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The Industrial College of the Armed Forces

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PRIVATIZED MILITARY OPERATIONS 2006

ABSTRACT: The Privatized Military Operations (PMO) industry is a service industry whose firms provide a myriad of support functions to the Department of Defense and civilian government agencies, including services such as security, logistical support, and weapons maintenance. The Iraq war has focused particular attention on the narrow security subset of these services. The activities of armed contractors have served to demonstrate that neither the U.S. nor international legal regimes have kept pace with the realities of contractors in a war zone. The war has also served to underline the demands being placed on the military acquisition system. This paper recommends regulatory changes for the management of private military firms and the acquisition process.

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Introduction

Private industry has been a key component of military success throughout our nation's history. Indeed, the Army founded the Industrial College of the Armed Forces in 1924 in recognition of the military's dependence on the industrial base. However, the role of the private sector has expanded rapidly in the past two decades, bringing contractors ever closer to the battlefield and raising both new possibilities and challenges. The 2006 Quadrennial Defense Review, for the first time, outlines a vision of the national security battle space with significant private sector involvement.

The purpose of this study is to assess an industry that is as old as the military itself but, in many respects, is a relative newcomer in terms of the vast scope of its current activities. This industry-- Privatized Military Operations (PMO)—has witnessed an explosive growth in the past two decades, especially in the United States as our armed forces have repeatedly deployed on numerous military operations. The role of Privatized Military Firms (PMFs) is now both larger and different “than it has been since the foundation of the modern state” (Avant, 2004, p. 2).

While the PMO industry is a broad and growing one, our research has shown that many, if not most, of the significant and/or controversial issues currently facing the industry involve the provision of security services during military operations. The private security sector is a relatively small subset of the overall PMO industry. Concerns involving the appropriate use of force, applicability of the laws of armed conflict, the use of “mercenaries,” contractor accountability, and similar issues frequently arise whenever discussion turns to this sector. These concerns often overshadow others involving the more mundane, but no less vital, provision of logistical or other types of PMO services. In this report, we attempt to address the significant concerns involving the private security sector of the PMO industry, while not ignoring those concerns that intersect the provision of other services.

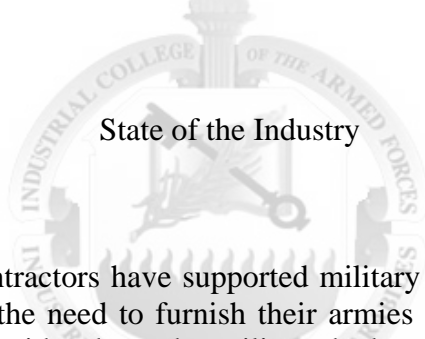
We begin by defining the industry in an attempt to put some parameters around the vast array of services procured by the U.S. Department of Defense (DoD). Next, we examine the state of the industry and the numerous challenges it faces. We conclude by recommending specific policies for the U.S. Government as it continues to understand and adapt to the role of PMFs in support of its mission.

The Industry Defined

Broadly speaking, the Privatized Military Operations (PMO) industry is a service industry. Its main function is to provide to the DoD a myriad of support services which traditionally have been performed by military personnel. This contracted support enables the military client to concentrate on its core warfighting mission. There have been several attempts by scholars and Government officials to define broad categories for industry functions. The Brookings Institution's Peter Singer, who has led the way in the academic examination of the PMO industry, divides it into three categories: military provider firms, military consulting firms, and military support firms.¹ (Singer, 2003). DoD Joint Publication 4.0, *Doctrine for Logistic Support of Joint Operations*, also identifies three categories of contractors based on the type of

support they provide. This definition diverges from Singer's paradigm by focusing both on the purpose of the contract and the circumstances under which it was awarded.² We believe, however, that the industry is undergoing rapid and dynamic change that makes both of these definitions problematic. Several firms previously identified as "military support firms" now provide privatized security, while so-called "military provider firms" now pursue contracts for logistical support and consulting. Likewise, the DoD definition fails to capture many changes now occurring in the PMO industry.

As the industry continues to change, we believe that a simple definition best serves our purpose: the PMO industry consists of firms performing functions by contract for the government in lieu of military or civil service employees. This definition encompasses firms providing logistical support, weapons system maintenance, security services, training, and a host of other services provided to the DoD, foreign militaries and others to enable them to perform their mission. Due to the significant issues surrounding the provision of security services during military operations, we also recognize "private security companies" (PSCs) as forming a discreet sector of the industry for purposes of our analysis.



State of the Industry

Background

History shows that contractors have supported military operations at least since the 16th century, as commanders saw the need to furnish their armies with supplies beyond that which they could plunder. Sutlers, with whom the military had contracts, helped supply "the most elementary needs" (Blizzard, 2004, p. 6). For its part, the U.S. military has looked to civilian contractor support since its inception. George Washington's Continental Army first relied on contractors for transportation, carpentry, engineering, food, and medical services. This practice continued in all subsequent wars, with contractors providing basic logistics support, primarily in the rear and away from the dangers of the battlefield (Blizzard, 2004). By the time of the Vietnam War, however, the sophistication of weapons systems had grown to such an extent that on-the-ground contractors were needed for technical support. The use of contractors for this purpose, coupled with the use of contractors for logistical functions within occupied areas, brought contractors perilously close to the sound of guns (Blizzard).

With the end of the Cold War and the breakup of the Soviet Union, the United States and other nations made policy decisions to significantly downsize their armed forces. The DoD reduced or eliminated many of its maneuver force units, and an even larger slice of its combat service support units, while simultaneously reducing its civilian workforce. Under the authority of the Office of Management and Budget (OMB) Circular A-76 (Performance of Commercial Activities) this downsizing effort provided an opportunity to turn over many military functions to private firms, while reserving core warfighting functions for the military. During the first Iraq War, the Government Accountability Office (GAO) estimates there were 5,000 government civilians and 9,200 contractor employees deployed in support of U.S. forces. By the time the U.S. deployed forces to the Balkans in 1995, contractors had truly become a necessary fixture on the battlefield. Halliburton's Kellogg, Brown & Root division (KBR) employed between 5,000

and 20,000 contractors to build and operate bases and perform dozens of other support functions for as many as 20,000 soldiers carrying out peacekeeping operations in the former Yugoslavia (Cahlick, 2002). In Bosnia alone, 5,900 civilian contractors supported a U.S. Army uniform presence of 6,000, close to a 1:1 ratio (Blizzard). This was consistent with government policies through the decade of the 1990s which favored privatization and outsourcing of an increasingly greater portion of government services.

