

USAWC STRATEGY RESEARCH PROJECT

CIVILIAN CONTRACTORS ON THE BATTLEFIELD

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## ABSTRACT

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The growing dependence on contractors in today's nonlinear battlefield, combined with its explicit inclusion stated in the current military strategy, provides the need to critically examine the subject of contractors on the battlefield. To bound this complex area of study, this paper will briefly discuss the background of contractor support to the military and review the current policies and doctrine involving logistical services provided by contractors in combat operations, specifically focused on the United States Army. It will then concentrate on the challenges of managing contractors on the battlefield as well as identifying the associated legal issues. Lastly, the paper looks ahead to the Department of Defense's ongoing efforts to better manage contingency contractor personnel providing support to U.S. military forces in combat environments. The paper concludes with an assessment of the adequacy of draft Defense policies and instructions and provides recommendations on actions the Department of Defense should take to establish policies and instructions to ensure a seamless partnership between the military force and the civilian contingency contractors.



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## CIVILIAN CONTRACTORS ON THE BATTLEFIELD

In all countries engaged in war, experience has sooner or later pointed out that contracts with private men of substance and understanding are necessary for the subsistence, covering, clothing, and moving of any Army.

— Robert Morris, Superintendent of Finance, 1781

The concept of employing civilian contractors on the battlefield is not new. The United States Army has used contractors continuously throughout times of war, dating back to the Revolutionary War. Private civilians provided a large amount of logistical support during this war by hauling supplies and materials, as well as providing food, clothing and shelter for George Washington's forces.<sup>1</sup> This practice of utilizing civilian contractors has continued since the birth of our country and has positively contributed to supporting both the military's warfighting and peacekeeping capabilities. With combat operations in Afghanistan and Iraq, the US military in recent years has greatly increased its use and deployment of civilian contractors as its responsibilities have greatly expanded since the September 11, 2001 terrorist attacks on the World Trade Center in New York City and the Pentagon in Washington, D.C. As the military contributes to our nation's efforts in the war on terror, as many as 20,000 civilian contractors were believed to be serving in Iraq in support of Operation Iraqi Freedom in the October 2004 time frame.<sup>2</sup>

The 2004 National Military Strategy (NMS) includes three military objectives: protect the United States, prevent conflict and surprise attack, and prevail against adversaries. These objectives are realized by way of creating a joint force capable of achieving the military objectives through the combination of joint doctrine, organization, training, materiel solutions, leadership, personnel and facilities.<sup>3</sup> One primary resource identified becomes the human factor comprising the joint force that is charged with executing the protecting, preventing and prevailing Strategy's objectives. The conclusion of the 2004 National Military Strategy specifically included the contracted workforce as a necessary part of the joint force as follows:

While engaged in multiple worldwide operations to meet these requirements, the Armed Forces of the United States must maintain force quality, enhance joint warfighting capabilities and transform to meet the challenges of the 21st century. Executing this strategy will require a truly joint, full spectrum force – with a seamless mix of active forces, the Reserve Component, DoD civilians, and contracted workforce – fully grounded in a culture of innovation. It will require the highest quality of people – disciplined, dedicated, professional – well trained, well educated, and well led.<sup>4</sup>

Clearly, the use of contactors to support military operations is an essential part of our force projection capability—and will continue to be essential as the Army continues its fight in the War on Terrorism and continued efforts underway with transformation.

The growing dependence on contractors in today's nonlinear battlefield, combined with its explicit inclusion stated in the current military strategy, provides the need to critically examine the subject of contractors on the battlefield. To bound this complex area of study, this paper will briefly discuss the background of contractor support to the military and review the current policies and doctrine involving logistical services provided by contractors in combat operations, specifically focused on the United States Army. It will then concentrate on the challenges of managing contractors on the battlefield as well as identifying associated legal issues. Lastly, the paper looks ahead to the Department of Defense's ongoing efforts to better manage contingency contractor personnel providing support to U.S. military forces in combat environments. The paper concludes with an assessment of the adequacy of draft Defense policies and instructions and provides recommendations on actions the Department of Defense should take to establish such policies and instructions to ensure a seamless partnership between the military force and the civilian contingency contractors.

## **BACKGROUND**

In today's complex and global operating environment, logistical support contractors can expect to perform anywhere on the battlefield subject to the combatant commander's risk assessment combined with the terms and conditions of the contract. Army Regulation 715-9 states that civilian contractors may be employed anywhere in the areas of operation necessary to support operations and weapon systems. Traditionally, contactors have worked at the Echelons above Division (EAD) level. However, if the Army commander determines that contractor support is required at lower echelons to ensure mission success, those contractors may be deployed as far forward as needed, consistent with the commander's policy, tactical situation, and contract specification.<sup>5</sup> Typically, this definition of contractors working at EAD-level has become more of an organizational constraint versus that of a geographical location on the battlefield.

