CONTRACTORS ON THE BATTLEFIELD REVISITED:
THE WAR IN IRAQ & ITS AFTERMATH

By James J. McCullough and Courtney J. Edmonds

In our June 2002 BRIEFING PAPER, we addressed certain emerging issues relating to the dramatic increase in the U.S. military’s reliance on contractor personnel for a wide range of support services in overseas combat and contingency operations following the September 11, 2001 terrorist attacks. The expanded use of contractor personnel in military support roles gained considerable momentum in early 2003 as the United States prepared for, and ultimately engaged in, war in Iraq. Now, after more than a year’s experience with combat support and reconstruction contracting in Iraq, in which the U.S. Government has awarded more than 2,800 contracts valued at over $11.7 billion, there is a growing body of evidence reflecting the contract performance and compliance problems that inevitably arise when agencies use contractors to provide goods and services on an expedited basis in hostile combat conditions or contingency operations.

Our previous BRIEFING PAPER discussed various legal issues related to contractor support of deployed military units, particularly with respect to overseas performance of contracts in support of combat and contingency operations. In addition to providing an overview of the sources of operational and policy guidance that governed contractor support of overseas U.S. military activities at that time, the PAPER addressed applicable labor and employment laws, Government indemnification of contractors, the Government contractor defense, and the extent to which military commanders may direct contractor operations in an overseas support environment. This BRIEFING PAPER expands upon the previous PAPER and explores the practical, legal, and operational issues raised by contractor support operations during the recent war in Iraq and its aftermath. The PAPER begins with an overview of practical issues relating to the performance of support contracts such as force protection, the legal status of contractors accompanying the force, and the federal and international laws applicable to contractor support of combat and contingency operations. It next discusses a number of business issues relating to the financial and operational risks that affect a contractor’s performance of such contracts. The PAPER then

IN BRIEF

Practical Issues
- Force Protection For Contractors
- Status Of Contractors
- Laws Applicable To Contractors
- Contract Direction For Contractors

Business Issues

Compliance Issues

James J. McCullough is a partner and Courtney J. Edmonds is an associate in the Washington, D.C. office of the law firm of Fried, Frank, Harris, Shriver & Jacobson, LLP.
addresses the legal issues that have arisen from increased scrutiny by Congress and multiple administrative and investigative agencies, including the U.S. Government Accountability Office, formerly the General Accounting Office, relating to the performance of contracts in support of deployed forces in Iraq. Finally, in the Guidelines section, the Paper provides suggestions to mitigate the risks that accompany performance of such contracts in the current highly charged political environment.

Practical Issues

The second Iraq war has provided unfortunate but concrete examples of the dangers that contractors face when they accompany the U.S. military into hostile environments. Although there were only seven contractor deaths in the 1991 Persian Gulf War, at least 110 employees working for U.S. contractors have died in Iraq to date since the start of hostilities in 2003, according to industry estimates. The Department of Labor has reported that contractors accompanying the U.S. military have submitted 529 claims for deaths and injuries in Iraq and 317 claims for incidents in Kuwait, where private companies have provided logistics support for U.S. forces deployed in Iraq. Experts say the number of casualties could have been far greater, given the high number of private contractors that have taken over duties for the military.

Worldwide, contractors have reported 2,387 employee claims for injuries, including 133 fatalities among U.S. contractor employees since September 2001. In addition to the potential for loss of life of contractor employees, contractors accompanying the U.S. military are faced with the difficult task of protecting capital equipment and other resources to fulfill contractual requirements. Notwithstanding the difficulties a contractor faces in protecting its resources, it must also ensure that its personnel perform in a manner that complies with the U.S. and international laws that govern the contractor’s status when accompanying U.S. military forces in hostile operations overseas. As discussed below, numerous practical issues regarding force protection, the status of contractor employees, and the applicable legal principles can arise during the performance of military support contracts.

Force Protection For Contractors

According to the most recent Department of the Army guidance in Field Manual 3–100.21, “Contractors on the Battlefield,” force protection is defined as “actions taken to prevent or mitigate hostile actions against [Department of Defense] personnel, resources, facilities and critical information.” The Army’s current guidance states that the Combatant Commander is responsible for the overall protection of contractors in the Commander’s area of operations. Force protection may include fortification construction, electronic countermeasures, integrated air defense coverage, nuclear-biological-chemical defensive measures, and rear operations that include, but are not limited to, specific anti-terrorist actions. In addition, force protection rules may include procedures for use of personal hygiene facilities, restrictions on the purchase of food or drinks on the local economy, establishing off-limits areas, escort requirements, medical procedures, and the wearing of distinctive uniform items. Contractor employees cannot be required to perform force protection functions and cannot take an active role in hostili-
ties; however, they retain the inherent right to self-defense. The Army’s policy is that, when contractors are deployed in support of Army operations/weapons systems, they will be provided force protection commensurate with that provided to Army civilian personnel.

Unfortunately, the policy of other components of the DOD regarding force protection is less clear. For example, Chapter V of the Joint Chiefs of Staff’s Joint Publication 4-0 states that “[f]orce protection responsibility for DOD contractor employees is a contractor responsibility, unless valid contract terms place that responsibility with another party.” On the other hand, a recent Air Force General Counsel Guidance Document on deploying with contractors expresses the view that “the military is responsible for protecting and defending contractors on military installations or in areas of military control, particularly against armed enemies.” In contrast, an earlier Air Force policy memorandum on force protection implies that such protection is defined by the terms of each contract by stating that the “Air Force may provide or make available, under terms and conditions as specified in the contract, force protection...commensurate with those provided to DOD civilian personnel to the extent authorized by U.S. and host nation law.” Finally, in recent testimony before the Senate Armed Services Committee, the incoming Commander of the Multinational Forces in Iraq stated that contractors providing support to the U.S. military in Iraq “are provided the same security that we provide to our forces.”

Two interim rules published in the Federal Register by the Army in November 2003 and a proposed rule published by the DOD in March 2004 add to the potential confusion regarding the military’s policy on force protection for contractors. One Army interim rule amended the Army Federal Acquisition Regulation Supplement by adding Part 5125 to address “contractors accompanying the force.” Other than stating that “the requirements activity, in conjunction with the contracting activity, must coordinate with the appropriate logistics organization to determine what level of support...will be available to contractors,” it does not address force protection. Similarly, the Army’s other interim rule, which added a contract clause entitled “Contractors Accompanying the Force” at AFARS 5152.225-74-9000, does not address whether the contractor or the Government has responsibility for force protection.

