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Subcommittee on National Security and Foreign Affairs**

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Mr. Chairman and members of the subcommittee, thank you very much for granting me the opportunity to testify today. I am honored to take part in this session.

It is, I believe, particularly appropriate that this subcommittee address the issues surrounding American contractors in conflict zones. As my testimony will indicate, contracting issues have for too long been consigned to those who handle contracting per se – whether in the executive branch, on Capitol Hill, or elsewhere – rather than by those who manage the foreign policy and military operations that drive it. Hearings by this subcommittee, which focuses not just on government contracting but also on broad areas of American foreign policy, represent a step forward.

My testimony today is based on a report entitled “Contracting in Conflicts: The Path to Reform,” released by the Center for a New American Security earlier this month. In this report, my CNAS colleague John Nagl and I discuss possible solutions to many of the problems that have plagued the expeditionary contracting process, particularly during our wars in Iraq and Afghanistan. The entire report is available for download on the CNAS website.

**Introduction**

Our report proceeds from the realization that when our nation goes to war, contractors go with it. In both Iraq and Afghanistan today, there are more private contractors than U.S. troops on the ground.<sup>1</sup> This state of affairs is likely to endure. Now, and for the foreseeable future, the United States will be unable to engage in conflicts or reconstruction and stabilization operations of any significant size without private contractors. Changes in business practices, the provision of government services and the character of modern conflict, together with limits on the size of the American military, diplomatic and development corps, are driving the size and scope of expeditionary contracting to unprecedented proportions. Absent a significant reduction in America’s international commitments and perceived global interests, the employment of private contractors in future American conflicts is here to stay.

Yet the system within which this contracting takes place has not caught up with the new reality. Tens of billions of taxpayer dollars committed to contracts in Iraq and Afghanistan have been implemented with little oversight. Contracting companies themselves crave clearer guidelines. The roles of contractors remain incompletely integrated into the conduct of American operations. The legal framework within which contractors work remains cloudy. And there have been serious allegations of harm to both local civilians and U.S. personnel as a result of contractor malfeasance.

To adapt, the U.S. government must embark on a path of ambitious reform that will require new laws

and regulations; an expansion of the government’s contracting workforce; a coordination mechanism within the executive branch; greater scrutiny, more transparency and clearer standards; a strategic view of the roles of contractors in American operations; and a change in culture within the government.

As an initial step, the U.S. government must understand and then rethink how contractors are employed in contingency environments. The vast majority of contractors work for the Department of Defense (DOD), the State Department and the U.S. Agency for International Development (USAID), and they perform widely varied tasks, including in such areas as logistics, transport, linguistic support, security, weapons systems maintenance, construction, intelligence analysis, local security force training and agricultural technical assistance.

This testimony looks beyond security providers, which have received the bulk of attention from Congress and the media, to address the great majority of service contractors that handle duties other than security. While less controversial, service contracts yield their own set of problems – including insufficient oversight and management, inadequate integration into operational planning and ambiguous legal status. The United States must establish new policies and rules of the road – not only for armed security contractors but also for the 85 to 90 percent of contractors that carry out a wide array of other tasks.

This testimony outlines a range of issues raised by expeditionary contracting and offers recommendations for how the United States – both the government and the community of private contracting firms – can strike a balance among the greater efficiency and effectiveness necessary to support American missions overseas; the versatility and flexibility required in a rapidly evolving strategic environment; and the proper oversight, accountability and transparency expected by American taxpayers. Since America’s dependence on contractors is likely to continue, the need for reform is pressing. The time to act is now.

### **ES&R Contracting**

We have proposed a new term, Expeditionary Stabilization and Reconstruction (ES&R) contractors, to capture the universe of companies and industries working in support of expeditionary operations (both during and after combat operations) by providing logistical and many other kinds of support. Stability operations contracting represents the transitional work that contracting industries carry out in order to establish and maintain stability in all or part of a nation-state, usually in support of military operations. Reconstruction contracting represents the work of private firms in building and rebuilding physical infrastructure as well as political, social and economic infrastructure – in some cases for years after the end of hostilities.

American reliance on such contractors has never been greater. The post-invasion reconstruction environments in both countries represent the largest-ever markets for private firms providing ES&R services. By 2007, the Congressional Budget Office estimated that at least 190,000 contractors were

working in the Iraqi theater on U.S.-funded contracts in support of the war effort.<sup>2</sup> Today there are more contractors in Iraq and Afghanistan - 100,000 and 107,000, respectively - than American troops.<sup>3</sup> Between 2003 and 2007, U.S. agencies awarded some \$85 billion in contracts for services, predominantly for contracts in Iraq.<sup>4</sup> The Department of Defense alone spent upward of \$30 billion in FY 2007 and the first half of FY 2008 on contractors in both theaters, in addition to significant sums spent on contractors by the State Department (\$1.9 billion) and USAID (\$1.7 billion).<sup>5</sup> Through March 2010 Congress had appropriated a staggering \$53 billion for reconstruction in Iraq and \$51 billion for reconstruction in Afghanistan, and President Obama has since requested an additional \$20 billion to fund reconstruction in Afghanistan.<sup>6</sup>

Many factors have contributed to America's unprecedented dependence on ES&R contracting. The global rise in outsourcing, changes in the nature of warfare, the shift to an all-volunteer force, the statutory limit on the overall size of U.S. military forces, the decline in USAID personnel numbers, a desire to reduce government costs during peacetime and the probable character of future U.S. engagements are trends unlikely to change significantly in the foreseeable future.

Yet while the government's reliance on contractors has increased, the size of the government workforce dedicated to overseeing those contracts has diminished. At DOD, USAID and other government agencies, individual contracting officers (COs) have overseen a steadily increasing volume of contracts while the number of contracting officers and contracting officer representatives (individuals appointed by the contracting officer to monitor the day-to-day administration of a contract, abbreviated as CORs) has held constant or even declined.