In the ongoing Global War on Terror, the operating environment and battlefields are certainly nonlinear and, for the most part, undefined. Civilian contractors operating alongside our military's men and women could potentially find themselves in the very center of a battle or insurgency fight; hence determining risk becomes problematic for the commanders on the ground. This dramatic change in the way we fight, and with contractor roles encroaching on

what could be interpreted as direct participation in hostilities, require our current doctrine to be carefully examined and fully addressed. The Pentagon's leadership must come to grips with a number of operational and profound legal problems created by putting civilians on the battlefield.

### **CONTRACTORS: A NECESSARY COMMODITY ON TODAY'S BATTLEFIELD**

The Department of Defense uses contractor services for a number of reasons. In some instances, contractors are able to fill in where scarce skills exist, due to reduction in strength or the concerted efforts to privatize certain military functions to then sustain specialized skills for future military deployments or contingencies. Elsewhere, the military does not have the technical or specialized skills needed in place to repair equipment or weapons. Finally, limitations placed on the number of U.S. military that can deploy to a region are compensated by contractors who are able to fill in and complete the tasks required for the mission. The usage and reliance on contractors in today's military hinge around the following four significant factors:

- Military manpower reductions
- Governmental push to privatize existing military functions
- Growing reliance on contractors to maintain sophisticated weapon systems
- Mandated troop ceilings

### **MILITARY MANPOWER REDUCTIONS**

An increasing need to properly integrate contractors into all military operations has become even more critical due to recent manpower reductions in our military force structure. With these military end strength reductions in the US Army, the most notable cuts in force structure were mainly in the logistical "tail" where reductions were made within the combat service support specialties to preserve the "tooth" of our Army, that being our powerful combat arms structure.<sup>6</sup> In 1991, when American troops first faced Saddam Hussein, the Army had 711,000 active-duty troops.<sup>7</sup> The authorized end strength level for the Army's active force at the end of fiscal year 2004 was 482,400<sup>8</sup>, representing a 32 percent drop since Desert Storm. The wide growth of outsourcing such mundane tasks as messing and kitchen police (KP) duties, laundry services, water and billeting out to private firms has allowed the military to better focus on its core competency: war fighting.

Compounding this manpower issue is that US military commitments abroad have increased significantly over the past decade. The operations tempo for all the Services has increased significantly over the past 12 years while operating with one-third fewer forces.<sup>9</sup> The U.S. Army alone has deployed troops 36 times since the end of the Cold War in 1989,

compared to just 10 such operations during the entire Cold War.<sup>10</sup> These mission increases have occurred across all the Services and do not appear to be tapering off. This increase in commitments has not gone unnoticed by Congress. Senator Carl Levin, during his 9 September 2003 statement during the Senate Armed Services Committee hearing, noted:

Our military forces are stretched thin. Over 180,000 are fighting the war in Iraq or supporting it from Kuwait and other Persian Gulf states. Another 10,000 are conducting combat and stability operations in Afghanistan. At the same time, we are helping maintain the peace in Liberia, Bosnia, and Kosovo. And of course, we have thousands of troops deployed in South Korea, dedicated in war plans to the defense of that nation in a region that is becoming ever volatile with the North Korean drive to develop nuclear weapons.<sup>11</sup>

The increase in operational tempo, coupled with the manpower reductions previously discussed, have forced the Defense Department to increase its usage of contractors in support of many logistical functions across the full spectrum of operations.

#### GOVERNMENTAL PUSH TOWARDS INCREASED PRIVATIZATION

The Defense Department's 2001 Quadrennial Defense Review Report states that the Department of Defense (DoD) will pursue actions to sustain the force more efficiently and effectively by only keeping those functions that must be performed by DoD. Therefore, any function that can be provided by the private sector and is not a core government function should be obtained through new models of public-private partnerships to improve overall performance.<sup>12</sup> With greater emphasis on privatization of functions that can be performed more efficiently outside the military, more functions are being likely candidates for contracts. Furthermore, the Office of Management and Budget Circular A-76 mandates that the Government obtain commercially available goods and services from the private sector when it makes economic sense to do so.<sup>13</sup> While government policy dating back to 1955 establishes that the Government will only provide what its citizens (i.e. the private sector) cannot, there has been a renewed focus on this issue. Hence, the purpose of DoD's Competitive Sourcing Program is rooted in the firm belief that Government should not compete with its citizens.<sup>14</sup> It follows, then, that there must be compelling justification for government to perform functions that the private sector could otherwise provide.