The proposed rule published by the DOD, which would amend the Defense FAR Supplement by adding a contract clause entitled “Contractors Accompanying a Force Deployed for Contingency, Humanitarian, Peacekeeping, or Combat Operations” at DFARS 225.225-70XX for use in contracts that require contractor employees to accompany a force engaged in contingency, humanitarian, peacekeeping, or combat operations, states that “the Contractor is responsible for all support required for contractor personnel engaged in this contract.” Since the proposed rule does not explain whether “all support” includes force protection, it is not clear whether force protection will be the contractor’s responsibility or the Government’s responsibility. Moreover, the proposed rule does not expressly assign responsibility for force protection, but states that information and guidance pertaining to DOD force protection policy for contracts that require performance or travel outside the United States should be obtained from certain points of contacts within each branch of the service or, for Combatant Command contracts, from the appropriate Antiterrorism Force Protection Office at the Command Headquarters.

This somewhat ambiguous situation concerning who is responsible for contractor force protection begs the question of how the military expects contractors to provide their own force protection in hostile environments. Notwithstanding the frequent media photos and videos that show what appear to be contractor personnel carrying military-style weapons, the general policy of the Army is that contractor employees may not possess privately owned weapons when accompanying U.S. forces. The decision to allow contractor employees to carry and use weapons for personal protection rests with the Combatant Commander. Standard issue military sidearms (9mm handguns) may be provided to certain contractor employees based upon the direction of the Combatant Commander. Once the Combatant Commander has approved the issuance
and use of weapons— but before the issuance of such weapons—the contractor must consent, the contractor’s policy must permit its employees to use weapons, and each affected employee must agree to carry a weapon. When these conditions have been met, the contractor employees may only be issued military-specification sidearms, loaded with military specification ammunition.25 The Combatant Commander Contractor may also require that contractor employees receive firearms and other predeployment training.26 In contrast, under Air Force policy, commanders must never task contractors to perform military duties or to use deadly force.27 In addition, Air Force policy states that contractors should not be given military firearms and should not receive training to use weapons.28 Finally, Air Force policy prohibits the transport of personal weapons aboard Air Force aircraft and does not allow contractors to keep weapons on an Air Force installation.29

The proposed rule issued by the DOD in March 2004 also would add an amendment to the DFARS that addresses the use of weapons by contractor employees.30 The proposed rule is similar to Army policy that permits the Combatant Commander to authorize the carrying of firearms by contractor employees. The proposed DFARS rule goes further than the Army policy, however, and permits the Combatant Commander to authorize the use of privately owned weapons and directs contractors to ensure that their personnel who receive weapons “are adequately trained, are not barred from possession of a firearm by 18 U.S.C. 922(d)(9) or (g)(9), and adhere to all guidance and orders issued by the Combatant Commander regarding possession, use, safety, and accountability of weapons and ammunition.”31 Upon redeployment or revocation of the contractor’s authorization to issue firearms, the contractor would be required to ensure that all Government-issued weapons and unexpended ammunition are returned as directed by the Contracting Officer.32

In response to the DOD’s proposed rule, a number of industry trade associations, as well as members of Congress, have expressed concern about the implementation of certain aspects of the rule.33 One commenter argued that protection of contractor personnel in the theater of operations is a governmental responsibility and that the Government should be required to indemnify and hold harmless the contractor against any and all losses or claims that may arise directly or indirectly from any act or omission relating to the use of Government-furnished weapons.34 The commenter noted further that “the government must accept responsibility for protection of contractors accompanying the force, and should not be able to require contractors to arm themselves—thereby threatening their status as non-combatants.”35 Also, during a recent hearing before the Readiness Subcommittee of the House Armed Services Committee, it was noted that the frequent attacks on contractor employees in Iraq were a “real issue and concern for their families back here in the U.S.,” and DOD officials were questioned about when the DOD’s policy regarding contractor use of weapons would be finalized and implemented.36 At the hearing, the DOD’s Principal Deputy Undersecretary for Acquisition and Technology acknowledged that the use of weapons by contractor employees was a “difficult issue” and stated that more time was needed to review the policy.37 The Army’s Deputy Assistant Secretary for Policy and Procurement confirmed that the Army was reviewing its policy concerning the use of weapons by contractor employees supporting the Army’s supply convoy operations in Iraq and advised the subcommittee that the policy review would be completed as soon as possible.38

■ Status Of Contractors

Under international law, contractor employees accompanying a military force are neither combatants nor noncombatants. Rather, they are considered “civilians accompanying the force” and, as such, they are accorded certain protections under the Geneva Convention Relative to the Treatment of Prisoners of War and the Hague Convention Respecting the Laws and Customs of War and Land.40 However, contractor employees might lose these protections if their status as civilians accompanying the force is compromised by placing them in a position of being controlled by the military chain of command, wearing distinctive insignia or uniforms, or openly carrying weapons.41 Such ac-
tions may subject them to the laws that apply to U.S. military forces during combat operations or they might be classified as “illegal combatants.” In addressing the status of contractor employees who accompany U.S. forces into the field, the above-referenced Air Force General Counsel’s memorandum opined that Status of Forces Agreements (SOFAs) defining the legal relationship between the United States and a host nation in which U.S. forces are deployed apply to external theater support contractors that provide operational support to military systems (e.g., manned and unmanned missile systems) wherever those systems may be deployed around the world. Under such circumstances, the Air Force guidance indicates that, if contractor employees “participate directly in the hostilities” (e.g., offensive actions against the enemy), then the contractor employees may be considered to have engaged in combat activities. However, the memorandum noted that Air Force policy prohibits contractors from engaging in combat activities.

### Laws Applicable To Contractors

1. **Geneva Convention and Hague Convention Agreements**—As noted above, over 110 employees of contractors deployed in the second Iraq war and its aftermath have been killed so far while supporting U.S. interests. In addition to the potential for loss of life, contractor employees may also be taken as prisoners or hostages by foreign forces or terrorists. More than 60 non-Iraqi hostages have been taken since April 2004 in Iraq. Several of the hostages were brutally murdered. Given the contractor employees’ status as noncombatants, they may be subject to protection under the Geneva Convention and/or the Hague Convention. However, the Geneva Convention and Hague Convention agreements apply during an international armed conflict between signatories. Accordingly, contractor employees are entitled to be protected as prisoners of war only if captured by a signatory to these conventions. Thus, these agreements are generally inapplicable to contingency or insurgency operations, which involve military forces that are not signatories to either agreement.