Current State

Today, the PMO industry is robust and growing. Global revenues for the industry rose from \$55 billion in 1990 to over \$100 billion in 2003; revenue estimates are projected to top \$200 billion annually by the year 2010 (Avant, 2005). U.S. firms have captured a healthy share of this revenue. Between 1994 and 2002, U.S.-based PMFs were awarded more than 3,000 contracts valued at over \$300 billion (Avant) and have been a major factor in the explosive growth in the government services industry as a whole. Indeed, three of the top ten U.S. defense contractors—Halliburton, L-3 Communications, and CSC Corporation—are now in the services sector; no such firms made the top 10 list as recently as the 1980s. Service contracts now account for nearly 40% of the overall DoD contract budget. Significantly, the PMO industry is also consuming an increasingly larger slice of the U.S. Government's budget for stability and reconstruction efforts. As of July 2004, more than 150 U.S. companies had received contracts worth up to \$48.7 billion for work in postwar Afghanistan and Iraq (Politi, 2004). Many of these contracts are devoted to the performance of security functions. Defense Secretary Rumsfeld noted in a May 4, 2004 letter to the House Armed Services Committee that approximately 20,000 private security workers were employed in Iraq. Although industry contacts have asserted that PSCs account for only five percent of the DoD budget for PMO support, the issues associated with this surge in the use of private security personnel have received significant attention in the media and academia, and serve as the focus of much of this study.

Surge Capacity

The PMO industry already has surged dramatically in support of military operations in Iraq and Afghanistan. Should the U.S. Government require even more private support, the PMO industry has a strong capacity to expand to meet the need. Typically, the firms in this industry maintain large databases of potential employees that they have vetted and approved for hire upon award of a Government contract. These databases consist of thousands of experienced personnel who can readily perform on short notice. These personnel ordinarily have many years of military or government experience, providing a valuable surge capacity in the event the DoD requires contractor support for an unforeseen contingency operation.

Nevertheless, the pool of potential employees is not limitless, and we understand that significant overlap exists between the databases of competing PMFs. Moreover, the PMO industry's surge capacity may erode over time if the government significantly downsizes the military after the Global War on Terror as it did after the Cold War. Private contractors depend largely upon former service members to fill their workforce, especially for security contracts, and a shrinking military may impact the labor pool they draw on for their surge capability in the future.

Outlook

As the United States considers the withdrawal of military forces from Iraq, there is concern by some in the PMO industry that it will face a major contraction. On the other hand, some PMFs, especially those providing security services, expect a continued demand for their services even after the withdrawal of large troop formations. While much will depend on the decisions of the new Iraqi government, in our estimation foreign governments and companies are likely to continue to employ private security contractors and other PMFs in Iraq for some time.

Several PMFs, especially British firms, are turning to the corporate market to diversify their portfolios. These firms are marketing a range of security and intelligence services to the international business community. Others point to the United Nations' stability and reconstruction operations as a possible source of future business, claiming that they can provide services at a level of expertise that would exceed many of the national militaries now supporting these missions. Blackwater USA, a leading provider of security services, recently announced that it is prepared to raise its own brigade in support of U.N. peacekeeping operations.³ In the near term, the use of PMFs for such services appears most unlikely, as many U.N. member states are very sensitive to the use of private force in a governmental role.

In sum, in an increasingly turbulent world, there is little doubt that the U.S. and other governments will continue to rely on PMFs to augment military functions no matter what happens on the current operational front. The functions of such firms have expanded far beyond weapons maintenance and logistical support functions, and now include a diverse set of services where exposure to danger is routine. The international community may not yet be ready to accept the deployment of a PSC on the battlefield, but that day may be drawing closer.

Government: Goals and Roles

The U.S. Government is both a customer and a regulator of PMFs. As a customer, the Government must ensure that the PMFs it hires provide adequate service at a reasonable cost. As a regulator, the Government must ensure that sensitive technology or capacities are not transferred to foreign adversaries. To achieve these goals, the Government currently provides significant regulatory oversight over PMFs, to the extent that they are operating overseas. The Arms Export Control Act,⁴ as implemented by the International Trafficking in Arms Regulations (ITAR)⁵ requires U.S. firms to obtain a license before exporting any defense article or service to a foreign country. These regulations effectively prevent U.S. firms providing military related services from operating overseas without Governmental sanction.

According to the ITAR, a defense article is any article that "is specifically designed, developed, configured, adapted, or modified for a military application, and has significant military or intelligence applicability such that . . . control is necessary."⁶ A defense service is "the furnishing of assistance (including training) to foreign persons, whether in the United States or abroad in the design, development . . . [or] use of defense articles."⁷ A defense service also includes "military training of foreign units and forces, regular and irregular . . . by correspondence courses, technical, educational, or information publications and media of all kinds, training aid, orientation, training exercise, and military advice."⁸ Consequently, a defense

article or defense service is any article or service contemplated with a military end-use in mind. Any U.S. person or entity that creates a defense article or defense service must adhere to the ITAR or face civil and criminal penalties. The only way to know for sure whether a particular article or service is susceptible to the ITAR is to submit to Department of State's Directorate of Defense Trade Controls' Commodity Jurisdiction.⁹ Arguably, the ITAR regime provides strong regulatory oversight for this industry.

Be that as it may, leading scholars have suggested a need for greater regulation and oversight of the PMO industry. One approach that has been suggested involves licensing both specific PMF activities and PMF executives and consultants. Others contend that the industry can be sufficiently regulated via contract terms, with robust contract administration and quality assurance. For its part, PMO industry representatives believe self-regulation offers the best framework for regulating this emerging industry.