Today, the U.S. military can fight nothing but the most limited engagements without the extensive use of contractors, and the State Department and USAID will continue to rely on contractors to carry out a great deal of reconstruction work. Since it is unlikely that the (statutorily limited) U.S. force structure will increase dramatically in the years ahead, and it is likely that American commitments overseas will remain great or even increase, U.S. reliance on private ES&R contractors is here to stay. But accepting this reality makes reform imperative.

The U.S. government's increased dependence on contractors has provoked a number of concerns, investigations and calls for reform. Five issues merit particular attention:

- Fraud, waste and abuse
- Cost
- Military implications
- Foreign policy implications
- Legal and regulatory implications

**Fraud, Waste and Abuse**

One area of particular concern among public officials and concerned citizens has been the degree of fraud, waste and abuse linked to reconstruction operations and contractor-provided services in Iraq and Afghanistan. The combined \$104 billion Congress has appropriated thus far for reconstruction in Iraq and Afghanistan (which excludes an additional \$20 billion Afghan reconstruction request), represents an extremely large, complex, and swiftly changing set of contracted activities. The great amounts of money disbursed, the speed with which the government demanded the reconstruction projects move forward and the lack of oversight – particularly in the early stages of reconstruction efforts in each country – has invited a significant degree of waste and corruption.

**Cost**

One of the fiercest debates over the role of private contractors in contingency operations concerns the issue of cost. Are contractors less or more expensive than using federal employees? The answer is much more complicated than it would appear at first glance and remains highly disputed. Most experts agree that contracting out logistics and construction activities tends to result in significant cost savings to the government, while more skilled labor – and private security functions in particular – tends toward parity with, or even exceeds, the cost of using federal employees. Hiring unskilled locals or third-country nationals can save the taxpayer substantial costs. As the required skills increase, however, the picture changes. Per-day salary for an American contractor, for instance, can easily exceed the per-day salary for a member of the military carrying out the same duty.

Among military personnel, pay is just one element of total compensation. The other elements – which constitute a significant portion of the compensation package – include retirement pay, services at military installations (e.g., housing and food) and health care, which may continue for life. CBO has estimated that, in calculating wartime costs alone, the Army could fulfill logistics functions (under the LOGCAP contract) for roughly the same cost as private contractors. At the same time, it estimated that, over a 20-year period (in both wartime and peacetime), obtaining logistics support from a private contractor would cost approximately \$41 billion, while obtaining the same services from Army units would cost around \$78 billion, nearly double the cost of the contracted services.<sup>7</sup>

The government has had, however, extraordinary difficulties in making comprehensive cost comparisons between government workers and private contractors carrying out the same functions. For example, the U.S. Comptroller General recently initiated a review of costs to DOD and the State Department of using private security contractors versus using federal employees for the same functions. As a March 2010 report of the Government Accountability Office (GAO) indicates, the Pentagon was unable to provide the information necessary for GAO to make such a comparison; it lacked information about the number of military personnel that would be needed to meet contract requirements or the cost of training personnel to carry out security functions. This occurred nearly five years after GAO issued a report calling on DOD to improve its transparency and data collection of active duty compensation.<sup>8</sup>

The clearest benefits of using contractors tend to center more on readiness issues such as flexibility and speed of deployment and less on cost savings. As CBO has pointed out, “Because contractors need not make long-term commitments to their employees, they are in a better position to ‘surge’ to meet a short-term demand for workers and then rapidly downsize later.”<sup>9</sup>

### **Military Implications**

The unprecedented numbers of private contractors on the battlefield and the vast scope of their activities pose new challenges for the U.S. military. Despite efforts to align the conduct of contractors with that of military personnel, these relationships remain poorly defined. Incorporating the role of contractors in operational planning, predeployment training, and wargames remains ad hoc at best, and the presence of large numbers of contractors poses new challenges for command and control and discipline in theater. Today and in the future, properly marshalling the collective activities of private contractors will be critical to a commander’s ability to accomplish his mission. This will require knowing the basics: how many contractors are in a particular battlespace, who and where they are, and what they are doing; how their responsibilities mesh with the authorities and responsibilities of American government personnel; and how operational plans incorporate contractors into the array of forces in play.

### **Foreign Policy Implications**

How America deals with ES&R contractors carries broad foreign policy implications. This is true most obviously in the wars in which the United States is engaged. The testimony of military personnel and contractors alike suggests that local populations draw little or no distinction between American troops and the contractors they employ; an act committed by one can have the same effect on local or national opinion as an act carried out by the other. In the midst of two counterinsurgency campaigns, contractor conduct directly affects U.S. authority and legitimacy on the ground in Afghanistan and Iraq. In an effort premised on a strategy of “clear, hold and build,” and in which much of the “build” mission will be executed by contractors, each of their actions impacts the effectiveness of American policies and information operations on the ground.

The great reliance on contractors in wartime raises foreign policy questions that go well beyond the domain of DOD. As the number of contract personnel increases, for instance, so too does the reliance on host-nation and third-country nationals. In one example, the U.S. government has requested that a contracting firm deploy into Afghanistan some 5,000 support contractors as soon as possible. The vast majority of these will be Indian nationals – irrespective of Pakistan’s acute sensitivity to the perception of Indian encroachment in Afghanistan. There appears to be insufficient deliberation within the State Department about the foreign policy implications of contracting decisions made at the corporate level, both on State/USAID funded contracts and on DOD contracts. Finally, and at perhaps the most overarching level, the role of private contractors may imply changes in the rules-based international society that the United States has endeavored mightily to construct and protect since 1945. Through legal precedents and norms of behavior established in the course of current wars, U.S. employment of contractors could shape the way that current and rising powers

conduct future wars. Washington has long been in the norm-setting and norm-enforcing business, and as a result it should expect that many others will follow America's lead.

### **Legal Implications**

The legal framework governing ES&R contractors in wartime is complicated, features overlapping jurisdictions and is somewhat ambiguous. Contractors working for the United States can be held accountable for crimes committed overseas under at least two domestic American laws, the Military Extra-Territorial Jurisdiction Act (MEJA) and the Uniform Code of Military Justice (UCMJ).