2. **Status of Forces Agreements**—U.S. military units operating within or transiting through a foreign country, and the contractors that support them, may be subject to an existing SOFA between the United States and that particular country. A SOFA is an international agreement between two or more governments that provides various privileges, immunities, and responsibilities and enumerates the rights and responsibilities of individual members of the deployed force. A contractor employee’s status will depend upon the specific provisions of the SOFAs, if any, that apply between the U.S. and the country of deployment at the time of deployment. In countries like Iraq, where there is no SOFA in place, agency personnel must become familiar with the policy and instructions of the Combatant Commander when planning for the use of contractors in that country. Even when a SOFA is in force, contractor employees may be subject to criminal and/or civil jurisdiction of the host country to which they are deployed. For example, under the North Atlantic Treaty Organization SOFA, contractor employees are not considered members of the “civilian component.” Accordingly, special technical arrangements or international agreements must be implemented to afford contractor employees the rights and privileges associated with SOFA status. In the case of any contradiction between the SOFA and an employer’s contract with the Government, the terms and conditions of the SOFA will take precedence.

3. **Uniform Code of Military Justice (UCMJ)**—In addition to domestic U.S. laws and international agreements, contractor employees may be subject to the UCMJ when serving with or accompanying an armed force “in time of war.” The U.S. Court of Military Appeals (renamed the U.S. Court of Appeals for the Armed Forces in 1994) has interpreted “in time of war” to mean a congressionally declared war. Thus, since both Desert Storm and the second Iraq war were not the result of a congressionally declared war, contractor employees were not subject to the UCMJ. In non-declared wars and other contingency operations and during peacetime, however, contractor employees who are
retired members of the military may be subject to charges under the UCMJ.\textsuperscript{55}

(4) \textit{Military Extraterritorial Jurisdiction Act of 2000 (MEJA)}\textsuperscript{56}—MEJA specifies that persons employed by or accompanying the armed forces outside the U.S. who engage in conduct outside the U.S. that would constitute an offense punishable by imprisonment for more than one year, if the conduct had been engaged in within the special maritime and territorial jurisdiction of the U.S., shall be punished as provided for that offense.\textsuperscript{57} No prosecution under MEJA shall be commenced if a foreign government, in accordance with jurisdiction recognized by the U.S., has prosecuted or is prosecuting such person for the offense, except upon the approval of the Attorney General or Deputy Attorney General of the United States.\textsuperscript{58} By its terms, MEJA permits the Department of Justice to go into U.S. district courts to prosecute employees of DOD contractors and subcontractors who commit crimes on foreign soil. The law also applies to individuals accompanying the armed forces, which may include a dependent of a DOD contractor or subcontractor employee.\textsuperscript{59} However, it does not include employees of contractors that have contracts with non-DOD agencies such as the Central Intelligence Agency.\textsuperscript{60} Although MEJA has been in effect for several years, only one civilian has been prosecuted under the statute. In that case, a dependent wife of an active duty member of the Air Force was indicted for the murder of her husband, which occurred on an Air Force base in Turkey.\textsuperscript{61} She was charged with second-degree murder and tried in a federal district court in California. The trial resulted in a mistrial, and it is unclear whether the Government will seek a retrial.

(5) \textit{USA Patriot Act}\textsuperscript{62}—As noted above, MEJA does not apply to employees or contractors of non-DOD agencies. However, employees or contractors of non-DOD agencies may be subject to U.S. jurisdiction under the USA Patriot Act. The Patriot Act provides jurisdiction over “offenses committed by or against” a U.S. national on lands or facilities used by United States personnel in foreign states.\textsuperscript{63} The Patriot Act expressly excludes personnel employed by or accompanying the armed forces and members of the armed forces subject to the UCMJ.\textsuperscript{64} In June 2004, the DOJ used the Patriot Act to indict a contract employee who was engaged in paramilitary activities in Afghanistan on behalf of the CIA. The individual allegedly interrogated and beat an Afghan national who had surrendered to U.S. military personnel in Afghanistan. The indictment charges the contract employee with four counts of assault. The maximum penalty for each of the four counts in the indictment is 10 years in prison and a $250,000 fine. The case was brought to the attention of the DOJ by the CIA and investigated by the CIA Inspector General. In announcing the indictment, the U.S. Attorney of the Eastern District of North Carolina opined that the Patriot Act not only is “vital to investigating and prosecuting terrorists, but also it is instrumental in protecting the civil liberties of those on U.S. military installations and diplomatic missions overseas, regardless of their nationality.”\textsuperscript{65}

(6) \textit{Foreign Assistance Act of 1961}\textsuperscript{66}—The Foreign Assistance Act of 1961 generally mandates that the U.S. Agency for International Development not use contractors based in other advanced countries to carry out the U.S. foreign aid program.\textsuperscript{67} As applied in Iraq, the Foreign Assistance Act exempts foreign assistance contracts from the normal statutory requirements for contract creation and grants the Government clear authority to make contract changes without compensation to protect the policy interests of the United States.\textsuperscript{68}

(7) \textit{Local Civil and Criminal Law}\textsuperscript{69}—Generally, the status of contractors and their employees under local law must be established by international agreement. Unless otherwise protected by international agreement, neither the contractor nor its employees will enjoy any immunity from local civil or criminal jurisdiction and will be ineligible to receive customs-free or tax-free logistics support from the U.S. forces.\textsuperscript{70} Contract provisions or military regulations denoting the contractor as “accompanying the force” will not suffice to establish such status.\textsuperscript{71} In the absence of a controlling country-to-country agreement such as a SOFA, a contractor may be unable to gain entry into the foreign country or, if allowed to enter, may be treated under local
law as a foreign corporation and subject to local regulation, taxation, and customs restrictions. In addition, a contractor’s employees may be unable to enter the foreign country or, if allowed to enter, may be subject to restrictions imposed on foreign labor.72

