated Government official.

(h) Contractor personnel. (1) The Contracting Officer may direct the Contractor, at its own expense, to remove and replace any Contractor personnel who jeopardize or interfere with mission accomplishment or who fail to comply with or violate applicable requirements of this clause. Such action may be taken at the Government's discretion without prejudice to its rights under any other provision of this contract, including the Termination for Default clause.

(2) The Contractor shall have a plan on file showing how the Contractor would replace employees who are unavailable for deployment or who need to be replaced during deployment. The Contractor shall keep this plan current and shall provide a copy to the Contracting Officer upon request. The plan shall--

(i) Identify all personnel who are subject to military mobilization;

(ii) Detail how the position would be filled if the individual were mobilized; and

(iii) Identify all personnel who occupy a position that the Contracting Officer has designated as mission essential.

(i) Military clothing and protective equipment.

(1) Contractor personnel are prohibited from wearing military clothing unless specifically authorized in writing by the Combatant Commander. If authorized to wear military clothing, Contractor personnel must--

(i) Wear distinctive patches, arm bands, nametags, or headgear, in order to be distinguishable from military personnel, consistent with force protection measures; and

(ii) Carry the written authorization with them at all times.

(2) Contractor personnel may wear military-unique organizational clothing and individual equipment (OCIE) required for safety and security, such as ballistic, nuclear, biological, or chemical protective equipment.

(3) The deployment center, or the Combatant Commander, shall issue OCIE and shall provide training, if necessary, to ensure the safety and security of Contractor personnel.

(4) The Contractor shall ensure that all issued OCIE is returned to the point of issue, unless otherwise directed by the Contracting Officer.

(j) Weapons. (1) If the Contractor requests that its personnel performing in the theater of operations be authorized to carry weapons, the request shall be made through the Contracting Officer to the Combatant Commander, in accordance with DoD Instruction 3020.41, paragraph 6.3.4.1 or, if the contract is for security services, paragraph 6.3.5.3. The Combatant Commander will determine whether to authorize in-theater Contractor personnel to carry weapons and what weapons and ammunition will be allowed.

(2) If the Contracting Officer, subject to the approval of the Combatant Commander, authorizes the carrying of weapons--

(i) The Contracting Officer may authorize the Contractor to issue Contractor-owned weapons and ammunition to specified employees; or

(ii) The [Contracting Officer to specify the appropriate individual, e.g., Contracting Officer's Representative, Regional Security Officer] may issue Government-furnished weapons and ammunition to the Contractor for issuance to specified Contractor employees.

(3) The Contractor shall ensure that its personnel who are authorized to carry weapons--

(i) Are adequately trained to carry and use them--

(A) Safely;

(B) With full understanding of, and adherence to, the rules of the use of force issued by the Combatant Commander; and

(C) In compliance with applicable agency policies, agreements, rules, regulations, and other applicable law;

(ii) Are not barred from possession of a firearm by 18 U.S.C. 922;

and

(iii) Adhere to all guidance and orders issued by the Combatant Commander regarding possession, use, safety, and accountability of weapons and ammunition.

(4) Whether or not weapons are Government-furnished, all liability for the use of any weapon by Contractor personnel rests solely with the Contractor and the Contractor employee using such weapon.

(5) Upon redeployment or revocation by the Combatant Commander of the Contractor's authorization to issue firearms, the Contractor shall ensure that all Government-issued weapons and unexpended ammunition are returned as directed by the Contracting Officer.

(k) Vehicle or equipment licenses. Contractor personnel shall possess the required licenses to operate all vehicles or equipment necessary to perform the contract in the theater of operations.

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(l) Purchase of scarce goods and services. If the Combatant Commander has established an organization for the theater of operations whose function is to determine that certain items are scarce goods or services, the Contractor shall coordinate with that organization local purchases of goods and services designated as scarce, in accordance with instructions provided by the Contracting Officer.

(m) Evacuation. (1) If the Combatant Commander orders a mandatory evacuation of some or all personnel, the Government will provide assistance, to the extent available, to United States and third country national Contractor personnel.

(2) In the event of a non-mandatory evacuation order, unless authorized in writing by the Contracting Officer, the Contractor shall maintain personnel on location sufficient to meet obligations under this contract.

(n) Next of kin notification and personnel recovery. (1) The Contractor shall be responsible for notification of the employee-designated next of kin in the event an employee dies, requires evacuation due to an injury, or is isolated, missing, detained,

captured, or abducted.

(2) In the case of isolated, missing, detained, captured, or abducted Contractor personnel, the Government will assist in personnel recovery actions in accordance with DoD Directive 2310.2, Personnel Recovery.

(o) Mortuary affairs. Mortuary affairs for Contractor personnel who die while accompanying the U.S. Armed Forces will be handled in accordance with DoD Directive 1300.22, Mortuary Affairs Policy.