Each has potential drawbacks. Serious constitutional questions surround the concept of trying civilian contractors by courts-martial under the UCMJ, questions that may eventually require answers from the U.S. Supreme Court.<sup>10</sup> MEJA, on the other hand, presents a constitutionally solid basis for trying contractors but the scope of its jurisdiction is ambiguous and the practical difficulties associated with its application are significant.

Further complicating the legal picture, ES&R contractors may also be subject to foreign and international law, including the Geneva Conventions. The legal status of contractors varies by country, depending on the jurisdiction and any agreements in place between the United States and the host government. In sum, the status of contractors does not fall neatly into any one legal category. Thus U.S. actions, particularly in the legal arena, will establish precedents that will likely be cited by other countries and the international community as a whole as they employ their own contractors in similar situations.

### **The “Inherently Governmental” Conundrum**

U.S. law has long aimed to protect the core functions of government by prohibiting anyone other than federal employees from performing “inherently governmental” tasks. Today, while there appears to be a rough consensus that there are some functions so intrinsic to the nature of American government that they should never be outsourced, there is little or no consensus about precisely what those functions are. The Office of Management and Budget released a draft policy letter on 31 March 2010 that aims to clarify “when work performed for the Federal government must be carried out, in whole, or in part, by Federal employees,” and to have the U.S. government speak with one voice on the issue. The letter adopts the definition contained in the 1998 FAIR Act: an inherently governmental function is one that is “so intimately related to the public interest as to require performance by federal government employees.”<sup>11</sup> While the letter provides examples of such activities, the draft guidance does not comment directly on some of the most contentious functions that have been contracted out, including the provision of security services, interrogation of enemy combatants and coordination of federal contractors.<sup>12</sup>

We believe that a better alternative is to focus on a “core competencies” approach. While Congress should deem inherently governmental any acts it can agree should never be outsourced under any circumstances, a core competencies approach would apply to all of those activities that do not fall

under that rubric. It would focus on those functions the government should develop, maintain and enforce, rather than trying to enumerate a list of specific activities for which it is impermissible, under law and in any circumstance, to ever contract out.<sup>13</sup> By eschewing contracting in specific areas as a matter of policy, the federal government would leave the option legally open to afford itself the flexibility to employ contractors in times of crisis or other extreme circumstances. Moreover, the core competencies approach would give commanders and others in the field the access to surge capacity and swiftness often necessary in an unpredictable contingency environment, while moving the U.S. government away from dependence on certain forms of contractors as a more general principle. It would also hold the promise of cutting through continued debates about what does or does not constitute an “inherently governmental” activity and instead concentrate on what the government should be doing and how it will ensure its competency to do so.

### **The Path to Reform**

If the United States is facing an era of persistent engagement, it is also facing an era of persistent contractors. It is time for a new, strategic approach to the role played by ES&R contractors in conflicts, one that seeks to build upon past disparate attempts to reform unique elements of the contracting process. It is past time to rationalize, modernize and improve the system of contingency contracting. The Department of Defense, the Department of State, the U.S. Agency for International Development and their bureaus and offices must continue to seek reform in all phases of the contracting process: policy, planning, formation and management.

### **Improve U.S. Government Management of ES&R Contracting**

Coordination is key to everything the United States seeks to achieve via ES&R contracting. Despite the years – and tens of billions of dollars – spent on ES&R contracting since 2001, the approach to contingency contracting remains fragmented and ad hoc. Insufficient interagency coordination before and during operations has been combined with an unprecedented degree of dependence by the agencies on contracted support. The result too often has been inefficiency, lack of transparency and insufficient unity of effort. Yet the problem goes beyond this: even expert contract managers (and, ultimately, contractors themselves) will be unable to adequately contribute to the overall mission if they receive incomplete, vague or contradictory instructions from policymakers and program officers. Policy must drive contracting, not the other way around.

The Department of Defense has taken steps to remedy poor coordination within DOD<sup>14</sup> but the State Department and USAID appear to have made fewer improvements in their own internal systems. In addition, interagency coordination has tended to be informal and incomplete; disjunctions between policymakers and contract managers have emerged. (The one exception is a Memorandum of Understanding agreed upon by the three agencies to manage private security contractors.) As a result, it is imperative to improve coordination among policymakers, program officers and federal contracting personnel, and also among the agencies. The best course is to increase the contracting capacity at DOD, State and USAID and establish a formal (but relatively simple) interagency coordination mechanism.

This effort should include expanding the current DOD Office of Program Support, which is located in the Office of the Undersecretary of Defense for Acquisition, Technology and Logistics. This expanded office, which would be renamed the Office of Contingency Contracting (OCC), should be led by a Senate-confirmed Assistant Secretary of Defense for Contingency Contracting. It should be the unambiguous Department locus for planning, funding, staffing and managing DOD's ES&R and private security contracting.

Similarly, the State Department should expand its Office of Logistics Management into a new Bureau of Contingency Contracting located under the Undersecretary for Management. The bureau should be led by a Senate-confirmed Assistant Secretary (the current office is directed by a Deputy Assistant Secretary). USAID should either direct that its Bureau of Democracy, Conflict and Humanitarian Assistance develop a specific expertise in ES&R contracting (including adding contract specialist personnel to the bureau) and provide guidance to USAID regional bureaus as they manage their own contracts or it should establish a separate contracting bureau headed by an Assistant Administrator-level official.

The objectives in making these changes are to expand the capacity within the agencies to handle ES&R contracting, to ensure that the offices are directed by officials whose rank is commensurate with the great importance of such contracting and to equalize within the agencies the ranks of responsible officials in order to harmonize the coordination mechanism described below.

As part of this effort, and to establish quickly a cadre of well-trained contract professionals, the three offices should recruit not only government civilians, active duty military and other direct hires, but should also seek to modify the laws governing civil service retirements in order to induce former federal contracting professionals to return to service without losing their pensions. This would permit the government to quickly hire retired federal contract managers on a temporary basis when needed. In addition, such a step would allow retirees to enlist in the contingency contracting reserve corps (described below) and deploy for temporary duty – thus providing to the government a potentially substantial pool of skilled personnel. The directors of the offices described above should encourage their employees to accept temporary detailing to the corresponding offices in the other two agencies and to contracting positions in theaters abroad in order to broaden their experience and expertise.