The U.S.-based International Peace Operations Association (IPOA) was established in 2001 as a trade association to promote sound and ethical conduct by PMFs engaged in peacekeeping and post-conflict reconstruction activities. It has promulgated a Code of Conduct for its member firms, pledging to respect human rights, to operate with transparency and accountability, and to comply with other ethical practices. PMO security firms operating in the United Kingdom have followed this lead, meeting in 2006 to create an organization, the British Association of Private Security Companies (BAPSC), which is working to establish a self-regulating code for its members. The BAPSC is also looking to promote transparent relations with U.K. Government departments and international organizations in order to foster compliance with the laws of countries in which its members operate.

Other governments, and particularly that of South Africa, do not frame this debate in the same way as the U.S. or the U.K. The South African government (GOSA) has legislated against the activities of privatized military or security companies in conflict zones through the 1997 enactment of its Regulation of Foreign Military Assistance Act (RFMA). This legislation is a reflection both of South Africa's transition from apartheid as well as a broader African continental policy debate over "mercenaryism." Mercenary activities that have led to the private use of arms in offensive operations in Africa have been seen as destabilizing and threatening, and carry connotations that hamper the development of the sector today. In fact, there is anecdotal evidence that there may be as many as 4,000 South Africans under contract with security firms in Iraq despite the fact that the GOSA has stated that its nationals are operating illegally in a conflict zone. The GOSA is now seeking to strengthen its legislative control of privatized security operators with a strong piece of legislation permitting the prosecution of South African citizens violating RFMA. This legislation, which bans foreign enlistment and mercenary activity, is expected to move through the Parliament this year.

Challenges and Risks

The operations of PMFs overseas, particularly in the security realm, have raised new concerns about what contractors should or should not do. The first consideration is whether something *must* be performed by the government by law or statute. The term “inherently governmental” has been controversial for more than a decade, as different people sought to understand what functions should be done only by government personnel. Most recently, OMB Circular A-76 defined inherently governmental activities as:

an activity that is so intimately related to the public interest as to mandate performance by government personnel. These activities require the exercise of substantial discretion in applying government authority and/or in making decisions for the government. Inherently governmental activities normally fall into two categories: the exercise of sovereign government authority or the establishment of procedures and processes related to the oversight of monetary transactions or entitlements. (p. A-2)¹⁰

OMB’s definition of inherently governmental functions specifically includes “determining, protecting, and advancing economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise” (A-76, p. A-2). This description certainly leaves much room for interpretation, and raises the question of whether certain activities performed by PSCs on military operations may be viewed as “inherently governmental” activities.

In addition to raising the issue of inherently governmental functions, the use of PSC contractors in Iraq and Afghanistan has blurred the distinction between combatants and civilians, highlighting the issue of the legal status of contractors on the battlefield under international law. While the current legal regime governing combatants and civilians is spelled out in the Geneva Conventions, it is clear that their post-World War II drafters did not envision the roles to which contractors would be put two generations later. Appendix A further addresses this issue.

Another important challenge for the U.S. Government is contract management. The first of the military’s large scale contingency contracts, the Army’s Logistics Civil Augmentation Program (LOGCAP) contract, was executed in the early 1990s. This contract has been followed by ever more sophisticated models, culminating in the Air Force Contractor Augmentation Program (AFCAP) III contract executed in November 2005 which employs multiple vendors and an array of different contract types under the larger AFCAP umbrella. The increasing use and sophistication of these contracts, however, also serves to underline the critical need for sufficient numbers of capable contracting and quality assurance personnel. The deployment of contractors on or near the battlefield not only raises the legal issues discussed in Appendix A but also the question of how these contracts are administered. Appendix B further discusses these issues with respect to contracting and the government’s management of contracts. Appendix C suggests a series of questions the DoD might consider when making the decision of whether to outsource a function or group of functions.

The academic community studying the growth of the PMO industry has also identified a number of risks associated with the use of contractors supporting military operations. The first

of these is the question of accountability. PMFs claim that the market deters unethical acts because future business hinges on a good public image. While this may be true for management, scandals involving contractor personnel in the Balkans and elsewhere have proven that a desire to maintain a good public image may not be sufficient to ensure the accountability of individual actors. At this time, the only legal restraint rests in the Military Extraterritorial Jurisdiction Act (MEJA) that allows the prosecution of civilians in United States federal courts. In practice, only one case has been brought against a contractor under the MEJA, reflecting the extreme challenge of building a case against a contractor for actions taken in Iraq or some other dangerous venue. The result is that contractors can operate with virtual impunity, where the only real consequence for unethical actions is termination of employment. This further complicates the blended force environment such as that in Abu Grahیب prison, where military personnel tasked with similar duties to that of contractors have been held legally accountable for their actions, while no action has been taken against contractors committing similar violations.

Another risk rests in the indirect chain of command. In today's battle space, the commander does not exercise every element of command with respect to private contractor personnel. In many cases, contracts are issued through supporting commands or other agencies in the United States for specific work to be performed in a theater of operation. Therefore, field commanders may have no direct contractual relationship with the contractors providing their support—and thus little control of that contractor. In addition, the theater commander has no command authority or influence over PMFs contracted directly by coalition partners, other government entities such as the Department of State, NGOs, or other firms. The only authority left to the theater commander is the control of contractor access to military facilities, and control of contractor movements through the provision of convoy security and tactical movement control measures such as checkpoints.

A third risk is that of reliability. Military personnel are bound by law and oath to perform their prescribed duties. Contract personnel are merely bound by the terms of the contract. If contractor employees decide they no longer want to fulfill their obligation due to an operationally risky environment, they may simply break the contract and walk away knowing that the consequences will only be financial in nature. Of course, the corporate headquarters will have a vested interest in mitigating such circumstances and will seek quickly to backfill positions. However, what happens if the tactical situation suddenly changes or the threat level increases? Although contracts may specify the requirement to work in these heightened threat conditions, the actual capability or willingness of contractors to work under such circumstances is far from guaranteed.