Contractors operating in Iraq may either be immune from or subject to liability under various circumstances. For example, Coalition Provisional Authority Order No. 17, which addresses the status of the CPA, Multi-National Forces-Iraq, and certain missions and personnel in Iraq, states that contractors accompanying multinational forces in Iraq (“MNF personnel”) are immune from any form of arrest or detention other than by persons acting on behalf of their “Sending States.”73 The “Sending State” is the state of nationality of the individual or entity concerned.74 On the other hand, CPA Memorandum No. 17, which addresses registration requirements for private security companies (PSCs) operating in Iraq, provides express requirements relating to licensing, insurance, and use of weapons and expressly provides that “PSC officers and employees may be held liable under applicable criminal and civil legal codes.”75 Thus, in spite of the immunities provided for contractors accompanying U.S. forces under CPA Order No. 17, a PSC operating in Iraq, even in support of U.S. forces or contractors supporting such forces, may fall within the requirements of CPA Memorandum 17. Therefore, such companies and their employees may be subject to liability under applicable Iraqi criminal and civil legal codes.76

(8) Choice of Law and Forum—Under contracts awarded for Iraq reconstruction projects, contractors were required to agree to waive any rights to invoke the jurisdiction of local national courts where the contract is performed.77 Contractors were also required to agree to accept the exclusive jurisdiction of the U.S. Armed Services Board of Contract Appeals and the U.S. Court of Federal Claims for the hearing and determination of any and all disputes that may arise under the “Disputes” clause of the awarded contracts.78 The contracts also required offerors to agree to use nonbinding alternative dispute resolution techniques, as well as time period guidelines for resolving disputes.79

Contract Direction For Contractors

Contractor employees should not be under the direct supervision of military personnel in the chain of command unless specifically authorized by statute.80 The CO and/or the CO’s designated Contracting Officer’s Representative (COR) must monitor contractor performance and maintain day-to-day liaison activities. The CO and the Administrative CO are the only Government officials with the authority to increase, decrease, or materially alter a contract’s statement of work or statement of objectives. Combatant Commanders must manage contractors through a contract’s CO and the CO’s appointed COR.81 Management of contractor support personnel is defined by the terms and conditions of the contract. When a contractor performs under a contract that, by its express terms or as administered, makes the contractor employees appear to be Government employees, such an arrangement is known as a “personal services contract.”82 Personal services contracts are prohibited under FAR 37.104 unless specifically authorized by statute.83 However, contractor employees are expected to adhere to all guidance and obey all instructions and general orders issued by the Combatant Commander or the Combatant Commander’s representative. Generally, these orders are not directly related to the performance of a particular contract but provide direction relating to force protection, operations security, and communications security. If the orders of the Combatant Commander are violated, the Combatant Commander may limit access to facilities or revoke any special status that a contractor employee has as an individual accompanying the force. The DOD Inspector General recently reviewed contracts awarded for the CPA by the Defense Contracting Command-Washington (DCC-W) and found that DCC-W had inappropriately awarded a number of personal service contracts for performance of services in Iraq.84 The DOD IG recommended that these contracts be terminated.85
Currently, the DOD does not appear to have a formal policy concerning management of contractors within an overseas area of operation.\textsuperscript{86} However, as noted above, on March 23, 2004, the DOD issued a proposed rule to amend the DFARS to address issues related to contract performance outside the U.S. and to provide a clause for contracts that require contractor employees to accompany a force engaged in contingency, humanitarian, peacekeeping, or combat operations.\textsuperscript{87} Under the proposed rule, contractors must:\textsuperscript{88}

(a) Provide their own in-country support for their personnel.

(b) Acknowledge that “contract performance in support of [deployed] forces is inherently dangerous.”

(c) Comply with, and ensure that its employees are familiar with, all foreign and domestic laws, treaties, U.S. regulations, certain orders and instructions of the Combatant Commander, and the UCMJ where applicable.

(d) Agree that, where there is a conflict between the instructions issued by the Combatant Commander relating to all transportation, logistical, and support requirements, the instructions issued by the Combatant Commander take precedence over existing contractual terms.

(e) Agree that, if the CO or COR is not available and emergency action is required because of hostile activity that causes the immediate possibility of death or serious injury to contractor personnel, the ranking military commander in the immediate area of operations may direct the contractor or contractor employee to undertake any action other than engaging in armed conflict with an enemy force.

(f) In the event of the death of a contractor employee, be responsible for the evacuation of the body from “the point of identification” and for notifying the employee’s next of kin.

(g) Comply with the Combatant Commander’s authority to authorize the contractor employees to carry firearms during humanitarian, peacekeeping, or combat operations.

As noted above, the DOD’s proposed rule generated numerous comments from contractors and trade associations that represent Government contractor interests.\textsuperscript{89} One leading industry association opined that the proposed rule “introduces too many new areas of conflict and ambiguity, [and] should not be adopted in its present form.”\textsuperscript{90} Generally, the associations that commented on the proposed rule viewed it as a far-reaching attempt to shift the burden of risk for contract performance in hazardous areas from the Government to contractors. Moreover, commenters complained that the elements of the proposed rule that would require contractors and contractor employees to know and comply with “all foreign and domestic laws, treaties, U.S. regulations, certain orders and instructions of the Combatant Commander” were unreasonable in light of the fact that contractors are often required to deploy on short notice, and “there is no consistent, reliable and accessible source of information for contractors on all of the laws…that may be applicable to a contractor supporting a contingency or humanitarian effort.”\textsuperscript{91} In general, the commenters believe that any actions by the Combatant Commander that are inconsistent with the contract should be recognized as changes and subject to the requirements for equitable adjustments.

In addition to the criticisms expressed by industry representatives and concerns raised during congressional hearings, there are several other issues relating to the implementation of the DOD’s proposed rule concerning “civilians accompanying the force” that arise from the apparent policy differences between the various branches of the DOD. First, the DOD’s proposed rule and the Army’s interim rule are inconsistent with Air Force policy with respect to contractor use of weapons, notification of next of kin, evacuation of personnel and bodies, changes, and emergency changes. As noted above, Air Force policy expressly prohibits the use of weapons by contractor personnel, and it also does not pro-
vide specific guidance concerning notification of next of kin, evacuation of personnel, and changes. Instead, it addresses these issues on a contract-by-contract basis. Second, it is unclear whether the DOD proposed rule’s requirement that the contractor be responsible for “all support” personnel means that a contractor would be responsible for force protection of all of its deployed personnel. Finally, it is unclear how the DOD proposed rule will be applied by the various branches of DOD, given the above-described policy differences.