We propose a mechanism by which the three officials named above would take responsibility for coordinating contingency contracting in future operations. They should meet on a regular basis to develop general guidance for contract managers (including translating policy and mission objectives into specific guidance for contracting personnel), propose any needed changes to the FAR (or to other statutes, regulations and procedures), ensure understanding across agencies, coordinate contracting processes and plans and identify problems that can be resolved or referred to policymakers. This basic structure should include a representative from the Office of Management and Budget (from either its national security budget section or its Office of Federal Procurement Policy) and should be chaired by a new National Security Council Senior Director for Reconstruction and Stabilization Operations (for whom handling contracting issues would comprise just one of several responsibilities). In addition, to



preserve institutional knowledge and enhance the stability of the three expanded offices, the agencies should consider nominating career officers to head them or, at a minimum, direct that each political appointee filling one of the three positions have support from a professional Deputy Assistant Secretary (or Deputy Assistant Administrator).

Replacing an ad hoc process with this more formal mechanism would help ensure that the government possesses the ability to articulate and carry out synchronized, efficient and effective strategies to support contingency operations. Before the government initiates a contingency operation, the officials named above and their staffs should coordinate with combatant commands, chiefs of mission, contracting firms and others as appropriate in order to inform operational plans and develop contracting-specific plans. They should also support policymakers in coordinating efforts with foreign governments, non-governmental organizations and international organizations.

### **Rebuild, Expand and Improve the Ranks of Contracting Personnel**

Given the explosion in the number of contracts in recent years, and the degree to which American operations have become dependent on outside contractors, growing the government contract workforce has become the necessary but not sufficient condition for fixing the problems that continue to plague the ES&R contracting process. The departments also must actively work to improve the skills and elevate the rank of personnel involved in contract management and oversight. There is a dire need for increased numbers of other government personnel involved in the contracting process, including contracting officer representatives, auditors and investigators.

Reforming the ES&R contracting process also requires that government personnel not directly tasked with overseeing contracts – including commanders, other military personnel, diplomats and policymakers – are educated in basic contracting issues and procedures.

The Secretary of Defense should:

- Continue to significantly increase the number of qualified contract personnel responsible for ES&R contracting.<sup>15</sup> The boost in personnel should include filling the remaining flag officer billets for acquisition authorized in the FY 2009 NDAA and increasing the number of CORs and other government personnel responsible for quality assurance and contract oversight.
- Continue to provide incentives for enlisted personnel, officers and civilians to pursue a career track in contract management or auditing.
- Issue a directive that prioritizes the education, training and assigning of ES&R contracting personnel, as well as other relevant personnel outside the acquisition staff. This directive should:
  - Direct that CORs should not have other duties that conflict with their contract responsibilities.

- Add basic contracting issues to professional military education and flag officer training and education. The aim should be to ensure that officers are qualified to assess compliance with contracting regulations and are familiar with the role of contractors in hostile environments.

The Secretary of State and the USAID Administrator should:

- Significantly increase the number of qualified contracting officers and CORs responsible for ES&R contracting, including in current operational theaters.
- Provide incentives for foreign service officers and civil servants to pursue a career track in contract management.
- Add basic contracting issues to education and training courses for senior Foreign Service Officers and senior USAID personnel.

### **Establish a Contingency Contracting Reserve Corps**

The FY 2009 National Defense Authorization Act created a government-wide Contingency Contracting Corps – a pool of individuals currently working in the federal acquisition workforce who agree to make themselves available for deployment in response to an emergency, major disaster or contingency operation. The Corps is authorized to deploy either within or outside the United States, and voluntary membership is open to all military and federal employees working in federal acquisition.

While the creation of this corps is a welcome development and provides an attractive model for dealing with the problems associated with the lack of qualified contract managers in theater, it is somewhat peculiarly housed at the General Services Administration (GSA). A better model would move the GSA-based contingency contracting reserve corps to an expanded DOD Office of Contingency Contracting, with deployment authority resting with the Secretary of Defense. In addition, deploying such a corps to manage ES&R contracts in a contingency environment should serve as the beginning, rather than the end, of the government’s efforts to deal with a future mismatch between the requirements for skilled contract managers and the pool of such managers available for deployment. The contingency contracting reserve corps should serve as a surge capacity when needed, but the government should aim to transition to non-reserve corps federal contract managers within a relatively fixed period of time (e.g., one year). This time could be used to hire and deploy skilled contract specialists as temporary federal employees, ensuring both that the U.S. government has the necessary capacity and that the necessary personnel are federal employees (i.e., not themselves contractors).

### **Increase Transparency and Accountability**

A standard complaint voiced by Congress, inspectors general, the press and the Commission on Wartime Contracting revolves around the lack of transparency and accountability in the ES&R contracting process. This opacity has led to poor management and glaring inefficiencies: as of December 2009, federal auditors had identified nearly a billion dollars in wasteful spending in

Afghanistan contracts.<sup>16</sup> Various factors exacerbate the difficulties of monitoring contract performance, including the multitude of contracts awarded, the relatively small staff that monitors them and the fact that contracting officers are often located far away from the area in which services are actually provided.