#### GROWING RELIANCE ON CONTRACTED SUPPORT OF HIGH TECHNOLOGY WEAPONS

Continual and rapid technological changes have made it uneconomical or not practical to keep military personnel technologically capable of maintaining, troubleshooting and in some cases, employing sophisticated weapons.<sup>15</sup> These systems contractors maintain and repair

include the highly technical weapons systems such as aircraft, armored vehicles, munitions/missiles and modern command and control systems. Examples of such high technological weaponry with the Army include the Army's Apache helicopters and the Palladin artillery weapons system, both being pilot programs wherein the prime contractor provides comprehensive "factory to foxhole" support. Additionally, the Patriot missile defense, the M1A1 tanks, the Hunter unmanned aerial vehicles (UAVs), and the Army Battle Command System (ABCS) consisting of its 11 subsystems, are all very heavily dependent on contractor support. These noted systems, along with others from the other Services, bring to the battlefield logistical support considerations which include the challenges to accommodate the human dimension of support contractors. In his June 24, 2004 statement to the United States House Committee on Armed Services, The Honorable Michael W. Wynne, Acting Under Secretary of Defense (Acquisition, Technology, and Logistics) succinctly articulated the current posture when he stated:

...that the Department often contracts for support and capabilities where the Department either does not have the expertise or the organic resources. Contracting can enable the Department to access technology and capabilities that would have been unavailable to the Department, would take an inordinate amount of time to develop internally, or would be prohibitively expensive to develop. Accessing commercially available capability makes sense and ensures that we stay ahead of our adversaries.<sup>16</sup>

Simply, the Army's increased reliance on contracted logistics support and services for such high-tech weapon systems will continue to mandate contractors on the battlefield in ever increasing numbers.

#### MANDATED TROOP CEILINGS

Whether Presidential, Congressional, or host-country-mandated, troop ceilings imposed on the military often forces them to turn to contracting service support functions, thereby allowing for a greater tooth in theater, i.e. number of combat arms and combat support soldiers in an area of operation vice the number combat service support soldiers. As with the military's past deployments to Bosnia and Kosovo, the imposed troop ceiling limitations on military personnel deployed to this region for the contingency resulted in the Services, primarily the Army, to contract logistical support and sustainment functions that were not considered core functions. Private companies have picked up the slack. For example, an estimated ratio of one contractor for every 100 military personnel existed during the first Gulf war;<sup>17</sup> while in Bosnia, which had mandated troop ceilings, the ratio at times was nearly 1 to 1.<sup>18</sup>

These fore mentioned factors – manpower reductions, outsourcing, sophisticated weapons systems and troop ceilings – have primarily caused the Army, but just as well most all the Services, to augment their force structures with higher than ever contractor employees that are critically important to mission success. Greater reliance on nonmilitary support is recognized by all the Services and is considered essential for successful future operations. Now that the contractor growth has been established, the next link which needs examination lies with existing DoD and Services' policies and doctrine on how to manage contractors on the battlefield.

### **MILITARY POLICY AND DOCTRINE LACKING FOR CONTRACTED SUPPORT**

The Department of Defense has lagged in formalizing policy across the Services and, as a result, there is little common understanding among the Services as to the Government's responsibility to contractor employees in the event of hostilities. Today, joint commanders often have contractors supporting several different Services, under several different contracts, each with different requirements and contract terms and conditions, operating within their area of responsibility. Overarching policy from the Department of Defense is certainly needed to adequately manage the increasing number of contractors on the battlefield and their impact on combatant commanders. A June 2003 General Accounting Office audit reported that no overall DoD guidance exists regarding the use of contractors to support deployed forces. The report also recognized that the lead Service was the United States Army in developing substantial guidance for dealing with contractors.<sup>19</sup>

### **THE ARMY'S EFFORTS TO DEVELOP GUIDANCE AND POLICIES**

The U.S. Army is the only Service, which has developed substantial guidance and formulated policies and doctrine for dealing with contractors in deployed situations. This guidance was in place prior to the terrorist attacks on the United States in 2001, which caused the military to quickly commence its global war on terrorism with its nonlinear, asymmetrical battlefields. As background, in 1998 the Army Training and Doctrine Command (TRADOC) and the Army Combined Arms Support Command (CASCOM) formed the Contractor's on the Battlefield (CoB) Integrated Concept Team (ITC) and began developing the doctrine and policy for using contracted support in Army operations. This integrated team "institutionalized" the use of contractors on the battlefield through the following regulations and manuals:

- Army Regulation (AR) 715-9, Contractors Accompanying the Force, 29 October 1999. This regulation establishes Army policy for using contractors to support battlefield operations. It is the first Army-wide policy governing operations on the

battlefield. This regulation is being updated to incorporate AR 700-137, LOGCAP, and DA Pam 715-16, Contractors Deployment Guide. It is currently undergoing re-staffing of the Final Draft before final publication later this year.<sup>20</sup>

- Field Manual (FM) 100-10-2, Contracting Support on the Battlefield, 4 August 1999. This is the Army's first capstone doctrinal manual for acquiring contractor support. Its purpose is to define battlefield contracting, in terms of its structure, organization and process—focusing more so on the actual acquisition of the contract support.<sup>21</sup>
- FM 100-21, Contractors on the Battlefield, 26 March 2000. This is the Army's first capstone doctrinal manual for the operational aspect of using contractors to support Army contingency operations. This field manual was revised and renumbered as FM 3-100.21, Contractors on the Battlefield, 3 January 2003.<sup>22</sup>