Resolution of these issues is necessary to enable contractors to plan for the deployment and protection of their personnel in support of military operations. In response to requests from the Army contracting community and contractors, the Army has issued the “Army Contractors Accompanying the Force Guidebook” to provide Army contracting personnel with Army guidance and sample contract language to facilitate writing contracts that include contractor deployment requirements. Although the Army has taken steps to clarify its policies, the DOD’s policy on force protection and the Combatant Commander’s role in managing contractors needs to be clarified to help agency personnel and contractors mitigate the operational and financial risks (and costs) discussed in the next section of this Paper.

Business Issues

Generally, when contractors perform a contract under dangerous conditions in hostile environments such as Afghanistan and Iraq, the cost of performing the contract is substantially increased due to the risk the contractor is being required to accept. Costs can be affected by the physical security, or lack thereof, in the area of operations where the contract will be performed, the nature of the work to be performed, and the period of time the agency allows the contractor to plan and perform the tasks required by the contract. One significant “cost factor” relates to the cost of insurance that the contractor may be required to maintain under the contract. In this regard, the U.S. Army Materiel Command recently reported that contractors in Iraq have expressed concern about their ability to obtain Defense Base Act insurance at reasonable rates, and the Professional Services Council confirmed that contractors have reported that rates for DBA insurance can exceed $25 to $100 per $100 of payroll. Costs are also affected by the characteristics of the environment in which the contractor will have to operate. For example, Iraq’s economy is a cash economy, and credit cards and wire transfers are rare. This fact of life affects the need for the transport of hard currency into the country and presents unique risks for prime contractors using subcontractors and suppliers. Contract costs are influenced by the manner in which a contractor chooses to fulfill a requirement. For example, a contractor may choose between using a U.S. subcontractor with U.S. labor rates or a foreign subcontractor that will use foreign employees at labor rates significantly lower than those of the U.S. subcontractor. Finally, contractor-acquired supplies brought into a theater may be subject to potentially prohibitive excise taxes even though military supplies are not.

The most significant hurdle for contractors doing business in war zones has been the significant potential for casualties among their employees. For example, on August 29, 2004, a powerful car bomb, which killed several people including three Americans, was set off in Kabul, Afghanistan in front of a building used by a U.S. contractor (DynCorp Inc.) for training Afghanistan’s national police, and in March 2004, four contractor employees of Blackwater Security Consulting were brutally murdered in a grenade attack in Fallujah, Iraq. Since May 1, 2003, over 187 non-Iraqi employees employed by U.S., British, and other coalition forces contractors have been killed in Iraq. As a result of the number of casualties among contractor employees of contractors accompanying the coalition forces in Iraq, and the fighting that has occurred both in Sunni and Shia areas and in urban and rural areas, Iraq reconstruction projects have been shut down, and supply convoys have been unable to reach towns and bases. A GAO investigation revealed that the unstable security environment has made providing services significantly more costly. Contractors had difficulty securing, or were not able to secure, in-country subcontractors, facilities, material, real
estate, transportation, or utilities because of security concerns. When they were able to obtain these capabilities, it was usually at a prohibitive cost. For example, the hiring of a security subcontractor was the first priority of many contractors in Iraq to mitigate the risk and operational costs of operating in such an environment. Since the military was not required to protect contractors deployed to such hostile environments, contractors had to hire their own security forces, and, as one observer noted, some contractors had a security-to-workforce ratio of one-to-one.

The unstable working environment and recent aggressive insurgency in Iraq has not only affected the cost of providing security for contractors, but it also has been the cause of delay and disruption of contract performance because of high absenteeism among local nationals employed by such contractors. In April 2004, when violence was particularly rampant throughout the country, the Director of the CPA Program Management Office (PMO) noted that only 25% of the 10,000 Iraqi workers scheduled to work showed up each day. This figure had improved to 75% by June 1, 2004. Not surprisingly, in light of such circumstances, security for contractor and CPA activities has accounted for at least 10 to 15% of total contract costs in Iraq. Not only did the security situation affect contractors’ costs, the CPA IG opined that the inability to accurately predict the costs of security (including insurance) raised serious questions about the need for additional funding to accomplish the Iraq reconstruction mission.

Unlike normal Government procurement, where contractors have the opportunity to participate in preaward activities, such as the exchange of information regarding the solicitation and source selection, many of the contracts awarded before and during the second Iraq war were awarded hastily without adequate acquisition planning and communication with potential contractors. Indeed, a recent investigation conducted by the GAO revealed that, during what was supposed to be the acquisition planning phase before the second Iraq war, the planning personnel with the most experience in using the Army’s Logistics Civil Augmentation Program (LOGCAP) contract were not part of the planning process. In addition, contractors were generally not involved because of security concerns. Consequently, at least two key principles needed to maximize LOGCAP support and minimize cost—a comprehensive SOW and early contractor involvement—were not followed. These problems placed both the Government and contractors in a situation where performance fell short of expectations. In addition to the lack of adequate preaward planning, the GAO found widespread problems throughout the acquisition lifecycle of many Iraq reconstruction contracts awarded by various agencies. For example, requisitions were not always provided to ACOs as required by the contracts, they frequently lacked sufficient documentation to justify the award of each contract, and they did not provide accurate estimates of the cost of the items to be procured. Further, the Defense Contract Management Agency (DCMA) did not have enough qualified personnel in theater to effectively administer LOGCAP task orders. In addition to the lack of qualified personnel, the GAO reported that many service personnel with oversight responsibilities for the contracts did not receive the necessary training to accomplish their missions. Consequently, their ability to perform all of their duties, such as preparing independent Government cost estimates to judge the reasonableness of contractors’ costs, was limited.

Compliance Issues

Inadequate acquisition planning by a number of agencies before and during the second Iraq war has plagued the performance of Iraq reconstruction contracts. For example, the U.S. Army Materiel Command recently noted that contract clauses “varied from contract to contract, activity to activity, breeding some confusion among contractors as to procedures, responsibilities in theaters, and entitlement to government furnished services and life support.” To further complicate procurement activity, many solicitations issued during the second Iraq conflict required proposals to be submitted within a period of days—not weeks or months—and award decisions were made in minutes or hours,
often without the benefit of a complete evaluation of offers.\textsuperscript{119} It was reported that, in one instance, the Army approved a contract worth $587 million to Halliburton Co. in just 10 minutes.\textsuperscript{120} In addition to poor acquisition planning and misuse or abuse of established procurement practices and procedures, contractors and agencies have come under scrutiny for a variety of issues, including failure to substantiate contract costs, and for issuing delivery orders that were out of the scope of the original contract. For example, an audit report prepared by the CPA IG noted that CPA COs did not always ensure that contract prices were fair and reasonable, that contractors were capable of meeting delivery schedules, and that payments were made in accordance with contract requirements.\textsuperscript{121} Because of the resulting media attention that highlighted many of these procurement failures and missteps, there has been an increased level of Government oversight, audits, and investigations at almost every level of the Iraq reconstruction process. This increased level of scrutiny reflects the fact that the Government is evaluating the performance of contractors on the battlefield by the same standards as it would normally apply to peacetime procurement activity.\textsuperscript{122}