A number of measures have been taken in recent years to address this problem. DOD now provides Congress with periodic reports on the contractors and subcontractors it employs. The Army trains and deploys CORs to sites where contractors are providing services in order to ensure on-the-ground monitoring.<sup>17</sup> The U.S. government has also attempted to centralize responsibility for contractor oversight at the country level. In Afghanistan, for example, the Coordinating Director for Development and Economic Assistance in Kabul is tasked with reviewing each contract and ensuring its compliance with U.S. standards and strategy.<sup>18</sup>

Another major step forward was the establishment of the Synchronized Pre-deployment and Operational Tracker (SPOT) system in January 2007. SPOT was designed to serve as a unified database for contingency contractor and contract services information. Although SPOT plays a useful role in aggregating information for better contractor management and oversight, there are still areas in which it falls short. GAO continues to report that many information fields in SPOT are left unfilled because agencies differ in their interpretations regarding which contractor and subcontractor personnel must be entered into the system, leading to important knowledge gaps.<sup>19</sup> In addition, wide discrepancies have emerged between the counts offered by SPOT and by the CENTCOM Quarterly Census. DOD, which conducts a manual count to track contractor personnel, regards the census as more accurate than SPOT, while GAO has found shortcomings in both systems. In one recent example, a 19 April 2010 SPOT report identified 32,000 contractors working for DOD in Afghanistan; meanwhile, the Quarterly Census found 107,000.<sup>20</sup> Agencies continue to use a variety of other systems – many of which are ad hoc – to obtain information on contractor personnel and contracts, undermining the utility of SPOT as a centralized database. This patchwork of practices must be integrated in order to establish SPOT as a fully effective contractor monitoring tool.

The Secretary of Defense, in coordination with the Secretary of State and the USAID Administrator, should:

- Establish uniform standards across agencies and ES&R contract type for consistency and consolidation of data. This standardization should include finalizing and standardizing the SPOT system and issuing identical directives to DOD, State and USAID regarding the information each must input into the system. To bolster the fidelity of this data, COs should rely not simply on firms' reported employment figures but also confirm such reports in site visits.
- Further integrate auditors into the contracting process by making wider use of co-located auditors at large ES&R contracting firms.

- Improve accountability and monitoring of subcontractors, which account for 70 percent of the contracting workload, by revising regulations to allow government contracting personnel to demand more transparency in subcontracted projects.
- Establish enhanced mechanisms for planning, executing and monitoring Commander’s Emergency Response Program projects.
- Establish a future baseline ratio of government contracting personnel (e.g., investigators, COs and CORs) to contractors to help ensure adequate oversight in future contingencies.
- Include clauses in ES&R contracts that require contracting firms to enforce rules governing behavior that impacts the overall U.S. mission, beyond the narrowly construed completion of their contracted activities.

The Secretary of State and the USAID Administrator should:

- Develop a quarterly census to track the number of contractors in contingency operations, similar to the one used currently by U.S. Central Command, until the SPOT system proves a reliable source of contractor information.

The Administration, together with Congress, should:

- Establish a permanent, independent inspector general that would (as SIGIR and SIGAR do today in Iraq and Afghanistan, respectively) provide audit, inspection and investigation services for ES&R contracting in contingency environments. This inspector general should possess the authorities enumerated in the Inspector General Act of 1978.

### **Increase Scrutiny of ES&R Contractors**

Congress, the press, government watchdog groups and others have focused to a large degree on the actions of private security contractors. Though they comprise the vast majority of U.S. contractors in hostile environments, and receive the bulk of taxpayer dollars expended on contingency contracting, ES&R contractors have received much less scrutiny. This phenomenon adds to the perceived lack of transparency in dealing with contractors on the battlefield and should be altered in order to enhance transparency and accountability; illuminate contractor wrongdoing; uncover further instances of fraud, waste and abuse; and highlight those firms and contractors that perform at a high level.

Congress, the media, government watchdog groups and the Commission on Wartime Contracting should:

- Increase the amount of attention, time and resources dedicated to examining ES&R contractor conduct in America’s overseas engagements. In so doing, these groups might draw on the effective

example set by the Special Inspector General for Iraq Reconstruction. Such examinations should focus on, among other factors, contractor misconduct; fraud, waste and abuse in the contracting process (both on the governmental and contractor sides); and whistleblower allegations. At the same time as they point out these negative factors, they should highlight those contracting firms that are properly and efficiently performing a variety of tasks for the United States.

### **Improve the Legal and Regulatory Framework**

Nine years after the commencement of hostilities in Afghanistan, and seven years after the war in Iraq began, the legal framework governing the use of ES&R contractors in hostile environments remains patchy and even ambiguous in some areas. One reason for this is the generally improvised approach Congress and two administrations have taken to codifying law in this area, coupled with a belief in some quarters that the role of contractors in future contingencies will be – or can be forced to be – seriously diminished. Because, as explained above, this is unlikely, it is vitally important to establish a clear statutory and regulatory framework in which contractors operate and are subject to stronger oversight. Such a framework should resolve jurisdictional issues for all contractors working for the U.S. government, including American citizens, host-nation citizens and third country contractors. In addition, it is essential to educate contractors and government workers about their legal rights and obligations and to provide the government personnel necessary both to ensure compliance and handle violations.

The Department of Defense General Counsel, together with the Department of Justice, should:

- Clarify how the various laws that potentially apply to ES&R contractors in theater – including the Military Extraterritorial Jurisdiction Act, the Uniform Code of Military Justice, the Special Maritime and Territorial Jurisdiction (SMTJ), host-nation law (including any Status of Forces Agreements) and international law – interact to create obligations for or jurisdiction over private contractors.
  - This should include clarifying the laws and jurisdiction relevant to third-country nationals employed by both contracting firms and subcontractors.
  - It should also include engaging with America’s partners, and with NATO allies in particular, to ensure a common coalition view of the ways in which host-nation law and international law apply to private contractors.

The White House, the Secretary of Defense and the Attorney General, together with Congress, should:

- Amend MEJA to unambiguously cover all ES&R contractors working for the U.S. government in theater and remove the provision limiting MEJA jurisdiction to only those contractors working in support of the “mission of the Department of Defense” overseas.