Institutionalizing the usage of contractors must be based upon certain governing principles that considers force structure, legal and capabilities. Although not absolutes and some principles may even be mutually exclusive at certain levels of detail, these principles provide the functional framework to evaluate the desirability of using contracted support. These principles, incorporated into the doctrinal and policy publications by the Concept Team, also had the support from the Department of the Army G4 and numerous organizations with contracting experience to include the Army Materiel Command, the Army Forces Command, the Army Intelligence and Security Command, plus various combat support and combat service support service schools. These governing principles provide functional parameters to evaluate the desirability of using contracted support in military operations and include the following:<sup>23</sup>

- Contractors do not replace force structure. They augment Army capabilities and provide additional options for meeting support requirements.
- Depending on mission, enemy, terrain, troops, time and civilian considerations (METT-TC), contractors may deploy throughout an area of operation and in virtually all conditions. Given an asymmetric threat on a nonlinear battlefield, there is no "safe" zone within the area of operation.
- Commanders are legally responsible for protecting contractors in their area of operations.
- Contractors must have enough employees with appropriate skills to meet potential requirements.
- Contracted support must be integrated into the overall support plan.
- Contingency plans must ensure continuation of service if a contractor fails to perform.

- Contractor-provided services should be invisible to the users. Any links between Army and contractor automated systems must not place additional burdens on soldiers.
- The Army must be capable of providing critical support before contractors arrive in the theater or in the event that contractors either do not deploy or cannot continue to provide contracted services.
- Although contractors can be used as an alternative source of capabilities at theater or corps level, commanders must remain aware that, within a given operation, using contractors could decrease flexibility.
- Changing contractor activities to meet shifting operational requirements may require contract modifications.

#### **LIMITATIONS ON CONTRACTOR USE**

Although the Army has taken great efforts over the past three to four years to institutionalize the use of and identify principles associated with civilian contractors in a combat environment, there are three functions that contractors, by law, cannot perform. They are:<sup>24</sup>

- Armed combat. The United States does not contract out its warfighting.
- Command and control of U.S. military and civilian personnel. Command and control is a unique military function that cannot be contracted.
- Contracting. The Department of Defense does not hire contractors to perform the functions of contracting.

Except for these specific limitations, contractors can perform any other military function.

Predominantly, contracted services and support are found within the combat support and combat service support missions which include maintenance, medical support, transportation, supply, communications support, and field services.

#### **CHALLENGES WITH CONTRACTORS ON THE BATTLEFIELD**

Despite America's lengthy history with contractors operating in a battlefield environment, including the Army's extensive experience with Logistics Civil Augmentation Program (LOGCAP) dating back to the Viet Nam era,<sup>25</sup> the practice of civilians going to war with the military still remains somewhat controversial. The presence of civilians accompanying the force raises questions relating to chain of command, authority, accountability, sustainment and force protection, as well as having legal and ethical ramifications. Guidance on the use of contractors to support deployed forces varies widely amongst the Services as identified by a June 2003

U.S. General Accounting Office study discussed earlier. There is little common understanding among the Services as to the Government's responsibility to contractor employees in the event of hostilities. Consequently, today's commanders often have contractors operating within their area of responsibility, supporting several different Services, under several different contracts, and each with different requirements and contract terms and conditions. A number of challenges further complicate the efforts that definitely must be fully understood and institutionalized to permit prompt, effective and essential employment of contractors on the battlefield. These challenges fall within two general categories – management and legal – each of which will now be discussed.

#### MANAGEMENT CHALLENGES WITH MILITARY CONTRACTORS

When contractors support Army operations, they must be controlled, deployed, protected, and sustained. As noted in FM 3-100.21, "commanders need to fully understand their role in planning for and managing contractors on the battlefield and to ensure their staff is trained to recognize, plan for and implement contractor requirements." Although there have been tremendous efforts by the Army to institutionalize doctrine and policies for using contracted support in Army operations, there still remain issues with going to war with civilians. Effective contractor management on the battlefield is essential to ensure that contractor-provided support is properly orchestrated and synchronized with the overall operation plan, and that contractor employees are properly accounted for, protected and supported.<sup>26</sup> The four most significant management issues this research discovered that face the military when contractors are deployed in support of contingency operations are deploying, controlling, protecting and sustaining the civilian contracted workforce.

#### **Deploying civilian contractors**

The combatant commander is responsible for the flow of equipment, personnel and supplies into his theater. Contractor personnel are not part of the operational chain of command. Properly coordinating contractor support and the flow of arriving contracted personnel, equipment and supplies can often have great impacts upon the reception, staging, integration and onward movement of forces into the theater. Uncoordinated flow of contractor personnel and equipment can compete with military forces and their equipment for airlift, aerial ports of debarkation and other modes of transportation, both intratheater and intertheater.<sup>27</sup>

### **Controlling civilian contractors**

Control of civilian contractors differs greatly from the military command and control concept of units and soldiers. Commanders have no “command and control” authority over contract personnel. Contractors are therefore controlled, or more accurately managed, through the management mechanism of the contract itself. Civilians are required to do only that which is specifically required by the contract. To change the performance requirements, changes to the terms and conditions of the contract must be made through the contracting officer.