(p) Changes. In addition to the changes otherwise authorized by the Changes clause of this contract, the Contracting Officer may, at any time, by written order identified as a change order, make changes in the place of performance or Government-furnished facilities, equipment, material, services, or site. Any change order issued in accordance with this paragraph (p) shall be subject to the provisions of the Changes clause of this contract.

(q) Subcontracts. The Contractor shall incorporate the substance of this clause, including this paragraph (q), in all subcontracts when subcontractor personnel are authorized to accompany U.S. Armed Forces deployed outside the United States in--

- (1) Contingency operations;
  - (2) Humanitarian or peacekeeping operations;
  - (3) Other military operations; or
  - (4) Military exercises designated by the Combatant Commander.
- (End of clause)

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# Attachment B – Comment on Interim Rule

# THE GOVERNMENT CONTRACTOR®



Information and Analysis on Legal Aspects of Procurement

Vol. 48, No. 24

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## Focus

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 ♦by Richard L. Dunn, independent consultant and senior fellow, University of Maryland

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### ¶ 221

#### FEATURE COMMENT: Interim Rule On Contractor Personnel Accompanying U.S. Armed Forces

On June 16, 2006, the Department of Defense issued an interim rule “due to compelling and urgent reasons” modifying the Defense Federal Acquisition Regulation Supplement coverage regarding contractor personnel accompanying U.S. armed forces in certain military operations and exercises (71 Fed. Reg. 34826–34831). The stated purpose of the rule is to revise the DFARS to implement DOD Instruction 3020.41, Contractor Personnel Authorized to Accompany U.S. Armed Forces, dated Oct. 3, 2005. As did the previous version of the DFARS coverage on contractors supporting a “force deployed outside the United States” or “contractors on the battlefield,” the interim rule addresses many details, but leaves many important questions unanswered or confused.

One such question is who is in charge when contractors support combat operations and perform functions previously performed by uniformed military personnel. Is it the military theater commander and his subordinates charged with accomplishing an important mission, or is it a contracting officer who may be thousands of miles away from life or death action? This is not merely a matter of organizational efficiency. When a nation deploys military forces—and there is little doubt contractor personnel are integral to current U.S. strategy—international law presupposes that those forces are subject to a commanding officer who can be held responsible for the actions of his subordinates. Under U.S. interpretation of international law, that a

*Focus continued on page 3 ...*

#### Reminder ...

THE GOVERNMENT CONTRACTOR is not published the week of Independence Day. The next issue will be dated July 12, 2006.



theater commander does not actually control forces in his theater and nominally under his command is no defense to his accountability for violations of the laws of war committed by those forces (*Application of Yamashita*, 327 U.S. 1 (1946)). This rule could extend to contractor personnel who perform functions once performed by military personnel and who work side by side with soldiers.

In grappling with this issue in 2004 (69 Fed. Reg. 13500), DOD proposed a rule vesting the theater commander with an emergency change order authority. The final rule (70 Fed. Reg. 23790) rejects this approach and, likewise, "any revisions or expansions of the authorities of the combatant commander." The discussion of the final rule and the contract clause that it promulgated—DFARS 252.225-7040—make clear that only the traditional approach of a CO's authority prevails. Though this issue is the subject of a law review article, an ABA Public Contract Law Section paper submitted to the Army and other supportive commentaries, the discussion of the interim rule, or "Supplementary Information," is silent on the subject.

Regardless, the new contract clause language may, intentionally or unintentionally, vest the theater commander and his military subordinates with sweeping authority to direct changes in contract performance. The strategic addition of two words—"including those"—has such an effect. DFARS 252.225-7040(d)(4) requires contractors and their personnel to comply with a theater commander's orders "relating to" force protection, security, health and certain other matters. By adding "including those" before "relating to," contractors now must comply with all orders of the theater commander, including those in the limited areas previously specified. Presumably, this also includes orders conveyed through the chain of command and orders by military personnel exercising the theater commander's delegated authority.

Absent a discussion on this issue in the notice promulgating the change, there remain many unanswered questions. How should a CO react to contract changes "ordered" by non-contracting officials pursuant to this provision? Should they be ratified? Should they be accepted as an authorized change by someone other than a CO? What exactly is the CO's role when a theater commander orders a contractor to take an action outside the contract scope or one that increases the cost of contract performance? The interim rule leaves room to speculate on these questions.

Another, perhaps even more critical, question concerns the interim rule's endorsement of contractor personnel engaging in defensive combat. While asserting that contractor personnel are not combatants, the interim rule provides that they may defend assets or personnel against enemy action pursuant to their contract's mission statement. Many experts agree that defensive combat operations constitute "direct participation" in combat under international law. Contractors participating in such operations would need to wear uniforms and be subject to the military chain of command to avoid being "unlawful combatants." The interim rule places no such conditions on *security* contractor personnel. Absent conditions and standards, a possibility exists that contractor personnel will be unlawful combatants and lose international and national legal immunity for certain acts, i.e., the Government contractor defense. The rule's cryptic discussion of international law fails to address what appears to be a significant change in U.S. military and international policy.