- Increase the number of Defense Criminal Investigative Service (DCIS) special agents in Iraq and Afghanistan in order to enhance DOD’s ability to investigate wrongdoing by contractor personnel.
- Establish in the Department of Justice a unit – a portion of which could be located in theater – dedicated to investigating and prosecuting any crimes committed by contractors in violation of MEJA, the Foreign Corrupt Practices Act or other relevant laws. This unit should work, when appropriate, in cooperation with DCIS.
- Establish a new, streamlined contingency Federal Acquisition Regulation that reduces the enormous amount of regulations contained in the current FAR and its laborious requirements before a contract can be cancelled. The contingency FAR should include an automatic waivers process and should attempt to achieve a better balance between preventing fraud, waste and abuse and providing the flexibility and speed necessary to carry out contracting in a hostile environment.
  - The contingency FAR should establish protocols for coordinating among agencies on decisions related to ES&R contracting in theater.
  - The contingency FAR should establish a framework that actively encourages the sharing of contractor information among agencies and U.S. government personnel (including ground commanders) in theater.

ES&R contracting firms should:

- Ensure that senior managers and in-theater supervisors are familiar with relevant U.S. and local law, Status of Forces Agreements, the law of armed conflict and the applicable rules of engagement.
- Precisely define the way in which legal obligations and rules of engagement apply to their contract employees, including local nationals.

The U.S. government should:

- Press for wider international adoption of the Montreux Document and initiate other efforts to clarify the status of private contractors under the law of armed conflict.

### **Raise Standards Among Contractors**

Just as the government must reform the way it handles ES&R contracts, so too should contracting firms and individual contractors bear responsibility for effecting change. Contractors working in the service of the U.S. government must be pressed to eliminate waste, fraud and abuse; hold their employees to the highest ethical and professional standards; and ensure that their employees are

adequately trained and prepared for the unique demands of ES&R contracting in hostile environments. Where contracting firms are reluctant to carry out these responsibilities individually or in concert, the government should demand reasonable efforts to fulfill them as a condition of U.S.-issued contracts.

ES&R contracting firms should:

- Enforce existing rules that require key employees (such as those who will carry weapons or are likely to see hostile fire) to have basic training in the law of armed conflict (e.g., the Geneva Conventions) and the rules of engagement for a particular theater of operations.
- Institute enhanced vetting procedures for third-country and local contractors to ensure that those with criminal pasts, a history of human rights violations or connections to enemy forces are prevented from obtaining employment.
- Establish a trade association that includes as members firms specifically engaged in ES&R contracting (as opposed to private security contracting). Such an association should:
  - Establish an accreditation program and licensing standards for firms.
  - Serve as an interlocutor with the government on ES&R contracting issues.
  - Establish a database of contractors working for licensed firms and put into place a process for receiving and investigating complaints.
  - Promulgate education and training guidance for contractors working for member firms.
  - Encourage the development of, and participate in the design of, an international code of conduct to which firms, both American and foreign, may voluntarily commit and which spells out specific repercussions for severe violations.
- Work with Congress, the Secretary of Defense, the Secretary of State and the USAID Administrator to establish and mandate compensation mechanisms for victims of contractor abuse.

### **Clarify the Proper Roles of Contractors in Conflicts**

One of the most passionate debates in the area of contingency contracting revolves around what activities are, or are not, “inherently governmental.” The term seeks to draw a stark line between tasks and behaviors that can be legitimately contracted out and those that cannot. In reality, such a clear delineation is often difficult to establish. There currently exist various instances of contractors carrying out precisely the sorts of tasks that many would deem to be “inherently governmental,” including providing security, conducting interrogations of enemy prisoners, maintaining weapons and coordinating the efforts of other contractors. An alternative approach would have the government

determine, in advance, those areas it seeks to avoid contracting out as a matter of policy but also leave open the possibility of legally employing contractors in the same positions during times of crisis. This report proposes a hybrid to resolve the “inherently governmental” conundrum: the government should define as “inherently governmental” those areas in which there is some consensus and move toward a “core competencies” approach in areas where there is not.

Congress should:

- State in law any specific activities that it deems “inherently governmental.” It has already designated offensive combat operations and direct contractual oversight as such, and should expand the list to the degree that Congress can agree on enumerated activities.<sup>21</sup>

The Office of Management and Budget should work with Congress to:

- Move toward a “core capabilities” approach to activities not specifically deemed by Congress to be inherently governmental. Such an approach would focus on the functions the U.S. government should possess and maintain, rather than debate internally over which are inherently governmental.
- Address structural and institutional factors that make hiring temporary federal workers (e.g., contracting officers as part of a surge capacity during a contingency operation) more difficult. The factors addressed should include existing disincentives that discourage qualified contracting personnel who have left government to return to it, such as prohibitions against retaining government pension payments while returning to temporary government service.

Congress should:

- Require the executive branch to carry out comprehensive cost analyses that compare the costs of contracted services with the costs of the same services provided by government personnel.

### **Integrate the Role of Contractors into Policy and Strategy**

Until now, discussions on the role of contractors in conflict have emerged in a largely ad hoc fashion, often in reaction to news stories highlighting their mistakes. While numerous statements and reports have noted the indispensable nature of contractors in future U.S. engagements, this has not directly translated into a policy discussion of the optimal features of a contracting force working alongside the military, diplomatic corps or USAID officials. As described above, the increasing use of private contractors has deep and widespread implications for American foreign and defense policy. The U.S. government must adopt a strategic view of the role of contractors and actively integrate them into planning mechanisms to ensure their systematic, effective and lawful deployment in future conflicts.

The Secretaries of Defense and State, together with the USAID Administrator, should:



- Establish an interagency process to determine the possible foreign policy implications of contracting with particular third-country nationals (e.g., employing contractors whose nationality and presence in a combat zone would provoke political sensitivities).
- Increase contracting coordination among International Security Assistance Force partners in Afghanistan and ensure that the role of contractors is considered in NATO policy decision making.
- Further integrate the role of contractors in strategic-level guidance, military doctrine and diplomatic strategy. Such efforts should include:
  - Ensuring that all aspects of ES&R contracting are considered in the formulation of the National Defense Strategy, the next QDR and future field manuals and joint publications, as well as other relevant tactical and operational level manuals.
  - Ensuring that all aspects of ES&R contracting are considered in the development of the Quadrennial Diplomacy and Development Review (QDDR).