### **Protecting civilian contractors**

Contractor employees are neither true combatants nor true noncombatants. Under international agreement, they fall under a subcategory of noncombatant titled “civilians authorized to accompany the force in the field.”<sup>28</sup> As such, they should not be consciously placed in a position where they might be subject to international attack<sup>29</sup>, nor be exposed to the same risks as soldiers. Additional force structure will be required to protect contractor personnel on the battlefield. With today’s nonlinear battlefields, including such asymmetrical threats as chemical, biological or nuclear, this additional force structure becomes especially critical when contractors are directly supporting the warfighter or moving with lead combat elements. As a civilian authorized to accompany the force, a contractor can only carry a weapon for personal protection once the combatant commander has granted approval.<sup>30</sup> The general policy of the Army is that contractor employees will not be armed. Contractors will not wear military uniforms or clothing except for specific items required for safety or security, such as chemical defense equipment, cold weather equipment or mission-essential equipment.<sup>31</sup> Military force structure will be required to provide force protection for all civilians working in the theater of operations, whether in rear operations, on forward lines, or in forward deployed task forces. Cost for this force protection must be included in the cost equation when comparing contractor support to using existing force structure.<sup>32</sup>

### **Sustaining civilian contractors**

The ideal battlefield would not contain civilians; the military would be totally self-sustaining to complete the mission at hand. The reality of this is almost unimaginable given the missions currently ongoing within the DoD. For the most part, contractors are expected to be self-sufficient, handling all actions necessary to perform under the terms and conditions of the contract without significant assistance from the government. Yet this typically changes when in a contingency or battlefield environment, as government-furnished support to a contractor is provided in the forms of either organizational (e.g. transportation, facilities, equipment or

materiel) or life support (e.g. lodging, subsistence, medical care, religious support, postal support) commodities.<sup>33</sup>

## LEGAL CHALLENGES WITH MILITARY CONTRACTORS

The second major challenge with contingency contractors deals with various legal issues. The legal status of the civilians accompanying the force in contingency operations, the limited control over the contractors to adhere to military general orders, rules of engagement, as well as disciplinary actions the military can take against contractors, continue to challenge military commanders.

### **Legal Status of Contractors**

Certain types of contractor support in a combat environment can raise questions regarding the noncombatant status of contractor personnel under international law. The default position under international law, including the Geneva Convention and the Laws of The Hague, is that contractor personnel are considered noncombatants who may legitimately accompany combatants into hostilities, but may not take up arms.<sup>34</sup> These noncombatant status distinctions are tremendously significant because they affect whether contractor personnel may be legitimately targeted by hostile forces and how contractor personnel may be treated by hostile forces in the event that contractors are captured or detained.<sup>35</sup> Additionally, noncombatants are not considered legitimate military targets, and if captured, they are entitled to “prisoner of war” status under the Geneva Convention. Noncombatants, just like authorized combatants, are not permitted to be treated as war criminals under international law. To assist with the distinction of noncombatant contractors accompanying the force, identification cards are issued to all civilians authorized to accompany the armed forces into battle, to include contracted personnel.<sup>36</sup>

This legal status challenge, found on our modern battlefield with soldiers and contractors working side-by-side, quickly finds the noncombatant status of the contractors morphing towards a quasi-combatants status and raises great uncertainties and questions to the ethical possibilities found on our modern battlefield with soldiers and contractors working next to one another. In Michael E. Guillory’s article, “Civilianizing the Force: Is the United States crossing the Rubicon?” he notes that the Geneva Conventions are applicable only during international conflicts or during partial or total occupation of territory by one state or another. He further explains that the United States has taken the position that it will “comply with the law of war during all armed conflicts; however, such conflicts are characterized and, unless otherwise directed by competent authorities, will comply with the principles and spirit of the law of war during all other operations.”<sup>37</sup> The inevitable conclusion that contractors will accompany the

military into war zones, now places civilian contractors at risk of crossing the line between lawful noncombatants and unlawful direct participation in hostilities under the Law of Armed Conflict.<sup>38</sup> The military's increased reliance on contractors in deployment operations illustrates this quasi-combatant status as being one of greatest concern, yet far from being resolved by the military and political powers of this country.

### **Commanding the Contractors—Rules of Engagement**

The second major problem with the use of private military contractors is the lack of formal rules they must follow. Soldiers fight according to rules of engagement, which in theory, are vetted to align with national-level goals and strategies. Soldiers are accountable to the U. S. Military Code of Conduct wherever they are. But civilian contractors are not formally part of the military and not part of the chain of command. As such, they generally do not have to comply with these rules and orders and have historically not been prosecuted for disobeying military rules.

The lack of discipline authority by the commander over contractor personnel is a challenge unless a declaration of war exists. Only if Congress has declared war, are contractors accompanying the force subject to the Uniform Code of Military Justice to include court-martial authority and are therefore under the direct command, control and discipline of the commander.<sup>39</sup> Such declaration has not occurred since WW II. Without such a declaration of war, contractors, like any U.S. citizen, are subject to the laws of the nation in which they are in -- not U.S. law.<sup>40</sup> This remained the case, where contingency contractors were subject to the laws of the host nation, until the enactment of the Military Extraterritorial Jurisdiction Act of 2000.