The interim rule notice also contains a number of confused and illogical statements concerning contractor use of force and self-defense. "Preemptive attacks" are said to be "inherently governmental military functions" and, thus, not allowed by security contractors. If a contractor employee sees enemy combatants position and aim a large caliber artillery piece or plant an improvised explosive device outside a friendly military compound, must the contractor wait for the first shot rather than launch a preemptive attack? If the employee is on mobile patrol and encounters the same artillery piece being positioned near a friendly compound, must he merely communicate with military forces until it is fired or may he, logically, take more aggressive action? Even domestic self-defense laws allow aggressive, though proportional, violence in response to objectively perceived threats of violence. Whatever the international consensus on preemptive action, U.S. policy, as exemplified by Operation Iraqi Freedom, allows preemption as a form of self-defense. Does this interim rule limit the "inherent right of personal self-defense" and the defense of others? There is no discussion of these issues.

The current importance of contractors in U.S. military operations is hard to overstate. One is left with the impression that those who issued the interim rule have not considered some significant aspects. Policies involving contractors in or near combat have implications that transcend DOD and,

one would think, should involve the Department of State and Congress as well. Those concerned with more than contracting policy should weigh in to help ensure that these issues are addressed in a way that is in the Government's best interest.



*This FEATURE COMMENT was written for THE GOVERNMENT CONTRACTOR by Richard L. Dunn, an independent consultant and senior fellow at the University of Maryland, and former general counsel of the Defense Advanced Research Projects Agency.*

## Developments

### ¶ 222

#### **SBA Issues Long-Awaited Notice On Set-Asides For Women-Owned Firms**

More than five years after Congress enacted a law to increase contracting opportunities for women-owned small businesses (WOSBs), the Small Business Administration has proposed a rule detailing how it intends to implement the legislation. The June 15 Federal Register notice follows a November 2005 ruling from a federal district court requiring the SBA to adopt a schedule for complying with its obligations under the Equity in Contracting for Women Act of 2000. 71 Fed. Reg. 34550 (June 15, 2006). See 47 GC ¶ 442.

The Act authorizes contracting officers to set aside contracts for eligible women-owned businesses in industries in which WOSBs receive a disproportionately small share of federal contracts. It also requires the SBA to conduct a study to identify the industries in which WOSBs are underrepresented in public contracting.

Seeking to force implementation of the legislation after a lengthy delay, the U.S. Women's Chamber of Commerce filed a claim in 2004 against the SBA in U.S. District Court for the District of Columbia. The court denied the SBA's motion to dismiss and required the agency to set a timeline for completing its statutory responsibilities.

Although the Equity in Contracting for Women Act authorizes women-owned businesses to certify their status to a CO, the SBA's proposed rule prohibits such self-certification. According to the Federal Regis-

### ¶ 222

ter notice, the Act places the responsibility for policing self-certifications on COs, which would "create extra work for acquisition officials and would likely result in delays and other administrative inconveniences in the procurement process." The proposed rule thus requires eligibility for the WOSB set-aside program to be determined solely by the SBA.

In a June 19 statement, Women's Chamber Chief Executive Officer Margot Dorfman criticized the SBA for departing from the 2000 statute. "The law specifically states that the SBA shall allow a women-owned business to certify, 'to the contracting officer that it is a small business concern owned and controlled by women ...,'" Dorfman said. "Under the proposed SBA regulations, the SBA declares that it will specifically not comply with the law on this matter." According to Dorfman, this creates a double standard because the SBA allows self-certification for small businesses owned by service-disabled veterans. "Clearly the SBA believes that service-disabled veteran small business owners may interact directly with a contracting officer to affirm their status—but a woman may not," Dorfman said.

The SBA estimates that roughly 2,000 women-owned firms will seek SBA certification annually. Under this estimate, Dorfman noted, it will take the SBA 38 years to comply with the Equity in Contracting for Women Act, which seeks to set aside five percent of all federal procurement dollars to WOSB contracts. The SBA also has failed to account for the growing number of women-owned firms seeking federal contracts, Dorfman said.

Under the proposed rule, the SBA will establish a WOSB federal contract assistance program administered by the agency's office of Government contracting. The program will allow COs to restrict competition in favor of WOSBs for contracts that do not exceed \$3 million, or \$5 million for manufacturing. Participating WOSBs will be subject to size determinations and protests brought by competing firms, a CO or the associate administrator for Government contracting.

### ¶ 223

#### **DLA Failed To Ensure The Reasonableness Of Prime Vendor Prices, GAO Says**

The Government Accountability Office has found that, despite previously identifying pricing prob-

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