Transparency, or a lack thereof, has also been identified as a risk for the industry. Contractors, whether publicly or privately held, are less susceptible to public and congressional scrutiny of their contract activities. In addition, PMF activities tend to generate significantly less media coverage than comparable activities by military forces. This apparent lack of transparency could cast a shadow of suspicion across an industry that frequently acts on behalf of the U.S. Government. Another transparency concern is that current policy allows the Executive Branch to contract with private companies for activities that the U.S. Government may be unwilling to engage in itself, effectively bypassing congressional scrutiny. Some have asserted that the use of PMFs, which are not included in total troop deployment numbers, to augment the force has

allowed the U.S. Government to cap troop levels at artificially low numbers, thereby helping to deflect political dissent. In fact, many of these firms are working on behalf of the U.S. Government, and unethical or questionable behavior on their part can have a detrimental effect on U.S. foreign policy and the ability of the U.S. to promote human rights and humanitarian law.

Finally, within the international community, one of the repeatedly stated concerns with the growth of PMFs is the potential to draw manpower from the uniformed services, particularly within the elite special operations forces. By paying salaries that may far exceed military pay scales, and particularly those of U.S. allies, these companies also offer special operators reduced deployment periods and a much greater degree of control over their lives.

In the U.S., retention of senior special operators seemed a significant concern in January, 2005, when the DoD was trying to increase the size of its special operations force structure beyond the 51,000 authorized. Current contingency operations such as OIF had forced many of our most elite forces into an extremely high operational tempo. Away from family and friends for increasingly long stretches, sometimes lasting 12+ months, many were thought to be looking at PSCs as an attractive alternative. The services offered bonuses of up to \$150,000 to prevent its elite personnel, already eligible for or close to retirement, from being lured away to higher-paying jobs as private security contractors. It appears that the enhanced retention programs have mitigated the threat of a more significant exodus than anticipated, but the lure of the PSC sector and its potential for hiring away the military's highly trained special operators will continue to require scrutiny by manpower officials



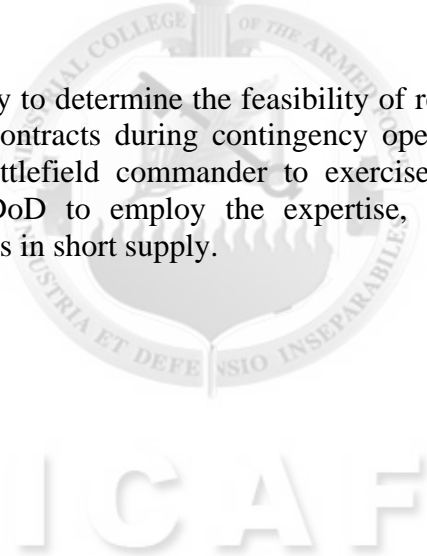
Conclusion/ Recommendations

While public-private partnering for national security at some level is likely to continue, we believe that policy makers have not thoroughly considered all the ramifications of this practice. When the choice is to use contractors, careful planning and training must occur to minimize any adverse impact on military operations. Also worth considering is the implication that each new function or service contracted for opens the door for the next one. With each “successful” contract service provided, the private sector is better positioned to expand, and the military/government community is arguably less able to perform the given function or service with its organic capabilities.

We recommend the following specific actions:

1. The U.S. Government should create an independent, interdepartmental office (possibly under the National Security Council) to partner with and monitor the activities and business of PMFs, creating a symbiotic yet managed relationship and rule sets. This office should include senior personnel from the DoD and military services, Department of State, Department of Justice, Department of Commerce, and the Director of National Intelligence. The office should develop policies applicable to PMFs to ensure proper accountability over the industry. These policies should be implemented through “partnership agreements” between the U.S. Government and PMFs, establishing a broad framework within which PMFs will operate. Issues to be addressed in the agreement could include, by way of example, requirements that PMFs will operate consistently within U.S. law and foreign policy, will follow Combatant Commander rules of operation, and will align practices consistent with the Combatant Commander’s intent that will guarantee mission success.
2. The U.S. Government must specifically define what functions are inherently military and, therefore, not eligible for contracting out. This is especially applicable to the contracting for private security services; appropriate parameters must be placed around the provision of these services to ensure that the United States does not permit these firms to cross the line into offensive operations. Current guidance in OMB Circular A-76 and DoDI 3020.41 (Contractor Personnel Authorized to Accompany the U.S. Forces) is simply inadequate to address the myriad of issues in this critical area. We recognize that the resolution of this issue may require a national debate between members of Congress, the Department of Defense, the Department of State, PMFs, and others. Legislation may be required to preclude the use of contractors for offensive operations.
3. It is essential that the DoD retain sufficient organic combat and combat service support force structure to execute support operations during early phases of contingency operations until contractors can safely take over the mission. An appropriate baseline force structure must be determined, agreed upon, and maintained to ensure combat support and combat service support capabilities exist when required. In addition, the DoD should conduct a study of the PMO industry “surge capacity” to determine the approximate number of contractor personnel available for support of contingency operations.

4. The U.S. Government should work toward enhancing the effectiveness of the MEJA. An initial step in this process could be the establishment of a special prosecutor for MEJA, a designated person responsible for investigating and, if appropriate, prosecuting crimes committed by U.S. citizens employed by PMOs overseas.
5. The U.S. Government should convene an international conference to discuss revision of the Geneva Conventions to address the presence of contractors on the battlefield. A goal of such a conference should be to define or clarify the status of contractors on the battlefield, including armed security guards, in relation to armed combatants.
6. To meet growing acquisition requirements, the DoD must increase the size of the acquisition workforce. First, budgets must be increased to ensure agencies can maintain a quality group of acquisition professionals—program managers, contracts officers, and quality assurance officers. Then, the DoD should greatly expand its “intern program” for promising college grads to work for DoD. Additionally, the DoD should offer bonuses to experienced acquisition employees to work for the Government. Finally, Congress should revise civil service retirement laws to allow acquisition workforce professionals to work for the Government after retirement without forfeiting their pensions.
7. DoD should conduct a study to determine the feasibility of relaxing the legal prohibitions on the use of personal services contracts during contingency operations. Contracts for personal services would enable the battlefield commander to exercise direct control over contractor employees, while allowing DoD to employ the expertise, speed and surge capability of contractors for specific skill sets in short supply.