The Military Extraterritorial Jurisdiction Act (MEJA) of 2000, enacted on 22 November 2000, was designated to extend Federal criminal jurisdiction over civilians accompanying the Armed Forces who commit serious offences overseas when a host country does not exercise criminal jurisdiction. This Act provides the Combatant Commanders with a new tool to solve the rare, but previously vexing issues of dealing with serious criminal misconduct by civilian personnel who cannot be tried under the Uniform Code of Military Justice.<sup>41</sup> The MEJA, designed to fill a jurisdictional gap, allows for the criminal prosecution of civilian forces accompanying the U.S. armed forces outside the United States. It can provide a useful tool for deterring and prosecuting serious misconduct by contractors at overseas locations. The MEJA has not fully been tested in part because the Department of Defense has not issued implementing regulations or instructions required by the law.<sup>42</sup> Hence, maintaining discipline of

contractor employees with the minor misconduct still remains the responsibility of the contractor's management structure, not the military chain of command.

#### **THE WAY AHEAD FOR DEPARTMENT OF DEFENSE**

The Department of Defense's response to the GAO report GAO-03-659, "Military Operations: Contractors Provide Vital Services to Deployed Forces but are Not Adequately Addressed in DoD Plans," dated May 7, 2003, acknowledged that better Department-wide guidance needs to be provided addressing various issues related to contractor employees on the battlefield. The Department concurred on June 16, 2003, with GAO's recommendation that the Secretary of Defense should develop DoD-wide guidance and doctrine on how to manage contractors who support deployed forces. In particular, the DoD guidance should include: (a) establish baseline policies for the use of contractors to support deployed forces, (b) delineate the roles and responsibilities of commanders regarding the management and oversight of contractors who support deployed forces, and (c) integrate other guidance and doctrine to assure that commanders are aware of all applicable policies.<sup>43</sup>

Efforts by the Joint Staff, with the J-4 taking the lead, have begun to correct the deficiencies acknowledged by the Department and are working towards the development of joint policy, followed by the development of joint doctrine. The Department of Defense, through a joint working group, determined the underlying issue of providing the warfighter with the needed guidance for increased number of contractors is to first develop the required policy then write the joint doctrine.<sup>44</sup> Policy must precede doctrine. This working group has produced two, yet unnumbered draft documents: DoD Directive<sup>45</sup> and DoD Instruction.<sup>46</sup> Both documents, version: 3 December 2004, are titled "Management of Contractor Personnel during Contingency Operations."

The Directive will establish the DoD policy and assign responsibilities for the management of DoD contingency contractor personnel. Applicable to all organizational entities in the Department of Defense, the Directive and its associated Instruction will serve as a comprehensive source of DoD policy and instructions for effective management of defense contingency contractor personnel who provide support to U.S. military forces in contingency operations. Efforts are moving in the right direction to assist with policy issues and challenges as sections of these two documents address issues associated with management of civilian contractors to include visibility/accountability, deployment requirements, force protection/security efforts, and sustainment and medical support requirements. Likewise, the legal challenges noted earlier are addressed in these two draft DoD documents and specifically

ensure the contract serves as the principal legal basis in defining the relationship between the Department and the defense contractor. Contractor legal status along with international law, host nation and third country laws, as well as U.S. laws, are addressed and procedures provided within the draft DoD Instruction.<sup>47</sup>

## **FINDING AND RECOMMENDATIONS**

The main finding from this research is that the draft Department of Defense Directive and Instruction memorandums fully address the recommendations outlined in the June 2003 GAO Report GAO-03-695 and tackle the many challenges and concerns discovered during this research project. Much work has been put forth by the Department to erase the void that has existed all too long with the lack of overarching policy and doctrine for managing civilian contractors on the battlefield. Consequently, the Defense Department can not afford to delay the publication of these documents any longer, since they clearly lay out the strategic policy and implementing instructions for managing contractors in joint, contingency operations.

With the ongoing review of the DoD Directive and Instruction Memorandums, the following recommendations are made to support this research's finding. The key to the Department's success with these documents is getting these documents distributed immediately. This research has determined that the Department of Defense combatant commanders, Services, and Agencies are all in dire need of the policies addressing contingency contractors on the battlefield. Staffing actions, at all levels, must move quickly to allow the publication of both the Directive and Instruction Memorandums. This will further permit the DoD components to continue the momentum of implementing further guidance and doctrine across the Department of Defense. However, further guidance from subordinate DoD components can not cause any delay in the implementation of the DoD Directive and Instruction.