### **Integrate Contractors into Command and Control**

Various hurdles have prevented the fully effective integration of contractors into existing command and control structures. Commanders and officers have reported not knowing even basic facts about the contractors operating in their areas of responsibility, such as their numbers and their missions. Knowledge of the rules governing these contractors can be equally scarce. Private security contractors generally operate outside the chain of command and the relationship between commander and contractor is sometimes unclear. Communication failures between commanders and contractors sharing an area of responsibility compound the problem; in Fallujah in 2004, for example, the Marine unit based just outside the city did not find out about the attack that killed four Blackwater contractors until it was reported by journalists.<sup>21</sup>

In addition, both pre-deployment training and the development of operational and contingency plans generally take place without adequate appreciation for the role of contractors on the battlefield. Training often includes individuals playing every role but contractors, and operational plans – while they now take into account the role of contractors – still tend to be developed without adequate consultation with contractors or with fully developed plans for their use on the battlefield.

The Secretary of Defense should:

- Ensure that operational and contingency plans take into account every aspect of contractor support by:

- Expanding Annex W, which contains information on the numbers of contractors required for a military operation and the tasks they will perform, and ensuring that it contains relevant and adequate detail.
- Requiring that other functional annexes identify contracted support requirements.
- Identifying probable transition points at which government employees will cede functions to private contractors or vice versa.
- Consult with contractors during the military’s mission planning process, to the extent that the mission will rely on contractor support. This process should include ensuring that commanders know – before they deploy – the number of contractors they will encounter in an area of operations and the services these contractors will provide.
- Require military staffs to establish contracting planning cells to:
  - Determine the precise roles contractors will play in a given operation.
  - Develop contingency plans for the possibility that a contractor either fails or is not permitted to perform a service as specified in a contract.
- Integrate contractor roles into pre-deployment training and war games. This should include issuing the joint policy document mandated by Congress in 2008 and ensuring that it includes guidance for the inclusion of contractor roles in all facets of training.

### **Change the U.S. Government’s Culture of Contracting**

A change in the culture of DOD, State and USAID with respect to contracting is long overdue. As one report noted, the Department of Defense has demonstrated an “inability to institutionalize operational contract support by accepting contractors as an integral part of the total force.”<sup>22</sup> Yet DOD may be the agency that has become the most comfortable with contracting out functions that until recently were performed largely by government personnel. In the State Department in particular, familiarity with contractors is sparse and there are few incentives for skilled personnel to move into contracting roles. Only a continued cultural shift in the way the three agencies view ES&R contracting – a shift that leads to changes in training, education, doctrine and planning – can lead to necessary change.

The Secretaries of Defense and State, together with the USAID Administrator, should:

- Provide clear incentives, including financial bonuses and promotions, to skilled employees who take on key contracting duties.
- Encourage employees in the field to become familiar with managing and communicating with private contractors. This should include promoting communication between military personnel

and contractors on the battlefield and interaction between relevant State Department and USAID personnel (e.g., officials serving on Provincial Reconstruction Teams) and contractors.

### **Harvest And Apply Lessons Learned**

The lessons learned in Iraq and Afghanistan constitute one of the most expensive educations in American history. Only over a number of years has the United States begun to get a handle on the broad implications of its reliance on great numbers of contractors to carry out missions in hostile environments. As this report attests, that work is hardly done. The United States should not compound its problems and mistakes by forgetting these lessons learned in their wake.

The Secretaries of Defense and State, together with the USAID Administrator, should:

- Establish a contingency contracting lessons-learned center to collect, process and disseminate a history of past contracting experiences and the lessons that can be drawn from them. This center should attempt to capture lessons learned that apply not only to the employment of contractors by the Department of Defense but also by the Department of State and USAID.

### **Conclusion**

The U.S. government and its contract employees have been thrust together as partners in a shared endeavor, the scale, cost and duration have taken nearly all observers by surprise. Private contractors now represent an enduring feature of American conflicts, stabilization operations and reconstruction efforts. In light of changes in business practices, the provision of government service and the character of modern warfare, this surprising circumstance is unlikely to change. The reality is that America’s reliance on private contractors is not likely to fade, and it is time for the United States to adapt to this new way of war.

Nine years after America’s initial engagement in Afghanistan, and seven years after the U.S. invasion of Iraq – and with continuing American commitments and interests across the globe – action is long overdue. America’s national security policy demands new ways of organizing, managing and overseeing the use of private contractors in overseas engagements. It requires new standards and new levels of oversight at home. It means thinking hard about what tasks should be outsourced and which should not. And it entails a greater understanding by policymakers and the American public of the role that the private sector has come to play in current and future engagements.

This testimony aims to draw together the most salient issues surrounding the use of contractors in American conflicts and chart a path forward. Taken together, the recommendations outlined above would reform, rationalize and improve the process of employing private contractors in ES&R roles. The government, the military, the contracting community and ultimately the American people will benefit from reform of the ES&R contracting system that ensures the private sector’s role in American engagements aligns firmly with our nation’s interests and values.

## Biography

### **Richard Fontaine** Senior Fellow at the Center for a New American Security



Richard Fontaine is a Senior Fellow at the Center for a New American Security (CNAS), which he joined in September 2009. He previously served as foreign policy advisor to Senator John McCain for more than five years. He has also worked at the State Department, the National Security Council and on the staff of the Senate Foreign Relations Committee.

During his tenure with Senator McCain, Fontaine helped draft the Detainee Treatment Act, the ADVANCE Democracy Act and the 9/11 Commission Report Implementation Act, among numerous other pieces of foreign policy legislation. He served as foreign policy advisor to the McCain 2008 presidential campaign and, following the election, as the minority deputy staff director on the Senate Armed Services Committee.

Fontaine served as associate director for Near Eastern affairs at the National Security Council (NSC) from 2003-04, during which time he worked on political and economic reform in the Middle East and in support of the special presidential envoy on Iraqi debt. He previously worked as a policy analyst in the NSC's Asian Affairs directorate, where he covered Southeast Asian issues and contributed to multilateral diplomacy in the lead-up to the 2003 Asia-Pacific Economic Cooperation (APEC) Forum in Bangkok.