Appendix A

Legal Status of Contractors on the Battlefield

The status of a contractor on the battlefield under the International Law of Armed Conflict (LOAC) is of utmost importance; it may determine whether the contractor properly may be targeted for attack by the enemy, whether the contractor is entitled to Prisoner of War status if captured, and other critical issues. Unfortunately, the current LOAC, primarily drawn up in the wake of World War II, has not kept pace with the changing dynamics on the battlefield.

Modern armies from the major industrialized nations rely extensively on contractors for everything from logistical support to weapon systems operators when deploying for battle. At the same time, the “forward edge of the battle area” no longer has application in a war against insurgents and terrorists who use roadside bombs and suicide bombers to achieve their goals. This twenty-first century battlefield has increased the demands for force protection across the entire area of operations. As a result, contractors increasingly have found the need to arm themselves, or to obtain the services of private security firms to protect them.

The four Geneva Conventions, and their subsequent Protocols, provide a comprehensive regime governing armed conflicts between two or more parties to the Conventions. The Conventions “are the foundation of the current law of armed conflict. Parties to the convention must follow its terms, and the international community views most of the concepts as customary international law” (Vernon, 2004, p. 403). They apply during declared wars and other armed conflicts between two or more parties, including occupation of territory without resistance.¹¹

The Conventions identify two classes of personnel on the battlefield—combatants, who lawfully may fight and be the subject of attack; and noncombatants, who are prohibited from taking direct part in hostilities. Noncombatants, who include only medical personnel and chaplains, receive protected status under the Conventions and may not be the subject of attack. Civilians on the battlefield are neither combatants nor noncombatants; they are treated separately under the Geneva Convention III, art. 3 as “persons taking no active part in the hostilities.” Civilians “cannot take a direct part in hostilities and cannot be directly attacked by armed forces” (Vernon, 2004, p. 405).

Thus, the Geneva Conventions and Protocols essentially provide a “qualified immunity” to civilians, including contractors, accompanying the force. This “immunity” from attack is subject to the civilians “abstaining from all hostile acts,” and may be forfeited if the civilians take a “direct part” in hostilities.¹² In other words, civilians engaging in hostile acts may be deemed to be “unprivileged belligerents” who properly may be targeted by enemy forces in wartime, and who may be treated as criminals under the domestic law of the captor (TJAGSA, 2005, p. 170).

Prisoner of War (POW) status may also be jeopardized by contractor participation in hostilities. In a conflict under the Conventions, members of the regular armed forces, as well as members of militias or resistance fighters, are afforded POW status if they: 1) are commanded by

a person responsible for his/her subordinates; 2) have a fixed, distinctive insignia; 3) carry arms openly; and 4) conduct their operations in accordance with the laws and customs of war.¹³ The Geneva Conventions also recognize “civilians accompanying the force” for POW status. However, these individuals “are not mentioned in any other area of the Geneva Conventions and thus have been the subject of legal debate” (Vernon, 2004, p. 407). Generally, civilians accompanying the force must have received authorization from the armed forces that they accompany. Such authorization generally is found if the contractor possesses a Geneva Conventions Identification Card from a government involved in the conflict.

POWs receive significant protections under the Geneva Conventions, including immunity (for combatants) from warlike acts, protection from violence, intimidation, and insults, and free medical care. However, civilians engaged in hostile actions could be viewed as unlawful combatants, spies, saboteurs, or worse, thereby losing entitlement to POW status (TJAGSA, 2005, p. 89). Likewise, mercenaries do not receive combatant or POW status under International Law. Scholars have complained, however, that the definition of mercenary under Article 47 to Geneva Protocol I is ambiguous, and creates a major loophole by requiring that a mercenary be “motivated by a desire for private gain and material compensation” (Avant, 2005, p. 231).

Of major concern is the use of contractor-provided security guard services on the battlefield. By definition, using contractors as security guards is a step beyond the mere arming of contractors for self-defense—it is specifically authorizing contractors to defend other persons or property. In these circumstances, contractors may be engaging in what appears to be an overtly military role, albeit “defensive” in nature. This is apparently occurring in Iraq today. For example, contractors guard the Baghdad airport, man checkpoints, provide armed protection for government officials, and train Iraq’s police (Blizzard, 2004). “Given the fluid nature of the current security situation in Iraq, it may sometimes be difficult to discern whether civilian security guards are performing law enforcement duties or are engaging in combat” (Elsea, 2004, p. 9). As noted by Avant, “as the insurgency heated up, PSCs [Private Security Companies] ostensibly providing low level security found themselves in situations indistinguishable from combat. PSC employees were shot and killed, and shot and killed others” (2005, p. 239).

Without question, the use of contractor security guards blurs the distinction between combatants and civilians. In such cases, it may appear that contractors are engaging in hostile actions or taking direct part in hostilities, possibly jeopardizing their protected status as “civilians” under the Geneva Conventions. The drafters of the Conventions simply did not envision the use of contractors for security purposes. This disconnect between the post World War II construct of the Conventions and the twenty-first century battlefield against insurgents and terrorists places contractor security guards in an untenable situation.

In response to congressional concerns, and in recognition of the lack of effective and consistent guidance, DoD recently issued new regulations and instructions to the armed services governing the use of contractors on the battlefield. DoD Instruction (DoDI) 3020.41, Contractor Personnel Authorized to Accompany the U.S. Armed Forces, was issued in October 2005 to “serve as a comprehensive source of DoD policy and procedures concerning DoD contractor personnel authorized to accompany the U.S. armed forces.” DoD also amended the Defense

Federal Acquisition Regulation Supplement (DFARS) in June 2005 to provide guidance to contracting officers in the drafting and administration of contracts.

DoDI 3020.41 explicitly permits contractor personnel to support contingency operations through the “indirect participation in military operations, such as by providing communications support, transporting munitions and other supplies, performing maintenance functions for military equipment, providing security services . . . and logistic services such as billeting, messing, etc.” (DoDI, para. 6.1.1). The geographic Combatant Commander (COCOM) is tasked with developing a security plan for protection of these contractor personnel (DoDI, para. 6.3.4).¹⁴ Further, the DoDI empowers the COCOM to authorize, after review by the Staff Judge Advocate, contractor personnel to be armed “for individual self-defense” when military force protection and legitimate civil authority are deemed “unavailable or insufficient” (DoDI, paras. 6.3.4.1, 6.3.4.2).¹⁵ In such cases, contractor personnel are authorized to use force only for individual self-defense, and must be briefed on the rules regarding the appropriate use of force.