Some within the contracting community believe that the current level of oversight (dubbed “the Halliburton effect”) is having a negative impact on both the Government and industry and, ultimately, mission accomplishment in exigent circumstances.\textsuperscript{123} An industry association has reported that real concerns exist in an environment in which all allegations of wrongdoing are accepted as fact.\textsuperscript{124} In this type of environment, the association opined, the concern is not about auditing or compliance, it is about congressional hearings during the contract’s period of performance. Contractors have reported a noticeable concern among their employees about making mistakes, and this has led to delays in decisionmaking and added time and costs to contract performance.\textsuperscript{125} Moreover, it is likely that some companies have simply foregone the opportunity to work in Iraq for these reasons.\textsuperscript{126}

In several cases, multiple agencies are in the process of investigating a variety of issues that have arisen during performance of Iraq reconstruction contracts and personal services contracts. For example, CACI International Inc. was the subject of at least five Government investigations surrounding its contracting practices and its role in the highly publicized interrogation and abuse of Iraqi prisoners at Abu Ghraib Prison in Baghdad.\textsuperscript{127} The General Services Administration initially advised CACI that it had questions concerning the contract instrument that was used to procure interrogation services requested by the Army for work in Iraq.\textsuperscript{128} At issue was whether CACI improperly supplied these services under delivery orders issued by the Department of Interior under a GSA Federal Supply Schedule blanket purchase agreement that covered information technology services.\textsuperscript{129} The GSA’s suspension and debarment official recently advised CACI that it will not be suspended or debarred from doing business with the Government; however, CACI’s possible role in preparing SOWs for work that it performed “continues to be an open issue and potential conflict of interest.”\textsuperscript{130} The GSA has asked CACI to respond to certain questions concerning this issue.

In addition to the GSA’s scrutiny of CACI’s contracting practices, the GSA and other agencies have also expressed similar concerns about Lockheed Martin’s business practices after learning that Lockheed had supplied interrogators to the U.S. military through a contract that may not have been intended for that purpose.\textsuperscript{131} The DOI IG and the CPA IG recently examined a number of contracts and business practices of Government contracting agencies and criticized DOI’s National Business Center, a fee-for-service contracting agency, for procuring commercial interrogators from Lockheed and CACI using contracts for information technology. The DOI’s IG recommended that DOI terminate all active orders with CACI and Lockheed that are not within the scope of their GSA Schedule contracts used to procure the interrogation services.\textsuperscript{132} Further, a more recent Army investigation of interrogation activities at the Abu Ghraib prison in Iraq concluded that four contract interrogators employed by CACI allegedly abused detainees, and that two linguists employed by Titan Corporation allegedly failed to report detainee abuse at the prison. The informa-
tion regarding the alleged activity has been referred through the DOD to the Department of Justice for possible prosecution. In addition to these inquiries, a number of other organizations, including the Defense Contract Audit Agency, DCMA, and GAO are reviewing CPA PMO programs.

The DOD IG also recently conducted an audit of external theater support contracts awarded by the DOD’s Washington Headquarters Service (WHS). The investigation began in May 2003 after the DCAA found irregularities in both the award and administration of the contracts and recommended an in-depth review by the DOD. The audit revealed that, of the 24 contracts awarded by WHS, almost all involved instances of Government officials allegedly circumventing or “liberally interpreting” contracting rules. The DOD IG noted that the “problems identified are primarily attributed to the need to react quickly to the rapidly changing situation in Iraq in early 2003 and that acquisition support was an afterthought to the Office of Reconstruction and Humanitarian Assistance.”

As a result of the investigation, the DOD IG concluded that the “DOD cannot be assured that the best contracting solution was provided, that DOD received fair and reasonable prices for the goods and services, or that the contractors performed the work the contract required.”

Recent DCAA audits and investigations also have found subcontract pricing issues with three contractors under the Restore Iraq Electricity contracts. Prime contractors performing under contracts awarded by the USAID, the U.S. Army Corps of Engineers, and the CPA generally were required to have accounting systems that comply with the FAR Part 31 cost principles, the Cost Accounting Standards, and the requirements for submission of cost and pricing data under the Truth In Negotiations Act. Adequate cost reporting and cost management systems were viewed as important because they affect the Government’s ability to monitor contract spending. The pricing issues found by the DCAA auditors were related to the lack of documentation for selection of specific subcontractors and the absence of cost and pricing data to establish fair and reasonable prices. As a result of a DCAA audit, the DOD IG asked the DOJ to look into allegations that Kellogg Brown & Root, a Halliburton subsidiary, overcharged the Government $61 million for fuel imported into Iraq from Kuwait and for gasoline and cooking fuel it resold to Iraqi civilians and overbilled for meals served to American troops and that two Halliburton executives received kickbacks from a Kuwaiti subcontractor. While working with investigators to resolve the allegations, Halliburton reimbursed the Government $6.3 million and admitted that its internal controls were inadequate to handle its increased workload in the Middle East and that its procurement processes suffered as a result. A subsequent DCAA audit, which found that $1.8 billion billed by Halliburton for work in Iraq and Kuwait had not been adequately accounted for, concluded that Halliburton’s cost estimating system is inadequate and recommended that Government contracting officials require the company to make corrections within 45 days.

In response to DCAA auditors’ requests for assistance in determining the reasonableness of compensation costs, on April 12, 2004, the DCAA issued a memorandum summarizing information regarding compensation costs for contractor employees located in foreign countries and performing work under Iraq reconstruction contracts. The DCAA memorandum provided the results of a survey of compensation costs of 37 contractors performing work in Iraq and provided guidance for DCAA auditors to consider in evaluating special pay, bonuses, allowances, and differentials that contractors provide their employees for performing such work. The responses to the survey showed that 33 of the 37 contractors performing work in Iraq used the same base pay scale for employees working on Iraq reconstruction projects as that used for other contractor employees performing the same job elsewhere overseas or in the United States. The remaining four contractors established a special base pay scale for employees working on Iraq reconstruction projects as that used for other contractor employees performing the same job elsewhere overseas or in the United States.
or miscellaneous benefits that are not offered, or exceed those offered, by most other contractors for doing work under Iraq reconstruction projects. Finally, the DCAA memorandum advised DCAA auditors that, “due to the unique circumstances, mission requirements, and working conditions throughout Iraq and the neighboring countries for reconstruction contracts, auditors need to consider the reasonableness of contractor-provided rationale and document support for offsets on a case-by-case basis.”