Combatant commanders and Services must ensure that their subordinate commanders and staff are aware of the forthcoming DoD documents on the management of contingency contractors and begin to educate their command on the policies now. Military staffs at all levels need to be continuously aware of the policy requirements and responsibilities associated with contractor management on the battlefield. Burdensome as this may seem, it remains an essential task on today's battlefields. Contractor accountability continues to be a significant challenge to commanders at all levels. The pending DoD Directive instructs the geographic combatant commanders to maintain by-name accountability of contractors deploying with the force (CDF). This database will facilitate integration of CDF to ensure force protection, medical

support, personnel recovery, and other related support issues addressed in this research paper.<sup>48</sup>

## **CONCLUSION**

The DOD components shall rely on the most effective mix of the total force, cost and other factors considered, including active, reserve, civilian, host nation, and contract resources necessary to fulfill assigned peacetime and wartime missions.

— DODI 3020.37

Contractors on the battlefield are here to stay. Contractor personnel have become essential to the many functions that were previously performed by military personnel. This migration from uniformed personnel to contract personnel has occurred in response to force structure cuts, pressure from Congress to increase privatization efforts and outsourcing options, the requirements for highly technically skilled support for sophisticated weapons systems within the Department of Defense, and contingency-mandated military strength ceilings. The benefits of utilizing civilian contractors far outweigh the costs associated with them serving as an element of the full spectrum force. The size and types of contracted support, the contractors' location on the nonlinear battlefield, and the criticality of their contributions to mission accomplishment definitely emphasize DoD's need to quickly develop and publish policy for key issues to better manage the contractor force and solve the legal challenges inherited with this force multiplier entity. The United States political and military leaders must continue with the efforts underway to quickly publish Department of Defense policy on the management of civilian contractors accompanying the forces during contingency operations.

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## ENDNOTES

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<sup>2</sup>Human Rights Watch, "Q&A: Private Military Contractors and the Law," *Human Rights Watch Online* 21 October 2004 [journal on-line]; available from <<http://www.hrw.org/English/docs/2004/05/05/iraq8547.htm>>; Internet; accessed 20 December 2004.

<sup>3</sup>Richard B. Myers, *National Military Strategy of the United States of America 2004*, (Washington, D.C.: Chairman of the Joint Chiefs of Staff, 2004), 15.

<sup>4</sup>Ibid, 23.

<sup>5</sup>Department of the Army, *Contractors Accompanying the Force*, Army Regulation 715-9 (Washington, D.C.: U.S. Department of the Army, 29 October 1999), 14.

<sup>6</sup>Isolde K. Garcia-Perez. "Contractors on the Battlefield in the 21<sup>st</sup> Century," *Army Logistician Online* November – December 1999 [journal on-line]; available from <<http://www.almc.army.mil/alog/issues/NovDec99/MS454.htm>>; Internet; accessed 21 September 2004.

<sup>7</sup>Neslon D. Schwartz, "The Pentagon's Private Army." *Fortune* 147 (17 March 2003): [database on-line]; available from ProQuest; accessed 13 January 2005.

<sup>8</sup>Congress, *House Rpt. 108-767- Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005*. Available from <<http://thomas.loc.gov/>>; Internet; accessed 14 January 2005.

<sup>9</sup>Stephen M. Blizzard, "Increasing Reliance on Contractors on the Battlefield," *Air Force Journal of Logistics* 28 (Spring 2004), 7.

<sup>10</sup>Linda Robinson and Douglas Pasternak. "America's Secret Armies: A Swarm of Private Contractors Bedevils the U.S. Military," *U.S. News & World Report* 133 (November 2002): [database on-line]; available from ProQuest; 13 January 2005.

<sup>11</sup>Blizzard, 7.

<sup>12</sup>Donald H. Rumsfeld, *Quadrennial Defense Review Report* (Washington, D.C.: Department of Defense, September 2001), 53.

<sup>13</sup>Blizzard, 7.

<sup>14</sup>Ibid.

<sup>15</sup>Steven J. Zamparelli, "Contractors on the Battlefield, What Have We Signed Up For?" *Air Force Journal of Logistics* (Fall 1999) [journal on-line]; available from <<http://www.afma.hq.af.mil/lgj/Vol%20XXIII%20No3.pdf>>; Internet; accessed 28 September 2004.

<sup>16</sup>Congress, House of Representatives, U.S. House Committee on Armed Services, *Statement of The Honorable Michael W. Wynne, Acting Under Secretary of Defense (Acquisition, Technology, and Logistics)*, 108<sup>th</sup> Cong., 2d sess., 24 June 2004.

<sup>17</sup>Schwartz.

<sup>18</sup>Robinson and Pasternak.

<sup>19</sup>General Accounting Office, *Military Operations: Contractors Provide Vital Services to Deployed Forces but Are Not Adequately Addressed in DOD Plans*, GAO-03-659 (Washington, D.C.: U.S. General Accounting Office, June 2003), available from <[www.gao.gov/cgi-bin/getrpt?GAO-03-695](http://www.gao.gov/cgi-bin/getrpt?GAO-03-695)>, Internet, accessed 2 December 2004.