In addition to authorizing contractors to bear arms, the COCOM, after legal review, is empowered to authorize the use of contractors for security services for “other than uniquely military functions” (DoDI, para. 6.3.5).¹⁶ Unfortunately, the DoDI fails to define “uniquely military functions,” stating instead that using contractors to protect military assets “requires legal analysis” and “case-by-case determinations.” This merely punts the resolution of this difficult issue to another time, and raises the possibility of multiple, inconsistent interpretations by commanders and their staffs on the battlefield. As Rebecca Vernon correctly argues, the “prohibitions on battlefield contractor use can only be enforced if the parameters are adequately defined. Otherwise, confusion and inconsistency will be a continuing problem” (2004, p. 407-08).

Arming contractors on the battlefield presents serious risks to contractors concerning their status under International Law. The Law of Armed Conflict needs to be revisited by the parties to the Geneva Conventions to address the current battlefield realities. In the meantime, the DoD should revise DoDI 3020.41 and DFARS 252.225-7040 to provide greater clarity on the issue of what “uniquely military functions” may not be performed by contractor personnel. These revisions are imperative to ensure that contractors do not unwittingly lose their protected status under the Geneva Conventions.

Appendix B

The Current Acquisition Environment

The environment in which PMFs operate is rife with armed conflict, lack of governance leading to failed or failing states, risky operations, and high Congressional interest. While conflicts and “hot spots” have been increasing, the U.S. military has been downsized by approximately one-third since the end of the Cold War. This has led to even greater reliance on contractor support for the military than in the past. Moreover, due to a very high optempo rate, nearly every contract requirement for PMF support is urgent. At the same time, media scrutiny of contractor and government operations has greatly increased. All of this combines to create extreme stresses on the government acquisition system.

Contract Environment

Successful contracting depends on a clear understanding of the environment in which the contract will be performed. This is particularly true of contracting for PMO services. One thing is clear—the contracting environment is substantially different than it was 20, or even 10, years ago. PMO services often are performed in a high threat, “headline-rich” environment. Contingency contracts typically are short-fused, meeting an urgent need with funds that often must be obligated very quickly. Despite that urgency, these contracts are subject to considerable scrutiny after the fact. Apparent “bad news” spreads quickly, and there is significant interest among the media, the public and members of Congress in PMO contracts.

Another key environmental factor is the make-up of the contract workforce. According to a recent GAO report, there were 60 companies and up to 25,000 contract employees supporting operations in Iraq and Afghanistan (GAO-04-854, 2004). These include citizens from the U.S, the United Kingdom, South Africa, Nepal, Sri Lanka, Fiji, and Iraq, among others. Obviously this is a much broader and more diverse group than the traditional acquisition system is accustomed to dealing with. Moreover, many of the companies are not experienced in contracting with the United States Government.

The U.S. military was involved in 140 conflict areas between 1990 and 2004. Not surprisingly, the level of contract support has grown substantially to support those forces. Within the realm of security, services include static security (e.g., protection of facilities); personal escorts; convoy protection; coordination of movements and accompanying security; and security advice, planning and training. As the PMO industry has experienced exponential growth over the past few years, numerous new firms and even peripheral interest groups among academics, authors and trade associations have arisen.

In short, the contingency contracting environment is significantly different than the traditional contracting environment within DoD. It gives rise to new challenges and, consequently, calls for new solutions in some areas.

Contract Regulation

Department of Defense Directive (DoDD) 5000.1, Defense Acquisition System (2003), states that the primary objective of Defense acquisition is to acquire quality products and services that satisfy user needs with measurable improvements to mission capability and operational support, in a timely manner, and at a fair and reasonable price (p. 3). DoDD 5000.2, Operation of the Defense Acquisition System (2003), further requires that the acquisition of services shall be based on clear, performance-based requirements, and include identified and measurable outcomes properly planned and administered to achieve the intended results (p. 46). It further provides that all service acquisitions shall use a strategic approach that includes developing a picture of what the Department of Defense is spending on services; an enterprise-wide approach to procuring services; and new ways of doing business (p. 46). Finally, the directive requires Program Managers to coordinate with the DoD Component manpower authority in advance of contracting for operational support services to ensure that tasks and duties that are designated as inherently governmental or exempt are not contracted (p. 46).

Defense Federal Acquisition Regulation Supplement (DFARS) 237.102 provides additional guidance for the acquisition of security services, although DoD is currently operating on a waiver to this regulation until September 30, 2006. The DFAR provision prohibits entering into contracts for the performance of firefighting or security-guard functions at any military installation or facility. The DFARS delineates several exemptions, but DoD must seek waiver authority to employ contractors in security-guard functions.

The Federal Acquisition Regulation (FAR) mandates requirements for the government acquisition process. However, the FAR and other current regulations do not address the specific issues associated with the acquisition of security services during contingency operations. The DoD has recognized these risks and issues and has attempted to concentrate on this through the newly released DoDI 3020.41, *Contractor Personnel Authorized to Accompany the U.S. Armed Forces*. However, both DoDI 3020.41 and DoDI 3020.37, *Continuation of Essential DoD Contractor Services During Crisis*, are limited to operational instructions for contractor use once deployed to the battlefield. As this industry matures, regulations must address not only the management of contractors on the battlefield but the acquisition process for this service.

Contracting Issues

Requirements Definition: Requirements definition is the most crucial part of the acquisition process. Incorrect, inaccurate, or excessive definition of requirements can result in schedule delays, wasted resources, or customer dissatisfaction. Unfortunately, the rushed environment in which contracting officials must operate, where every acquisition is deemed urgent, often leads to poorly defined requirements. There is simply no substitute for prior planning.