In addition to oversight by agencies such as the DCAA, the DCMA, and the DOD IG that are tasked with review of procurement activities, various members of Congress have initiated hearings and investigations into the alleged mismanagement of procurement activity in Iraq and the alleged abuses of Government procurement laws and regulations. Several members of Congress have alleged conflicts of interest in the performance of a number of oversight contracts issued by the CPA and have contended that the contracts for program management services should have been terminated because they put the winning contractors in charge of overseeing other contractors with whom they have other business relationships. In response to these congressional concerns, the CPA did not directly address the conflict of interest allegations but noted that the contracts in question were “PMO” contracts, not “oversight” contracts. The CPA PMO spokesman added that oversight functions are performed by the DCAA, GAO, and the offices of the DOD and CPA inspectors general.

Although multiple agencies have exercised oversight and investigative authority over contractors performing contracts in Iraq and have found deficiencies in the Government’s acquisition process, a GAO investigation of DOD’s procurement activities revealed that “lessons learned” during the second Iraq war have not systematically been collected, shared, or implemented. Measures to ensure that contractors provide service in an economical and efficient manner have not been adopted at all locations. The GAO conceded that exigent circumstances did not always allow the Army and Air Force to select a more economical and efficient method to obtain services. To strengthen oversight of logistics support contracts, the GAO suggested that the following steps be taken: (1) DOD components should identify operational requirements that are to be provided by contractors early in the planning process and involve the contractor in the planning, where practicable; (2) DOD service secretaries should establish teams of subject matter experts to evaluate and make recommendations on the appropriateness of the services being provided, the level of services being provided, and the economy and efficiency with which the services are being provided; (3) the DOD should implement a department-wide “lessons learned” program to capture the experiences of others who have used logistics support contracts; and (4) training courses should be developed and implemented for commanding officers and other senior leaders who are deploying to locations with contractor support.

In response to the GAO investigations and its own DOD IG’s findings, the DOD has stated that it is drafting a directive, entitled “The Management of Contractor Personnel During Contingency Operations,” to capture lessons learned and to address the issues of contractor personnel management.

Many of the laws, policies, and regulations that guide the use of contractors accompanying U.S. forces have been in effect for several years. However, the ongoing operations in Afghanistan and Iraq and the multitude of issues relating to force protection, contractors’ use of weapons, and cost accounting that have arisen during the second Iraq war and the performance of Iraq reconstruction contracts demonstrate that many of the existing policies and regulations are either ambiguous, inconsistent with other guidance, or simply not followed. Accordingly, and until there is an improved level of clarity and consistency, it is imperative for agencies and contractors alike to maintain an awareness of the DOD’s and each agency’s policies and regulations regarding contractors on the battlefield and ensure that they understand and include appropriate terms and conditions in their contracts to address operational and financial risks relating to such operations on a case-by-case basis.
These Guidelines are intended to provide practical suggestions, in addition to those provided in our June 2002 BRIEFING PAPER, for Government contractors called upon to provide overseas support to the U.S. military in connection with combat or contingency operations and for agency personnel involved in the award and administration of such support contracts. They are not, however, a substitute for professional representation in any specific situation.

1. Review the most current DOD and military department guidance concerning the rules, regulations, and policies applicable to contractors on the battlefield. The Army Field Support Command has established a “Contractor on the Battlefield Resource Library” website that provides relevant and current guidance regarding in-theater use of contractor personnel. The website can be found at http://www.afsc.army.mil/others/Gca/battle2.htm.

2. Determine what force protection responsibility your company will have once your employees arrive in theater so that force protection and security costs can be accurately estimated for proposal purposes and management can effectively plan for the protection of deployed personnel.

3. Determine whether company personnel will be required to use, or will have access to, personal weapons. If company personnel will be required to use weapons, ensure that the company policy permits employees to use weapons and that affected employees agree to carry a weapon as part of their performance under the contract.

4. Before deployment to the area of operations, provide a written disclosure to contractor employees of risks associated with contract performance in hostile environments and the extent of insurance coverage under the DBA and the War Hazards Compensation Act. Ensure that each employee signs the disclosure to document the employee’s acknowledgment and acceptance of the risks of the deployment.

5. Ensure that the company’s contract support personnel are aware of DOD and Combatant Commander requirements for preparation of letters of authorization and security clearance paperwork. Problems relating to a company’s ability to staff projects in a timely manner may result in negative past performance ratings when competing for future contracts.

6. Determine what Government-furnished property will be provided during contract performance, and ensure that the company has adequate recordkeeping systems in place on site to account for any such property.

7. Ensure that the company’s cost-estimating systems will take into account excise taxes, supply disruptions, and administrative expenses relating to documentation of purchases on the local economy and through nontraditional sources.

8. Actively involve the company’s management personnel and contract administrators in preaward planning processes with DOD officials. Assist acquisition planners with identifying and mitigating risks and in-theater contingencies that may affect cost, performance, and compliance.

9. Avoid engaging in business practices, such as writing SOWs for task orders that will be performed by your company or encouraging Government personnel from one agency to use another agency’s contract vehicle, that may be characterized as improperly influencing a Government agency to procure certain services from your company that are beyond the scope of the contracting vehicle used to obtain such services from your company.

10. Conduct due diligence regarding the beneficial ownership of any potential subcontractors before entering into any business relationships or joint ventures to determine whether government officials from the country...
in which the contract will be performed have ownership interests in that company.

11. Determine whether the DFARS 252.228-7003 “Capture and Detention” clause is included in the solicitation. If not, seek inclusion of the clause so that company employees can be compensated if taken hostage or killed by hostile forces.

12. Be proactive in preparing for DCAA audits and IG investigations by ensuring that cost and pricing data and documentation are maintained so that the company can provide evidence of contract costs and the processes used to determine that the prices paid for goods and services were fair and reasonable. Proper maintenance of such documentation also minimizes the possibility of negative comments in future past performance evaluations regarding the company’s inability to control, or properly document, contract costs.