<sup>20</sup>Department of the Army, Department of the Army Logistics – Plans (DALO-PLS), *Information Paper: SUBJECT: Policy Change to Contractors Accompanying the Force (CAF)*, Washington D.C., 9 August 2004.

<sup>21</sup>Joe A. Fortner, "Institutionalizing Contractor Support on the Battlefield," *Army Logistician Online* July – August 2000 [journal on-line]; available from <<http://www.almc.army.mil/alog/issues/JulAug00/MS570.htm>>; Internet; accessed 21 September 2004.

<sup>22</sup>Ibid.

<sup>23</sup>Ibid.

<sup>24</sup>Ibid.

<sup>25</sup>General Accounting Office, GAO-03-659.

<sup>26</sup>Department of the Army, *Contractors on the Battlefield*, Field Manual 3-100.21, 3 January 2003; available from <<http://atiam.train.army.mil/portal/atia/adlsc/view/public/297009-1/fm/3-100.21>>; Internet; accessed 22 September 2004.

<sup>27</sup>Schwartz.

<sup>28</sup>Joint Chiefs of Staff, *Joint Doctrine for Logistic Support of Joint Operations*, Joint Publication 4-0 (Washington, D.C.:U.S. Joint Chiefs of Staff, 6 April 2000), V-6.

<sup>29</sup>Department of the Army, *Contractors on the Battlefield*, Field Manual 3-100.21.

<sup>30</sup>Joint Chiefs of Staff, *Joint Doctrine for Logistic Support of Joint Operations*, Joint Publication 4-0 (Washington, D.C.:U.S. Joint Chiefs of Staff, 6 April 2000), V-8.

<sup>31</sup>Department of the Army, *Contractors on the Battlefield*, Field Manual 3-100.21.

<sup>32</sup>Eric A. Orsini and LTC Gary T. Bublitz, "Contractors on the Battlefield: Risks on the Road Ahead?" *Army Logistician Online* January – February 1999 [journal on-line]; available from <<http://www.almc.army.mil/ALOG/issues/JanFeb99/MS376.htm>>; Internet; accessed 21 September 2004.

<sup>33</sup>Department of the Army, *Contractors on the Battlefield*, Field Manual 3-100.21.

<sup>34</sup>James J. McCullough and Abram J. Pafford, "Contractors on the Battlefield: Emerging Issues for Contractor Support in Combat & Contingency Operations," *Briefings Papers* June 2002; [journal on-line]; available from <<http://www.ffhsj.com/govtcon/pdf/briefjune2002.pdf>>; Internet; accessed 27 January 2005.

<sup>35</sup>Ibid.

<sup>36</sup>Ibid.

<sup>37</sup>Michael E. Guillory, "Civilianizing the Force: Is the United States Crossing the Rubion?" *The Air Force Law Review* 51 (2001): [database on-line]; available from ProQuest; accessed 4 October 2004.

<sup>38</sup>Blizzard, 9.

<sup>39</sup>Gordon L. Campbell, "Contractors on the Battlefield: The Ethics of Paying Civilians to Enter Harms Way and Requiring Soldiers to Depend upon Them," 27-28 January 2000; available from <<http://www.usafa.af.mil/jscope/JSCOPE00/Campbell00.html>>; Internet; accessed 21 September 2004.

<sup>40</sup>Ibid.

<sup>41</sup>Andrew D. Fallon and CPT Theresa A. Keene, "Closing the Legal Loophole? Practical Implications of the Military Extraterritorial Jurisdiction Action of 2000 – Civilians Accompanying the Armed Forces." *Air Force Law Review Online* Spring 2001 [journal on-line]; available from <<https://afis10.jag.af.mil/dscgi/ds.py/GetRepr/File-76385/html>>; Internet; accessed 20 December 2004.

<sup>42</sup>Human Rights Watch, "Q&A: Private Military Contractors and the Law", 21 October 2004.

<sup>43</sup>General Accounting Office, GAO-03-659.

<sup>44</sup>Department of Defense Procurement Conference, "Contractors on the Battlefield - A Joint & Industry Overview," 27 May 2004, briefing slides available from <[http://acc.dau.mil/docs/2004dodpc/presentations/Thursday/02G\\_Broadwell.pdf](http://acc.dau.mil/docs/2004dodpc/presentations/Thursday/02G_Broadwell.pdf)>; Internet, accessed 14 January 2005.

<sup>45</sup>Department of Defense Directive Number 4XXX.aa, *Management of Contingency Contractor Personnel during Contingency Operations*, Draft DoD Working Paper, 3 December 2004 (Washington D.C.: U.S. Department of Defense).

<sup>46</sup>Department of Defense Instruction Number 4XXX.bb, *Management of Contingency Contractor Personnel during Contingency Operations*, Draft DoD Working Paper, 3 December 2004 (Washington D.C.: U.S. Department of Defense).

<sup>47</sup>Ibid.

<sup>48</sup>Department of Defense Directive Number 4XXX.aa, *Management of Contingency Contractor Personnel during Contingency Operations*, Draft DoD Working Paper, 3 December 2004.

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