Cost Control and Oversight: Generally, there has been a lack of good cost control and oversight processes in the acquisition of security services on the battlefield. One approach to improving these processes is the Air Force Contract Augmentation Program (AFCAP) III contract, which provides for the award of a range of contract types, from cost plus to firm fixed-priced. AFCAP strives for effective cost control and allows the government the most flexible, executable

contractual arrangement possible. Further, the contract provides for competition for task orders amongst six highly qualified contractors rather than purchasing from a single source. It is the first DoD contingent “CAP” contract to go multi-vendor. The selection of the contract type is based on mission urgency, risks, complexity, and stewardship. Firm fixed-price contracts are used when the requirement is fully defined and stable and the priority is lowest price. A cost-plus-award-fee contract is used when the requirement is not fully defined or is unstable, and the priority is to respond the fastest. Finally, a cost-plus-fixed-fee arrangement is used when the requirement is fluid at task order start. The key to its success is the ability of contract administrators to award short term, cost contracts when time and requirement clarity is lacking, with the option to adjust to a fixed price contract when these shortfalls can be adequately addressed.

Quality Assurance: According to a July, 2004 GAO study, the DoD did not have sufficient numbers of trained personnel in place to provide effective oversight of its logistics support contractors (GAO 04-854). Contract support personnel had little knowledge of the contract they were overseeing, and were not consistently trained to evaluate and monitor contract performance. These were not new findings; similar, if not the same deficiencies, were noted in GAO reports in 1997, 2000, and 2003 (GAO-04-854). In fact, oversight of the U.S. military’s Balkans logistics contract, which had cost overruns in the hundreds of millions of dollars, was originally overseen by an artillery officer with no contracting background (Singer, 2003).

Personnel: The oversight capability needed and lacking in the above examples consists primarily of contracting professionals and quality assurance personnel (QAP)—two distinctly different capacities which need to be joined at the hip. Unfortunately, both are in short supply. QAPs are on-sight technical managers whose function is to assess contractor performance against contract performance standards. During the 1990s the Clinton Administration reduced DoD’s procurement and acquisition personnel from approximately 461,000 to 231,000 in anticipation that acquisition reform initiatives would make the contracting process more efficient (McCarthy, 2004). As the DoD has downsized both military and civilian personnel, QAP capacity has been greatly reduced. QAP capacity is lacking not only in quantity, but in quality as well. As operations have extended in Afghanistan and Iraq, contracting personnel with operational contracting experience have been severely strained. Experience in working with these types of requirements is extremely beneficial, but in short supply.

Appendix C

Public or Private Support: A Framework for Decisions

Operational commanders and other senior decision-makers routinely face questions of how to maximize their available resources and minimize costs, including the human costs on the military forces and their supporting contractors. The following are a series of questions to consider in making the decision of whether to outsource a function or group of functions.

Availability of Forces

- What other opportunities or commitments would be missed by using military forces to meet this requirement?

As discussed above, there are inherently military functions that only the armed forces can provide. Would using military forces for the application being considered preclude their availability for other, more pressing needs?

- Conversely, what opportunities would be missed by *not* using military forces in this application?

Proficiency and readiness come through training. Is this application an opportunity to give the military forces needed training in a particular skill area? Taken to the extreme, it can be argued that every time a function is contracted, the military becomes less capable in that area and will ultimately be unable to perform that function in the future.

- Would using contractor services in lieu of military forces for this application ultimately reduce allowable manpower levels? Is that a desired outcome?

The Army chose to contract for logistics support in lieu of maintaining Cold War force levels. As more functions are contracted, Congress and others will likely press for more reductions in the number of active and reserve military personnel. Thus, the long-term implications on force structure are worth considering for short-term decisions.

Timeframe

There are at least two time-related considerations with regard to whether a function should be contracted. The first is how soon personnel are needed and whether military forces can be made available in the required timeframe. This obviously includes a determination of what skills are needed, how many people will be required, what equipment is needed, and how quickly those people and equipment must be in place. With less bureaucracy in private firms as a general assumption, contractors may be able to provide equipment and personnel with the necessary skills more quickly than the military.

The second consideration is how long the services will be needed, i.e., is this a short-term or long-term commitment? Given their many commitments and a limited number of forces, military forces may not be able to stay in place for the duration of an effort. Obviously that depends on what type of effort is envisioned, and military forces will stay as long as there is a perceived threat of combat. For some missions, however, contractors can provide a longer-term commitment. For stability operations and reconstruction in particular, success depends largely

on relationships, and having the same people available for the duration of the effort can be beneficial.

Footprint

As Clausewitz said, war is an extension of politics, and certainly the size of the military footprint is a political consideration in the decision of whether to use military forces or contractors to provide services. There may be a political need for a show of military force, perhaps to project power as a means of preventing conflict. Increasingly, there are missions at the other end of the spectrum: U.S. forces are working to win hearts and minds through humanitarian efforts, and clearly the message can benefit from people in uniform, visibly helping local residents. Conversely, some situations dictate a minimal military presence, and private firms may be all or part of the solution.

Threat

The degree of danger and uncertainty must be a key factor in deciding whether to use private contractors. If commercial providers will operate in high threat environments, a number of follow-on questions must be answered in advance of actually letting the contract. They include (but are not limited to) the following:

- What is the contingency plan if a contractor refuses to work or is unable to meet the mission requirements?
- Under what circumstances would the military step in to protect the contractor?
- If contractors are present in an area and military personnel are under attack, are the contractors authorized to use force to protect the military? If so, is that authorization only applicable to U.S. forces, or does it include allied forces?

Morale

Without question, contractors today are providing valuable services that make the military more effective by allowing military personnel to function on what they do best – warfighting. Many soldiers have high praise for the support services they are receiving and benefiting from, which are often better than they could provide for themselves. Food services and base camps in Iraq are an example. But there are also “down” sides to using contractors in areas of operation, and one that must be considered is the effect on morale, unit cohesion, warrior ethos and professionalism, etc. Using commercial providers doesn’t necessarily lower morale or lead to fractionalization of the forces, but these issues should be considered in the decision-making process.