During his time at the State Department, Fontaine worked in the office of former Deputy Secretary of State Richard Armitage and in the department's South Asia bureau, working on issues related to India, Nepal, and Sri Lanka.

Fontaine began his foreign policy career as a staff member of the Senate Foreign Relations Committee, focusing on the Middle East and South Asia. He also spent a year teaching English in Japan.

A native of New Orleans, Fontaine graduated summa cum laude with a B.A. in International Relations from Tulane University. He also holds a M.A. in International Affairs from the Johns Hopkins School of Advanced International Studies (SAIS) in Washington, and he attended Oxford University.

Fontaine lives in Falls Church, Va., with his wife and three children.

**“Contracting in Combat Zones:  
Who are Our Subcontractors?”**  
Prepared Statement of Richard Fontaine



<sup>1</sup> This figure is based on three sources: Department of Defense, Contractor Support of U.S. Operations in USCENTCOM AOR, Iraq, and Afghanistan, USCENTCOM Quarterly Census 1<sup>st</sup> Quarter FY2010, [http://www.acq.osd.mil/log/PS/hot\\_topics.html](http://www.acq.osd.mil/log/PS/hot_topics.html); General Ray Odierno interview with Fox News Sunday (18 April 2010) stating that there are currently 95,000 U.S. troops in Iraq; and John J. Kruzell, “Afghanistan Troop Level to Eclipse Iraq by Midyear,” identifying 83,000 U.S. military personnel in Afghanistan (24 March 2010), <http://www.defense.gov/news/newsarticle.aspx?id=58461>.

<sup>2</sup> Congressional Budget Office, Contractors’ Support of U.S. Operations in Iraq (August 2008): 12.

<sup>3</sup> Ibid: 1.

<sup>4</sup> Ibid. From 2003-2007, the Department of Defense awarded contracts totaling \$76 billion, whereas the U.S. Agency for International Development and the Department of State obligated \$5 billion and \$4 billion, respectively. During this period, 75 percent of DOD contracts were obligated through the Army.

<sup>5</sup> Government Accountability Office, Contingency Contracting: DOD, State, and USAID Contracts and Contractor Personnel in Iraq and Afghanistan (October 2008): 20, 29, 34.

<sup>6</sup> James Glanz, “New Fraud Cases Point to Lapses in Iraq Projects,” New York Times (13 March 2010), <http://www.nytimes.com/2010/03/14/world/middleeast/14reconstruct.html>; Special Inspector General for Afghanistan Reconstruction, Quarterly Report to the United States Congress (30 April 2010).

<sup>7</sup> Congressional Budget Office, Logistics Support for Deployed Military Forces (October 2005): xiii, 38.

<sup>8</sup> Government Accountability Office, Military Personnel: DOD Needs to Improve the Transparency and Reassess the Reasonableness, Appropriateness, Affordability, and Sustainability of Its Military Compensation System, GAO-05-798 (July 2005).

<sup>9</sup> Congressional Budget Office, Logistics Support for Deployed Military Forces: xi-xii.

<sup>10</sup> A conversation one of the authors had with a U.S. senator suggests that, at least among supporters of the provision in Congress, there exists confidence that its constitutionality will be upheld.

<sup>11</sup> Office of Management and Budget, “Work Reserved for Performance by Federal Government Employees,” Federal Register (31 March 2010).

<sup>12</sup> Ibid: 16196-16197.

<sup>13</sup> Several observers have offered two potentially useful principles that might underlie any determination of what activities should be considered core competencies. Under these principles, core competencies are those activities which, if removed, would clearly lead to mission failure, and those which if performed by contractors would pose significant legal complications. An additional consideration is the desire to avoid lost skill sets; if the U.S. government outsources a function, it may risk losing the capacity to carry out the activity at any point without contractors.

<sup>14</sup> Among other steps, DOD has issued doctrine in the 31 March 2010 “Operational Contract Support Concept of Operations” establishing an Army Contracting Command and establishing a Joint Theater Support Contracting Command for contingency-specific contracts in Iraq and Afghanistan.

<sup>15</sup> Secretary of Defense Robert Gates stated that DOD intends to hire an additional 9,000 defense procurement professionals by 2015, including 2,500 auditors at the DCAA. This cadre will have responsibility, however, for procurement across the spectrum, not only for ES&R contracting. See DOD News Briefing by Secretary of Defense Robert Gates (6 April 2009).

<sup>16</sup> Opening statement by Senator Claire McCaskill before the Subcommittee on Contracting Oversight, U.S. Senate Committee on Homeland Security and Governmental Affairs (17 December 2009).

<sup>17</sup> Edward M. Harrington and Jeffrey P. Parsons, Statement before the Subcommittee on Contracting Oversight (17 December 2009).

<sup>18</sup> Dan Feldman, Remarks before the Subcommittee on Contracting Oversight, U.S. Senate Committee on Homeland Security and Governmental Affairs (17 December 2009).

<sup>19</sup> Government Accountability Office, Warfighter Support: Continued Actions Needed by DOD to Improve and Institutionalize Contractor Support in Contingency Operations GAO 10-551T: 17.

<sup>20</sup> Department of Defense, Contractor Support of U.S. Operations in USCENTCOM AOR, Iraq, and Afghanistan, USCENTCOM Quarterly Census 1<sup>st</sup> Quarter FY2010 and Synchronized Predeployment and Operational Tracker (SPOT), “Weekly SPOT numbers for DOD, DOS, USAID, and Other” (19 April 2010).

<sup>21</sup> Peter Singer, Can’t Win with ‘Em, Can’t Win Without ‘Em: Private Military Contractors and Counterinsurgency, (Washington: The Brookings Institution, September 2007): 13-14

<sup>22</sup> Government Accountability Office, Warfighter Support: Continued Actions Needed by DOD to Improve and Institutionalize Contractor Support in Contingency Operations GAO 10-551T (17 March 2010): 26-7.