13. Agency personnel should ensure that their solicitations unambiguously state that contractor employees will be bound by the requirements of the Geneva Convention standards and provide specific training requirements and personnel standards to ensure that contractors hire properly trained and qualified personnel. The training requirements should include training concerning the chain of command and the use of “hotline” reporting mechanisms that can be used to report violations of the Geneva Conventions and other contract requirements.

14. Agency personnel should consider inclusion of a clause in solicitations for combat support activities that provides the CO or COR the unilateral right to require removal of contractor employees from the area of operations for any violation of the Geneva Conventions and/or violations of material contract terms and conditions. Agencies utilizing contractors for such services should ensure that CORs receive proper training concerning the Geneva Conventions and assign adequate numbers of CORs to the areas of contract performance to monitor the performance of such contractors.

★ REFERENCES ★


2/ 46 GC ¶ 278.

3/ See McCullough & Pafford, supra note 1.


7/ See Merle, supra note 5.

8/ Cox, supra note 6.


10/ Id. at 6-2.

11/ Id. at 6-3.

12/ Id. at 6-1.

13/ Id. at 6-1.


17/ Transcript of the Senate Armed Services Committee Hearing on the Nomination of General Casey to be Commander of the Multinational Force-Iraq, FDCH Political Transcripts, June 24, 2004, at 27.


19/ 68 Fed. Reg. at 66,739.


22/ Id.

23/ See Army Field Manual 3-100.21, supra note 9, at 66; see also 68 Fed. Reg. at 66,741 (48 C.F.R. § 5152.225-74-9000, para. (e)).

24/ See Army Field Manual 3-100.21, supra note 9, at 66.


28/ Id.

29/ Id.


31/ Id. at 13,502 (proposed DFARS 252.225-70XX, para. (i)).

32/ Id.


36/ Transcript of Hearing of the Readiness Subcommittee of the House Armed Services Committee, (June 24, 2004).

37/ Id.

38/ Id.


41/ Army Field Manual 3-100.21, supra note 9, at 2-11.

42/ Id.

44/ Id. at n.1.

45/ Id.

46/ See Merle, supra note 5.


48/ See supra note 1; see also http://www.defenselink.mil/policy/isa/inra/da/list_of_sofas.html for a list of SOFAs currently in effect.


52/ 10 U.S.C. ch. 47.


55/ 10 U.S.C. § 802(a)(4); see also Hooper v. United States, 326 F.2d 882 (Ct. Cl. 1964).


59/ 18 U.S.C. §§ 3261(a), 3267; see also 69 Fed. Reg. at 4894 (proposed 32 C.F.R. § 153.5(a)(2), (9), (6)).

60/ 18 U.S.C. § 3267; see also 69 Fed. Reg. at 4894 (proposed 32 C.F.R. § 153.5(a)(6), (7)).


63/ Id. § 804 (codified at 18 U.S.C. § 7(9))(emphasis added).

64/ 18 U.S.C. § 7(9); see also 18 U.S.C. § 3261(a).


69/ For a discussion of a contractor’s obligation to comply with U.S. labor and employment laws in connection with its overseas performance and with host nation laws while providing contractual support to the U.S. military and the difficulties a contractor may face in instances where U.S. and host nation labor or employment laws appear to conflict, see McCullough & Pafford, supra note 1.

70/ Id.

71/ Id.

72/ See U.S. Army Materiel Command Headquarters, supra note 49.


74/ Id. at 2.

76/ Id.


78/ Id.

79/ Id.

80/ FAR 37.104(b).

81/ See Army Field Manual 3-100.21, supra note 9.

82/ FAR 37.104(a).

83/ FAR 37.104(b).


85/ Id. at 16.

86/ See Army Field Manual 3-100.21, supra note 9, at 1-7.


88/ Id.


90/ See Letter from Professional Services Council, supra note 35, at 1.

91/ Id. at 5–6.


95/ DOD IG Rep. No. D-2004-057, supra note 84, at 4. In an apparent attempt to curb contractors’ DBA costs, the Army Corps of Engineers issued a draft request for proposals on August 10, 2004, for a pilot program that eventually could lead to a single insurance carrier to provide required DBA coverage to every DOD contractor working overseas. The draft RFP is available at https://acquisition.army.mil/asfi/upload/W912HQ04R0005/W912HQ-04-R-0005%20DRAFT.doc.

96/ Professional Services Council, “A Private Sector Perspective on Contract on the Battlefield Issues: Iraq Lessons Learned,” Presentation at the ABA Section of Public Contract Law 2004 Annual Meeting (Aug. 9, 2004). The USAID and the U.S. Department of State negotiated with a single insurance underwriter to obtain DBA insurance rates on a worldwide basis to cover the employees of their contractors and subcontractors. The USAID rate is $2.15 per $100 of payroll costs, while the State Department’s rates are $3.87 and $5.00 per $100 of payroll costs for professional and construction personnel, respectively. See Raymond J.M. Wong, Assoc. Gen Counsel (Contracts) DCMA, “The Cost Treatment of Employee-Related Insurance for Contractor Employees in the Battlefield,” Presentation at the ABA Section of Public Contract Law 2004 Annual Meeting (Aug. 9, 2004).

97/ Professional Services Council, supra note 96.

98/ Id.
99/ See Army Field Manual 3-100.21, supra note 9, at 2-7.


101/ See Cox, supra note 6.


103/ Id.

104/ See 46 GC ¶ 116.


107/ Id.


109/ Id.

110/ GAO, supra note 102, at 18.

111/ Id.

112/ Id.

113/ Id. at 25.


134/ Bowles, supra note 106, at 649.


136/ Id.

137/ Id. Executive Summary.

138/ Id.


140/ See GAO, supra note 102, at 25.


142/ Id.; see Statement for the Record of Dr. Dov S. Zakheim, Undersecretary of Defense (Comptroller), House Committee on Government Reform (Mar. 11, 2004).


145/ Id. at 2.

146/ Id.

147/ Id.

148/ Id. at 8.

149/ 46 GC ¶ 220.


151/ Id. at 615.

152/ Id.

153/ See GAO, supra note 102, at 32.

154/ Id. at 37.

155/ Id. at 39.

156/ Id. at 49–50.

157/ See Rep. Joel Hefley’s Opening Statement to the Committee on Armed Services Subcommittee on Readiness (June 24, 2004).