Integration

The question of integration applies on at least two fronts: the integration of contract forces with military forces, and the integration of multiple contract efforts within a geographic area. Effective training and clear rules of engagement are required for both to operate well, but these can easily fall short if not carefully planned and executed. Decisions about whether to contract for services in a given area should consider what other functions/companies are working

in the planned area of operations and how operations there would be integrated for greatest effectiveness and safety.

Cost

Clearly cost is a major consideration; indeed, it is often what drives even the decision to consider private providers over military forces. For this discussion, cost is purposefully *not* addressed earlier to make the point that “cost” includes a number of facets, not just the number of dollars spent on a contract vice the number of dollars spent for the corresponding number of military personnel. Taking the long view, the “tooth to tail” ratio for contractors may be less, since their cost does not directly include lifetime medical benefits, retirement pay, etc. For the short term, the salary costs for commercial providers may be significantly higher or lower than the corresponding cost of military personnel. True costs include costs in effectiveness, opportunity costs and political costs (e.g., public opinion and/or Congressional support). These are not quantifiable, but they are very real, and they should be part of the analysis when deciding whether to use commercial or military sources.

If the Choice is Private ...

Once the decision has been made to contract with the commercial sector for a particular function or operation, there remain several questions to consider. Ample thought to the acquisition strategy upfront can make a notable difference in the likelihood of a successful contract, both from the perspective of the buyer and the seller. Elements of the acquisition strategy include what to buy, how to buy it, and how to inform key stakeholders, among others. Specific questions to be asked include:

- Are there capable providers in the private sector, and if so, are there enough for fair competition?
- Is there sufficient money to contract for the necessary services?
- Are there sufficient personnel resources available to contract for the work and to monitor/oversee the execution of the contract?
- What will be the degree of integration with military forces, including operations, food, housing, medical care and aviation support?
- What is likely to be the public response to this decision? Congressional response?

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Footnotes

¹ Singer identifies military provider firms “by their focus on the tactical environment” (p. 92). These firms engage in actual fighting, typically alongside a military client to make the client more effective. Military consulting firms provide “advisory and training services integral to the operation and restructuring of a client’s armed forces” (p. 95). These firms do not operate in the battlespace, but offer advice on strategy and operations that may prove essential to success. Finally, Singer defines military support firms as those firms providing to the military “nonlethal aid and assistance, including logistics, intelligence, technical support, supply, and transportation.”

² Joint Publication 4-0, *Doctrine for Logistic Support of Joint Operations*, defines the following types of contractors used in contingency operations: theater support, external theater support, and systems support. According to these definitions, theater support contractors assist deployed operational forces under prearranged contracts through host-nation and regional businesses and vendors. These contracts provide goods, services, and minor construction – usually from the local vendor base or nearby offshore sources - to meet the immediate needs of the local commanders (Blizzard, 2004, p. 5). External contracts, such as the Army Logistics Civilian Augmentation Program (LOGCAP) and the Air Force Contract Augmentation Program (AFCAP), provide support for deployed operational forces that is separate and distinct from theater and systems support contractors. The contractors may be U.S. or third-party businesses and vendors providing a wide range of services, including billeting, food services, road and airfield construction, transportation—even mortuary services (Blizzard, 2004, p. 5). Finally, system contractors support deployed operational forces under existing weapon system contracts, providing spare parts and maintenance throughout the life cycle of the system. For example, the F-117A stealth fighter, the Global Hawk unmanned aerial vehicle, and Air Force reconnaissance aircraft rely on system contractors for maintenance and logistics support. System contractors must deploy with the military, since organic support is limited or nonexistent (Blizzard, 2004, p. 6).

³ Sizemore, Bill (2006), You and What Army? Ours, Blackwater Says. *Virginia Pilot*, March 30, 2006, A1.

⁴ 22 U.S.C. § 2751.

⁵ 22 C.F.R. §§ 120-130.

⁶ *Id.* at § 120.3.

⁷ *Id.* at § 120.9(a)(1).

⁸ *Id.* at § 120.9(a)(3).

⁹ *See id.* at 120.4.

¹⁰ The FAR also prohibits contracts for inherently governmental functions, and provides examples of which functions are or are not inherently governmental. For example, the direct conduct of criminal investigations and the direction and control of intelligence and counter-intelligence are considered inherently governmental, while reorganization and planning services and the development of regulations are not (FAR 7.503(c)(1-19). The FAR definition takes into account neither the acquisition environment—down-sized government and additional involvement in regional conflicts, nor the Global War on Terror, both of which contribute to a lack of available manpower and a greater necessity for contractor support. Indeed, the GAO recently determined that the DoD violated the prohibition of contracting for “inherently governmental” functions by purchasing interrogation and intelligence services (GAO 05-201, April 2005).

¹¹ Common Article 2 of the Geneva Conventions stipulates the circumstances in which the conventions apply. Legal scholars view both the armed conflict against the Taliban in Afghanistan and Operation Iraqi Freedom as meeting the definition of “armed conflict.”

¹² The official commentary to Protocol 1, Art. 51(3) explains that taking a “direct part” in armed conflict means “acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.” It excludes “general participation in the war effort” from this definition. Compare Army Field Manual (FM) 3-100.21, *Contractors on the Battlefield* (Jan. 2003) (contractors cannot “take an active role in hostilities but retain the inherent right of self defense”).

¹³ Geneva Conv., Article 4.

¹⁴ Contrast with Joint Pub. 4-0, p. V-7, para. 13a, which states that force protection responsibility for DOD contractor employees is a “contractor responsibility, unless valid contract terms place that responsibility with

another party (e.g., the Geographic CINC or Chief of Mission).” *But see* Army Field Manual (FM) 3-100.21 (2003), para. 6-4, which makes the “commander” responsible for protecting contractors on the battlefield.

¹⁵ Contrast the DODI with FM 3-100.21, para. 6-29, stating that the “general policy of the Army is that contractor employees will not be armed,” and Joint Pub 4-0, p. V-7, para. 13b, stating that “as a general rule, contractor personnel accompanying U.S. forces should not be armed.”

¹⁶ Compare with Joint Pub. 4-0, p. V-1, stating that “contract employees cannot lawfully perform military functions.”

